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InfoPAK[SM]

Multi-Country Survey on Covenants Not to Compete

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Multi-Country Survey on Covenants Not to Compete

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This InfoPAK[SM] is designed to provide a summary of the law governing covenants not to compete in multiple countries. The InfoPAK[SM] will aid in the counseling and drafting of covenants and provide guidance regarding commonly-occurring contract issues, including factors courts consider when analyzing a covenant not to compete.

This information should not be construed as legal advice or a legal opinion on specific facts, or representative of the views of Greenberg Traurig LLP or of ACC or any of its lawyers, unless so stated. This InfoPAK[SM] is not intended as a definitive statement on the subject but rather to serve as a resource providing practical information for the reader.

This material was compiled by Greenberg Traurig, LLP. For more information on Greenberg, visit their website at www.gtlaw.com, or see the "About Greenberg Traurig, LLP" section of this InfoPAK[SM]. The ACC wishes to thank the members of the Employment and Labor Law Committee for their contributions to the development of this InfoPAK[SM].

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I. Introduction

The business world is changing and the law struggles to keep pace. The flow of capital, personnel and ideas around the world is accelerating. The business opportunities abound as new markets open and others expand. With these opportunities come risks. Will you be able to protect your businesses' ideas? Can you prevent your key executives from leaving and going to work for a competitor? And if so, for how long? As you build your staff, how do you address restrictions on those individuals moving?

One way to prevent your critical employees from walking out your doors with your intellectual and proprietary information may be through the contractual agreements containing provisions that prevent or restrict movement, such as covenants not to compete or non-competition agreements. Accordingly in-house counsel must understand the applicable law concerning a specific type of restrictive covenant, namely non-competition agreements, which also are known as covenants not to compete. Non-competition agreements restrict one party, usually an employee, from entering into or starting a similar business that is in competition with another party, usually an employer. As a general rule, courts do not favor non-competition agreements, and where enforceable, may require that such agreements be narrowly-tailored as to, time, scope of activity to be restrained and duration. The law, practice and court enforcement of non-competition agreements varies markedly between jurisdictions. A well-written non-competition covenant in one country may not be enforceable in another country, and in some locations, non-competition covenants are not enforceable at all.

This InfoPAK[SM] is organized by country and discusses the most important factors to consider when drafting a covenant not to compete.

This InfoPAK[SM] is intended to provide users with a basic understanding of these different areas and guide further research on specific topics by providing references to relevant statutes and case law.

Very truly yours,

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II. Multi-Country Survey

Below are separate summaries that highlight the important factors governing covenants not to compete in each of the referenced countries. The summaries are organized in alphabetical order.

A. Australia

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1. Country Legal System – Civil, Common Law, Other Common Law

a. Type of Court/Tribunal to Hear Matter?

Federal, State, or Territory court.

b. Who Has the Burden of Proof?

The employer or party seeking to enforce the post-employment restraint.

c. Statute of Limitations for Bringing an Action?

Generally, the limitation period for bringing an action founded on contract is six years in most Australian states. If the employer wants to pursue injunctive relief, the claim should be brought as soon as possible, as any delay may preclude the granting of such relief.

2. Source of Law Governing Non-Compete

a. Statute

b. Constitution

c. Case Law

The source of law governing post-employment restraints is case law; and, in the State of New South Wales, statute law in the form of the *Restraints of Trade Act 1976* (NSW) also applies.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

For a restraint to be enforceable, the employer must have a legitimate or protectable interest (e.g. confidential information, trade secret, customer connection, staff connection) and the restraint must be reasonable in its scope (with respect to time, geographic area, activities sought to be restrained).

a. Must the Agreement Be in Writing?

There is no specific requirement at law for the post-employment restraint to be in writing however, as a practical matter, it will likely be more difficult to enforce if it is not in writing.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

There is no specific requirement at law for the post-employment restraint to be in any particular language in Australia, although English is preferable.

c. Are There Limits to the Type or Level of Employee Covered?

There is no limit on the type or level of employee who may be covered by a non-competition clause. However, employment contracts with restraint clauses are commonly entered into by senior executives, managers or other professional employees. The reason for this is because the kind of information or customer connection or staff connection which would give rise to an employer's legitimate or protectable interest is more likely to be held by a senior employee than a junior employee.

d. Are There Limits to the Length of Time That Is Allowed under Law?

The period of restraint should be no longer than reasonably necessary to protect the employer's legitimate interest. What is reasonably necessary will vary from case to case according to the facts and the nature of the interest protected. In the case of *Birdanco Nominees Pty Ltd v Money* [2012] VSCA 64, the Victorian Court of Appeal held that three years was a reasonable period of restraint in the circumstances. However, it is more

common for a court to hold lesser periods of restraint as reasonable, with 12 months or less being more commonly enforceable.

e. Are There Limits to the Geographic Reach Established by Law?

The restraint should not cover a geographical area that is larger than reasonably necessary to protect the employer's legitimate interest. What is reasonably necessary will depend on the facts, such as the nature of the employer's business, and nature of the interest protected. In the case of *Brilliant Lighting (Aust) Pty Ltd v Baillieu* [2004] VSC 248, a geographic restraint with an Australia-wide prohibition was considered. The employer's application for an injunction failed on the basis that the geographic restraint of "anywhere in Australia" was far too wide in circumstances where the employer conducted business in the state of Victoria and in Mount Gambier, a city in South Australia.

f. Any Other Details or Essential Elements of the Agreement?

Other details or essential elements of the agreement discussed below.

4. What Kind of Consideration Is Required?

Legal consideration is necessary for enforcement.

a. Monetary or Financial Consideration?

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

Not required

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

Not required however a court may be more readily persuaded to enforce the restraint by an injunction where the employer has agreed to pay the employee for the period of restraint. However, a promise to pay for the duration of the restraint does not ensure that the restraint will be enforceable.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

Consideration can be actual employment provided to an employee.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

If the restraint is created after the employee commences, the employer may need to ensure the employee receives some consideration in return for their undertaking. One alternative

is to put the restraint in a deed, making it enforceable even in the absence of consideration.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

A change in terms of employment may provide sufficient consideration to support a new or revised covenant, for instance, where the change of terms involves the offer of promotion.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

The employer may enforce the agreement against the former employee for breach of the agreement. The employer may sue the new employer if it can establish that the new employer induced the former employee's breach of contract – the cause of action being the tort of inducing a breach of contract.

b. What Remedies?

There are two main remedies:

- Injunction restraining the former employee from taking up a new position with the competing employer in breach of the non-compete clause; and
- Damages to compensate the employer for any monetary loss as a result of the employee's breach of contract.

As a matter of practice, it is only in rare cases that an employer will go on to seek damages for any loss caused by a breach of restraint. The employer will usually apply for an interlocutory or interim injunction. If the employer obtains an interim order, the matter will usually be settled. If the employer fails, the action will commonly be withdrawn.

c. Must Remedies Be Listed in Agreement?

There is no requirement for remedies to be listed in the agreement.

In some cases employers have included liquidated damages clauses in employment contracts. However, there is risk with doing so is that it may be held to be an illegal penalty if it exceeds a genuine pre-estimate of the employer's loss. There is also risk that inserting a liquidated damages clause into a contract may defeat an application for an injunction on the basis that damages would not provide an adequate remedy.

d. Is Injunctive Relief Available?

Yes.

i. If So, What Is the Standard?

An employer will usually apply for an interlocutory or interim injunction, pending full trial of the claim.

In determining whether to grant such an injunction, a court will need to be satisfied that the plaintiff has established a prima facie case and that the balance of convenience favours making an order.

An employer will need to show that they have a legitimate prospect of establishing that the restraint is valid, and that there is evidence to suggest a breach or imminent breach by the employee. The employer will also need to show that the employee's activities are causing harm, or are likely to cause harm, to the employer's business. In exercising its discretion the court will take into account any undertakings offered by the defendant to minimize the risk of harm.

In practice, if an interlocutory injunction is granted, it is rare for the employer's claim to proceed to trial.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

In NSW, by virtue of the legislation that applies in that state, a restraint clause can be 'read down' or varied if it is too broad but only to the extent to which it is not against public policy. In other states, courts may only sever parts of a restraint clause found to be invalid, but not read them down.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

In NSW, courts are empowered to 'read down' a restraint clause by legislation and so an agreement need not acknowledge the court's ability to make changes.

Courts may sever parts of a contract whether or not there is an express severability provision. However, it should not be assumed that a court will apply the severance test liberally to a post-employment restraint.

c. Drafting Considerations

i. Nested Clauses?[1]

A cascading clause is a common drafting device used by lawyers in Australia when drafting a post-employment restraint of trade to make severance easier to enforce. The court may sever the restraints which are too wide, leaving the employer free to enforce those that remain.

ii. Other Options to Allow for Blue Penciling?

No.

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

What is a reasonable restriction with respect to geographic area will depend on the circumstances and the nature of the interest protected. In the case of *Monash Real Estate Pty Ltd v Ross* [2005] VSC 116, the court considered a geographic restraint of 15, 10 or five kilometers from the employer's office for an employee moving to a competitor real estate business. The court found the employer had a customer connection sufficient to give rise to a protectable interest and granted an injunction restraining the former employee from soliciting customers situated within a 10 kilometre radius of the employer's office.

ii. Unreasonable

A restraint may be held to be unreasonable if it purports to exclude activity in a territory wider than the markets in which the employer operates. In the case of *Brilliant Lighting*, a geographic restraint of "anywhere in Australia" was held to be unreasonable in circumstances where the employer carried on business in a much more limited geographical area.

The source of law on the reasonableness of geographic restraints is case law.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

What is reasonable or unreasonable with respect to the period of restraint depends upon the circumstances and the nature of the interest protected. It is more common for periods in excess of 12 months to be held as unreasonable.

ii. Unreasonable

If it purports to restrain the employee for a longer period than warranted, given the nature of the interest protected.

The source of law on the reasonableness of time restraints is case law.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

Where the restraint purports to restrict an employee from undertaking the kinds of services and activities the employee performed for the former employer or restraining a former employee from participating in a competitive business in any capacity.

ii. Unreasonable

If the restraint purports to restrain the employee from engaging in a wider range of business activities than those engaged in by the employer.

The source of law on the reasonableness of the scope of restraints is case law.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable? Yes

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

Facts as they existed at negotiation however subsequent developments may be looked at to determine whether it was a reasonable agreement to make at the relevant time, having in mind the best estimate the parties could make for the future.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

As a fundamental principle, the terms of the agreement are important and parties should be held to what they have agreed. However, restraints of trade provisions must be reasonable to be enforceable.

In the case of *Provida Pty Ltd v Sharpe* [2012] NSWSC 1041, Pembroke J of the New South Wales Supreme Court set out principles with regards to the enforceability of post-employment restraints as follows:

- Weight is to be given to what parties have negotiated, but a contractual consensus is not conclusive even when the restraint provision states the restriction is reasonable;
- The validity is tested at the time of entering into the contract and by reference to what the restraint entitled or required the parties to do rather than what they intended to do or have actually done;
- The test of reasonableness is measured by reference to the interests of the parties concerned and the interests of the public;

- An employer is not entitled to protection against the use by the employee of knowledge obtained by him of his affairs and business methods;
- An employer's customer connection is an interest which can support a reasonable restraint of trade.

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

See discussion above.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

Yes.

a. If Yes, How Does It Affect Enforcement?

In Australia, the majority view appears to be that an employer's repudiation of the employment contract will cause all obligations, including post-employment obligations, to fall away. Consequently, an employer will need to take care to avoid repudiatory conduct.

For example, the employer terminates an employee's employment summarily and contrary to a requirement in the contract to give notice; the employee goes to work for a competitor contrary to an otherwise valid restraint clause. In this situation, the employer may not be able to enforce the restraint because of its own conduct.

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

The employer may release an employee from their obligations under the contract of employment in respect of a post-employment restraint.

a. If Yes, under What Conditions?

The conditions to be determined between the parties.

b. Is Consideration/Compensation Required to Be Paid?

No.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

A choice of law provision will generally be effective, although this is subject to some

limitations set out below.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

Limitations include where a statute expressly or impliedly requires otherwise, where contrary to public policy, or if the reasons for the selection lack bona fides.

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

A court will give weight to a choice of jurisdiction clause. Whether the court ultimately decides to give effect to a particular clause will depend on a number of factors including whether the clause is exclusive or non-exclusive.

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

Parties can agree to resolve a dispute over a post-employment non-compete agreement by private arbitration and courts will seek to enforce their agreement. Consideration should be given to whether having such a clause is desirable given it may act to delay or deny remedies available from the court.

11. Leading Cases/Current Trends

This is a constantly developing area of law. In relation to current trends:

- Traditionally courts have been reluctant to enforce post-employment restraints. This reluctance has been based on the long-standing premise that restraints are, in general, contrary to public policy in a free trade market economy. However, there is some evidence that this reluctance may be diminishing.
- The insertion of geographic restraints are perhaps not as significant as they once were, with the advent of online commerce and electronic communication. However, a geographic restraint will still come into play for certain businesses (such as for real estate agents or medical practices) where the geographic connection is vital.

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

Garden leave is recognised in Australia. While on garden leave, the employee remains subject to the duty of fidelity implied into every contract. An aspect of this duty is not to

act contrary to the employer's interest, for example by not competing with the employer while employed.

The court may take into account the period spent by the employee on garden leave for the purposes of determining whether the post-employment restraint goes further than reasonably necessary to protect the employer's legitimate interests.

b. Non-Solicitation of Customers?

Non-solicitation of customers is recognised in Australia. Such a clause is capable of being enforced if it goes no further than reasonably necessary to protect the employer's legitimate interests. An employer's legitimate interests include preserving the customer connections to the source of its income.

A court may be more prepared to enforce a non-solicitation clause than a non-compete clause given the former clause is typically less restrictive than the latter clause. A valid non-solicitation of customer clause will typically preclude an employee from approaching or seeking to lure away clients or customers of the employer rather than preclude an employee from competing with it altogether.

Non-solicitation clauses can be included with non-compete clauses in contracts of employment however the presence of one may result in a diminishing need for the other.

c. Other?

The employer has a level of protection in the form of the duty on the employee to maintain confidentiality. This duty subsists during, and survives the termination of, the employment relationship. The duty is implied as an incidence of the employment relationship (and may also arise from the operation of equitable principles) but an employer may wish to make explicit the obligations by writing into the contract a confidentiality term.

B. Canada (save for Quebec)

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1. Country Legal System – Common Law

a. Type of Court/Tribunal to Hear Matter?

If an employer commences an action to enforce a non-competition provision in an employment contract the action will typically be commenced in the superior trial court of the province where the employee worked. In some circumstances, if the quantum of damages claimed against the former employee is relatively low and no injunctive relief is sought, the action may be commenced in the small claims division of the provincial court in the province at issue.

b. Who Has the Burden of Proof?

The employer, as the party commencing the action, has the burden of proof.

c. Statute of Limitations for Bringing an Action?

The statute of limitations for bringing an action varies by province. The general limitation period for commencement of an action is two years.

2. Source of Law Governing Non-Compete

Whether a non-competition provision is enforceable is determined by factors established at common law developed through case law.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

Non-competition provisions are generally considered to be a restraint of trade and contrary to public interest. As a result, Canadian courts will only enforce a non-competition provision where it is reasonable to do so, in the context of the agreement by the parties and the public interest. To enforce a non-competition provision, an employer will need to demonstrate (i) the provision is necessary to protect the legitimate proprietary interest of the employer, (ii) the provision is not overly broad in its application having regard to its geographic and time limitations as well as the scope of the restraint, and (iii) lesser measures (such as a non-solicitation provision) would not be sufficient to protect the employer's legitimate proprietary interest.

a. Must the Agreement Be in Writing?

There is no specific obligation at law that requires the agreement to be in writing. However, as a practical matter it is difficult for an employer to prove the existence of a verbal non-competition provision and a court is unlikely to enforce a verbal non-competition provision due to the highly technical and detailed requirements necessary for enforceability.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

There is no specific language requirement for enforceability, however the employer will need to demonstrate the provision is reasonable. The reasonableness of the provision will be evaluated by an overall assessment of the clause, the agreement in which it is found and the surrounding circumstances.

c. Are There Limits to the Type or Level of Employee Covered?

There is no limit on the type or level of employee who may be covered by a non-competition provision. However, it may be difficult for an employer to successfully demonstrate a junior employee has access to information about an organization's business or trade relationships sufficient to warrant the protection of a non-competition provision. Conversely, this type of agreement may be an appropriate and necessary in relation to a senior or executive level employee where their knowledge about the business and personal relationships with customers and clients could negatively impact on the employer's business, even with confidentiality agreements and non-solicitation provisions in effect.

d. Are There Limits to the Length of Time That Is Allowed under Law?

While enforceability of the provision will turn largely on the circumstances surrounding its introduction, Canadian courts are unlikely to enforce a non-competition provision that exceeds two years.

e. Are There Limits to the Geographic Reach Established by Law?

A non-competition provision will need to have a limited geographic scope in order to be enforceable. However, the extent to which a geographic scope in a non-competition provision is, or is not, reasonable will be largely depend on the nature of the employee's position, the geographic reach of the employer's operations and the limit that could be justified in order to protect the employer's legitimate and proprietary interests, even if this may result (in limited circumstances) in the scope extending beyond provincial or national borders.

f. Any Other Details or Essential Elements of the Agreement?

In addition to a reasonable scope as it relates to time and geography, the non-competition provision will also need to be limited in terms of the scope of business. A provision that limits and employee working for a competitor in any capacity is not likely enforceable. The provision will need to limit the employee's ability to compete only insofar as he or she may be employed in a role where they may be in a competitive relationship with the employer.

4. What Kind of Consideration Is Required?

Consideration (monetary or otherwise) must be provided to enforce the non-competition provision.

a. Monetary or Financial Consideration?

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

Not required.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

Not required provided consideration was provided upon on entering into the non-competition agreement. However, receipt of post-termination payments may be conditional upon compliance with the terms of the non-competition provision. Post-employment compensation paid for the term commensurate with the term of the non-competition provision may also strengthen its enforceability, particularly if the employee is receiving payments over and above what he or she may be entitled to on termination of employment under contract or common law.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

The offer of employment alone can be sufficient consideration for a non-competition provision. There is no requirement that this type of provision be introduced only at the beginning of employment.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

Continued employment is generally not viewed to be sufficient consideration to support a non-competition provision. If a non-competition provision is introduced in the course of employment, additional consideration (usually in the form of a monetary payment) will need to be provided in order to bind the covenant.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

A positive change in the terms of employment (e.g., a promotion with increased compensation package) can provide sufficient consideration to support a non-competition provision.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

The employer may enforce a non-competition provision against the employee for breach of

the agreement. An employer may also pursue a cause of action against the employee's new employer for inducing breach of contract as it relates to the non-competition provision if the circumstances support such an action.

b. What Remedies?

The employer can seek injunctive relief to prevent the employee from working in violation of the non-competition provision. Injunctive relief will generally only be appropriate where the employer could not otherwise be adequately compensated by damages.

The employer can also bring an action for damages for breach of the non-competition covenant. With such a claim, the damages will generally be assessed taking into account the actual losses to the employer's business resulting from the employee's actions.

c. Must Remedies Be Listed in Agreement?

There is no requirement for remedies be listed in the agreement, however, it is common for parties to include a provision recognizing a breach of the non-competition provision will result in injury to the employer which is not adequately compensated through damages, such that injunctive relief may be an appropriate remedy. It is also common for parties to include language acknowledging that the employer's business will suffer financial hardship in the result of a breach, to support a later damage claim if necessary.

d. Is Injunctive Relief Available?

Injunctive relief is available.

i. If So, What Is the Standard?

The three-part common injunction test applies: (i) there is a serious issue to be tried; (ii) the employer will suffer irreparable harm if the injunction is not granted, and (iii) the balance of convenience favours the granting of the injunction. The employer is also required to give an undertaking to pay any damages which may be owed to the Employee in the event the interlocutory injunction is granted and it is later determined at trial that the Employer was not entitled to the injunctive relief.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

Canadian courts will generally not amend or modify an ambiguous or overly broad non-competition agreement to make it compliant with the law. Generally, the parties will be held to the terms negotiated and, if they are ambiguous or unreasonable, the provision will be void and unenforceable. Canadian courts have rejected the application of notional severance to non-competition provisions in employment. In limited circumstances, Canadian courts have accepted that "blue-pencil" severance may be applied to a non-competition provision. However, this intervention is to be used sparingly and only where

the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant. In light of the reluctance of courts to use this discretion, employers are well-advised to draft non-competition provisions narrowly and not rely on the courts to amend the language to bring it into compliance with the law.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

Canadian courts will generally not modify or amend a non-competition provision to make it enforceable.

c. Drafting Considerations

i. Nested Clauses?[2]

Courts will not use nesting provisions to select options that will result in an enforceable agreement.

ii. Other Options to Allow for Blue Penciling?

Canadian courts have accepted that "blue-pencil" severance may be applied in limited circumstances to a non-competition provision. However, this intervention is to be used sparingly and only where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant.

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

Yes. A non-competition provision will only be enforceable where it restricts the activities of the individual as minimally as possible to achieve the necessary objective. A non-competition provision that is overly broad in scope is unlikely to be enforced by a court.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Reasonableness is determined by case law.

i. Reasonable

The geographic scope of a non-competition provision should be as specific and limited as possible to protect the employer's interests and should be expressly stated in the non-competition provision. A geographic scope provision is more likely to be considered reasonable if it is limited to the area in which the employee carried out his or her responsibilities during the course of his or her employment. While a geographic scope clause may cross provincial or national boundaries, this also leaves the provision more susceptible to challenge, particularly if the scope of the employee's influence did not extend beyond provincial or national boundaries.

ii. Unreasonable

A non-competition provision that does not include a geographic scope at all is more likely to be found unreasonable, although there may be limited circumstances where the nature of the work or the type of non-competition provision drafted (e.g. a provision where the non-competition provision restricts the employee from working for a particular entity as opposed to in an entire sector of business) make a geographic scope provision unnecessary. Similarly, a geographic scope clause that seeks to limit an employee's ability to compete outside the jurisdiction where he or she performed the material duties of the position is less likely to be considered reasonable.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Reasonableness is determined by case law.

i. Reasonable

Temporal scope should generally be limited to the period of time required for the employer to repair or solidify its business relationships following the departure of the employee bound to the agreement. In most cases, a reasonable non-competition provision in the employment context will not exceed twelve months. The shorter the temporal limitation of the non-competition provision, the more likely it is to be upheld by the courts.

ii. Unreasonable

An employer will likely have difficulty enforcing a non-competition provision in excess of twenty-four months, absent compelling circumstances to justify why it would take a longer period to insulate the employer from the potential impact of the employee engaging in competition.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Reasonableness is determined by case law.

i. Reasonable

As with the geographic and temporal limits of the non-competition provision, the scope of business covered by the agreement should be as narrow as possible. A non-competition provision is more likely to be considered reasonable if it defines the scope of the employer's business concisely. A reasonable provision limits the employee's ability to work in a competing capacity for a business that, at the time of termination competes or is likely to compete with the business in which the employee was materially involved with in a limited period (usually no more than two years) prior to termination of employment.

An employer may wish to limit the non-competition provisions scope to only certain identified direct competitors, as opposed to restricting the employee from working for any competitors within an entire sector of industry generally. This may increase the likelihood

of the agreement being found enforceable.

ii. Unreasonable

A non-competition provision that seeks to restrict the employee from working for a company that does not compete, or has not competed in recent years, with the employer is not likely to be enforceable. Such unenforceable non-competition provisions may arise where the definition of the employer's business is overly broad in the provision itself. Similarly, a non-competition provision may not be enforceable if it seeks to restrict the employee from working for a competitive business entirely, even where the employee might be engaged in a capacity unrelated to the business of the employer.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable? Yes

Courts have held the circumstances surrounding the agreement will be relevant in assessing its enforceability, in addition to the language of the clause itself.

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

Both facts as they existed at the time of negotiation and at the time of enforcement may be relevant. For example, if at the time the provision was negotiated, the facts support a finding the employee was provided with something of value (e.g. an existing book of business) he or she would not have received absent an agreement to enter into the non-competition provision, this will increase the likelihood of the provision being enforced by the courts. Conversely, if the facts support the conclusion the employer's business at the time of the termination or enforcement was materially different than the business as defined in the non-competition provision, such that enforcement post-termination would do little to protect the employer's interests, these facts may lead a court to conclude the provision is not reasonable and therefore not enforceable.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

Generally speaking, non-competition provisions are viewed as a restraint of trade and against the public interest in that they impose restrictions on an employee's ability to seek new employment post-termination. As such, in determining whether a non-competition provision is enforceable, a court will balance the interests of the employer in protecting its business interests and being able to repair and solidify business relationships after the employee's departure against the employee's interest in being able to find new employment in his or her area of expertise. Only where a non-competition provision restricts the employee as narrowly as possible to achieve its objectives will it be enforceable.

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

In assessing the reasonableness of a non-competition provision, the court will consider

whether the provision impairs the employee's ability to work elsewhere as minimally as possible in order to protect the employer's legitimate business interests. This will include an evaluation of whether a narrower scope, time or geographic location would have been appropriate, as well as whether other measures (such as a non-solicitation provision) could have protected the employer's interests without restraining the employee's ability to find new employment.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

The manner of termination generally will not impact on the enforcement of a post-employment non-competition provisions. However, in limited circumstances, if an employer is found to have breached the employment agreement, this may impact on the enforceability of a non-competition provision.

a. If Yes, How Does It Affect Enforcement?

There are limited circumstances where an employer's breach may nullify the enforceability of a non-competition provision. This applies where there are specific terms or benefits that were to be provided to an employee under the agreement reached which, in essence, form a condition precedent to the employee's agreement to be bound by the non-competition provision. In those circumstances, an employer's breach of the agreement may result in the non-competition provisions being unenforceable.

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

Yes.

a. If Yes, under What Conditions?

There are no requisite conditions for a release from a non-competition covenant, however, this generally occurs as a component of a negotiated resolution with the employee.

b. Is Consideration/Compensation Required to Be Paid?

No.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

Canadian courts will apply a choice of laws provision provided the application of the law is not contrary to public policy and was selected for bona fide and legal reasons.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

The Canadian courts will examine the impact of the choice of laws provision and the motivation for agreeing to a particular legal system. If it appears the choice of laws was made to evade or avoid legal obligations in the jurisdiction most closely connected to the action, the provision is unlikely to be enforced.

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

Where a forum selection clause is non-exclusive, the Canadian courts will generally determine which jurisdiction has a real and substantial connection to the litigation, with the clause being one factor to consider. Where the parties have entered into an exclusive forum selection clause, such a clause will generally be honoured absent an underlying issue with the enforceability of the contract as a whole.

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

Properly drafted, an agreement to submit any disputes related to a non-competition provision to arbitration will be enforceable.

10. Leading Cases/Current Trends

Elsley v. J.G. Collins Insurance Agencies Ltd., [1978] 2 S.C.R. 916

Staebler Company Ltd. v. Allan et al. (2008), 92 O.R. (3d) 107 (ONCA)

Payette v. Guay Inc., 2013 SCC 45

Shafron v. KRG Insurance Brokers (Western) Inc. 2009 SCC 6.

11. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

Providing an employee "garden leave" whereby they continue in employment but are not required to actively attend at work, is one means of limiting the individual's ability to compete post-employment.

b. Non-Solicitation of Customers?

Non-solicitation provisions are recognized and often preferred over non-competition provisions as they restrict an employee's ability to 'poach' clients of an employer while not

restricting the employee's ability to enter into new employment. Even where an employer believes a non-competition provision is necessary, it may elect to impose a limited non-competition provision as well as a non-solicitation provision that covers a longer period of time.

c. Other?

Employers may also use stringently drafted confidentiality and non-disclosure agreements to provide explicit protection against disclosure of information obtained in the course of employment.

C. France

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1. Country Legal System – Civil, Common Law, Other

Civil law system.

a. Type of Court/Tribunal to Hear Matter?

Any action by employers against their former employees shall be brought before the labor courts. Any action by the employer against the new employer of their former employees shall be brought before the commercial courts.

b. Who Has the Burden of Proof?

The burden of proving that a non-compete obligation has been breached rests on the employer.

c. Statute of Limitations for Bringing an Action?

The statute of limitation for an action requesting payment of the compensation for the non-compete agreement is three years.

The non compete clause, inserted in the employment contract is subject to the statute of limitation's rules applicable to the employment contract. Hence, the statute of limitation for

an action on the non-compete clause is two years.

2. Source of Law Governing Non-Compete

Case law and collective bargaining agreements:

There is no statute defining the post-employment non-compete agreements. They are governed by case law and must comply with the limitation provided in applicable branch-wide collective bargaining agreements.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

a. Must the Agreement Be in Writing?

The non-compete must be in writing to allow the employee to precisely know its scope and conditions of application.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

No specific language requirement is needed as long as the language makes it clear that it is creating a non-compete obligation for the employee.

c. Are There Limits to the Type or Level of Employee Covered?

There are no general defined limits regarding the level of the employees covered. However, some collective bargaining agreement can restrict the applicability of the non-compete to employees of a certain level. But generally, for the non-compete to be valid, the employer will have to demonstrate that it is necessary to protect the interest of the company. This will be harder to prove when dealing with low-level employees.

d. Are There Limits to the Length of Time That Is Allowed under Law?

Collective bargaining agreements generally provide for a maximum length. In the absence of any provision in the applicable collective bargaining agreement, the courts will usually deem that the reasonable maximum length is of two years (in rare cases where the scope of the non-compete is otherwise very limited, a longer period of time has been deemed acceptable).

e. Are There Limits to the Geographic Reach Established by Law?

There is not set limit defined by law. However, case law has established two important principles to follow when determining the geographical scope of the non-compete. First, it must be defined precisely has to allow the employee, at the time they sign the agreement, to know the extent of the restriction of their freedom to work. This means that a specific geographical area must be provided for (it is not possible to simply state that the agreement

is applicable in any place where the company has an entity). The other principle that must be followed is that the scope of the non-compete must be limited to what is strictly necessary to avoid competing with the employer. Based on this, the scope can differ greatly from a few kilometers to the whole of the French metropolitan area depending on the industry and the company of the employer.

f. Any Other Details or Essential Elements of the Agreement?

The agreement must define precisely the activities it covers. Once again, this will be analyzed by the courts based on the necessity for the employer and the restriction it imposes on the employee to find another job. The more specific the activities covered are, the less likely a court is to strike down the agreement.

4. What Kind of Consideration Is Required?

a. Monetary or Financial Consideration?

A monetary compensation is required by law in exchange for the non-compete agreement. It cannot be included in the employee's salary during the performance of the employment contract.

It must be paid, on a monthly basis, during the post employment non-compete period.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

The non-compete agreement can be introduced at the beginning of the employment or at any point during the employment as long as a monetary compensation is provided for (but if the agreement has not been introduced at the beginning of the employment, the employee remains free to refuse it and cannot be disciplined or terminated based on this refusal). It can even be introduced in a post-employment settlement.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

No, a specific additional monetary compensation must be provided for.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

No, a specific additional monetary compensation must be provided for.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

Employers may enforce covenants not to compete against their former employees and against their new employers if they knew of the non-compete obligation when they hired the employee.

b. What Remedies?

Three remedies can be sought out by the employer:

- Interruption of the payment of the compensation
- Damages from the employee
- Termination of the employee's competing activities

c. Must Remedies Be Listed in Agreement?

No.

d. Is Injunctive Relief Available?

Yes. The employer can ask the labor courts to forbid the employee from continuing the competing activity, subject to penalty. For such a request to be heard in summary proceedings there must be a manifestly unlawful action and no serious challenge to the claim.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

When faced with a non-compete agreement they deem too excessive, the courts can alter its scope so as to avoid declaring it void. This can happen where the courts deem that the non-compete does not allow employees to find a position compatible with their education and experience. In that case, they can alter the length and geographical scope of the non-compete as well as the activities listed. However, courts do not have the power to alter the monetary compensation provided for in the agreement.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

The courts can alter the agreement regardless of whether or not such a possibility has been acknowledged in the agreement.

c. Drafting Considerations

i. Nested Clauses?

Not possible, especially for the monetary compensation, which must be the same whether the employee is dismissed or resigns.

ii. Other Options to Allow for Blue Penciling?

No.

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

Yes. In the absence of a limited and reasonable scope (including time, geography and activities covered), the agreement will not be enforced by the courts.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

The reasonableness of geographic restrictions is established by case law except where a collective bargaining agreement provides specific limits.

i. Reasonable

Limited to what is strictly necessary to avoid competition with the employer. The court will apply a case by case analysis: from one kilometer around the former employer for a hairdresser to the whole country for a consulting firm, provided the restricted activities still left some possibility of employment in the country to the employee.

ii. Unreasonable

A non-compete agreement covering the whole French territory has been deemed unreasonable for an employee with limited experience and education where the court deemed a restriction limited to a few French departments would suffice to preserve the interest of the company.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable? Yes

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

Both are examined. The terms of the agreement are evaluated to determine if, as the time it was signed, the employee could understand the scope of the non-compete and the facts and circumstances are evaluated to determine if, at the time of enforcement, the employee is still able to find a job while complying with the agreement.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

There is a balancing test between the legitimate interests of the company and the ability of the employee to find another job compatible with their education and experience.

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

The test will be based on the ability of the employee to find a job while complying with the non-compete agreement.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

In the absence of any specific provision in the applicable collective bargaining agreement and/or the non-compete agreement, the manner of the termination does not affect the enforcement of the non-compete agreement. It is possible to restrict, in the agreement, the situations in which the non-compete obligation will apply (for example, it is possible to provide that it will not be applicable in cases of dismissal for economic reasons). However, it is not possible to provide that the monetary compensation will only be paid depending on the manner of the termination.

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

The company can unilaterally terminate to the non-compete agreement if the following conditions are met:

- The agreement provides for this unilateral termination
- The termination is notified within a specific time period provided for in the collective bargaining agreement or the in the agreement. The agreements cannot provide that the employer is free to terminate the clause at any point during the post-employment non-compete period. In cases of dismissals, if no specific time period is provided for in the agreements, the unilateral termination of the non-compete agreement must be done, at the latest, at the time of the notification of the dismissal.
- The decision to terminate be in writing, clear and precise
- If the decision to terminate the non-compete agreements affects several employees, each employee must be notified individually
- If the employer terminates the non-compete within the required time period, then the payment of the compensation is no longer required.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

The parties are free to choose the law of another country as the governing law for the non-compete.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

Yes, the court will apply the law chosen in the agreement only if it provides the same level of protection of the employee (i.e. if the law of the chosen country does not provide for mandatory compensation for a post-employment non compete covenant, French courts will apply the French law regarding the non compete covenant).

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

A forum selection clause in an employment agreement or in a non-compete agreement between an employer and an employee will not be enforceable.

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

Only after the dispute has arisen can an agreement to submit the dispute to arbitration be concluded.

11. Leading Cases/Current Trends

Leading case: French Supreme Court, 10 July, 2002, n°99-43.334: specifies that, to be valid, the following conditions must be met: appropriate duration, geographical scope and financial compensation.

Current trends:

- Due to the financial compensation, employers often waive their right to enforce this clause at the time of the employment contract's termination.
- The Supreme Court is mindful to the freedom of work, and does not hesitate to reclassify as non-compete clauses (with a financial compensation requirement), clauses named differently by parties to avoid the applicable regulations.

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

Under French law, an employee on garden leave and without a non-compete clause in his employment contract has the freedom to work even for a competitor.

b. Non-Solicitation of Customers?

A monetary compensation is required by law in exchange for the non-solicitation of customers (about 25% of gross salary). If the clause is too broad and prevents the employee from finding a new job; it could be reclassified by judges as a non-compete clause (with a higher monetary compensation).

c. Other?

i. Non-Poaching Clause

This non-poaching clause enables the employer to forbid an employee from hiring, during a specified period of time, all or parts of the company's staff. This clause must be drafted with precision, or it could be reclassified by judges as a non-compete clause (with a monetary compensation).

ii. Confidentiality Clause

The duty of confidentiality is inherent to the employment contract. Therefore, for some employees, the employment contract shall provide for a specific clause, in order to forbid the disclosure of sensitive and strategic information.

D. Germany

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1. Country Legal System – Civil Law

a. Type of Court/Tribunal to Hear Matter?

Labor court for all employees who were not employed as CEOs (*Geschäftsführer*). If employee was employed as CEO, district court would hear matter, as non-competition agreements with CEOs are considered civil contracts and interpreted as such. However, the Court of Justice of European Union ("CJEU") requires application of special employee protection laws also to the CEO if he/she is bound by the shareholders' directives (i.e. if the CEO does not own enough shares to control the company); e.g. mandatory maternity leave for a CEO. Nonetheless, the district court would be the court to hear the matter involving the CEO. For purposes of this outline, focus is on regular employees and not on CEOs

b. Who Has the Burden of Proof?

The employer must prove that employee's new activity is a breach of the post-contractual non-compete covenant. If employer is claiming damages, it also needs to prove the damage. The employer may not simply withhold salary payments if the employment is still ongoing, even if the employee engages in a competing business. Theoretically, if the employer is entitled to damages, it could withhold the equivalent part of the salary as long as the salary exceeds the minimum amount which is exempt from execution. In practice, the employer may decide to immediately terminate the employment without observing a notice period and stop paying the employee from that day. Whether such termination is fair or not will be determined by the court if the employee files an unfair dismissal claim.

If the employer withholds salary payments, the employee has to simply allege missing payment (and ongoing employment). The employer then has to prove that it paid the employee or that the employment was terminated. In Germany, the employer usually wires the salary to the employee's bank account on a fixed day of the month, hence, proof of the payment, if made, will hardly be an issue.

c. Statute of Limitations for Bringing an Action?

According to statute, a claim must be brought within three years following the year in which employee breached his duty. Parties may agree on a general forfeiture of claims: the claim must be asserted within three months and, if rejected by the other party, claim must be filed within three months after the rejection. Otherwise claim will be forfeited. The same standard applies to the employee's claim for payment.

2. Source of Law Governing Non-Compete

a. Statute

Statute: sec. 74 *et seq*. Commercial Code (*Handelsgesetzbuch*)

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

a. Must the Agreement Be in Writing?

Yes.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

While there is no precise language requirement it is recommended that such agreement repeat the wording of the statute when it comes to the amount of compensation (50% of the overall remuneration the employee received before the employment ended). The agreement is not required to be in German to be enforceable. However, it is recommended that such agreement be in the German (or bi-lingual) language to avoid an error in translation during a court proceeding making the clause unenforceable.

c. Are There Limits to the Type or Level of Employee Covered?

No but the employer must have a justified interest to introduce the non-compete covenant. That is the case if the employee had the chance to broaden/deepen his or her knowledge during the job or was able to establish/strengthen a network of interest for competitors.

d. Are There Limits to the Length of Time That Is Allowed under Law?

Post termination: 24 months.

e. Are There Limits to the Geographic Reach Established by Law?

Yes, the geographic scope generally covers all geographic areas in which the employer is actively doing business.

f. Any Other Details or Essential Elements of the Agreement?

Agreement must provide for compensation: 50% of the overall remuneration the employee received before the employment ended, to be paid throughout the non-compete period.

4. What Kind of Consideration Is Required?

Agreement must provide for compensation: 50% of the overall remuneration the employee received before the employment ended, to be paid throughout the non-compete period.

a. Monetary or Financial Consideration?

Agreement must provide for compensation: 50% of the overall remuneration the employee received before the employment ended, to be paid throughout the non-compete period.

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

Yes.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

Agreement must provide for compensation: 50% of the overall remuneration the employee received before the employment ended, to be paid throughout the non-compete period.

iii. If Paid at the Time of Entering the Agreement, How Much and How Is This Identified or Accomplished?

N/A. Payment is due during the non-compete period as required by statute.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

Offering employment is not enough, i.e. employee is not obliged to accept offer of continued employment or otherwise waiving his/her right to compensation.

Non-compete covenant may be agreed at any time until the end of employment. The employer has the right to waive the non-compete covenant anytime. However, its duty to pay compensation only ceases one year after declaration of the waiver (sec. 75a Commercial Code (*Handelsgesetzbuch*)).

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

No.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

No.

e. May a Non-Compete Agreement Be Introduced for the First Time in a Termination Agreement in Which Additional Benefits to Be Paid upon Termination May Also Be Offered?

Yes, so long as the minimum remuneration of 50% of compensation is agreed to be paid.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

By employer: Filing for injunctive relief; claiming contractual penalties and/or damages.

By employee: Claim for compensation (employee must not prove that a new activity which would be considered as competition was available. The mere agreement is enough.)

b. What Remedies?

Injunctive relief: an order preventing the employee from engaging in competing activity.

Payment of contractual penalty and/or damages for losses caused by the employee's breach of the non-compete provision. The breach must in fact result in damage to the employer's business. If the employer can prove 1) breach, 2) damage and 3) that the damage was caused by the breach, the amount of damages will be assessed by comparing the financial situation as it is with the financial situation that would exist had there been no breach.

c. Must Remedies Be Listed in Agreement?

Only the amount of the contractual penalty must be included in the agreement. To be enforceable the penalty cannot exceed the amount of one month's salary.

d. Is Injunctive Relief Available?

Yes.

i. If So, What Is the Standard?

Injunctive relief is a court order requiring the employee not to engage in the offending activity during the time frame of the non-compete. To obtain such injunctive relief, the employer would have to prove that the employee is engaging in a competing activity.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

The "Blue Pencil" test allows the court to delete language in the agreement if the remaining wording constitutes an enforceable agreement without needing to add to or modify the remaining wording. Whether a court will blue pencil an agreement depends on the wording of the agreement and whether it is confusing. If the court finds a clause to be confusing and hence incomprehensible to an average reader, the entire clause will be considered void.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

Blue penciling options are automatic.

c. Drafting Considerations

i. Nested Clauses?

Not recommended. The recommended way to ensure non-compete clause with the correct scope and enforceability is to stay with the wording provided in the statute. The scope may be narrowed, of course.

ii. Other Options to Allow for Blue Penciling?

No.

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

Yes.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

The statute provides for geographic limits to the agreement. The geographic scope must not hinder the employee's development in an unreasonable way, sec. 74a para. 1 Commercial Code (*Handelsgesetzbuch*). The courts have defined what is reasonable or unreasonable.

i. Reasonable

Where applicable, the non-compete provision should be restricted to such areas in which the employer (or any group company) carries on business upon termination of the employee's employment.

The rules surrounding geographical restrictions are derived from case law.

ii. Unreasonable

Agreements that cover geography that exceeds the locations at which the employer or its affiliates are doing business at the end of employment and without justified interest of the employer to exceed these boundaries.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Sec. 74a para 1 Commercial Code (*Handelsgesetzbuch*): Non-compete period must not

exceed two years.

i. Reasonable

Any period up to two years from the date of termination of employment.

ii. Unreasonable

Any period exceeding two years from the date of termination of employment.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Sec. 74a para 1 Commercial Code (*Handelsgesetzbuch*): The restrictions may not impede the professional development of the employee in an unreasonable way. The court will determine on a case by case basis whether the wording is reasonable and whether a certain activity qualifies as competition.

i. Reasonable

Activities for a direct competitor, a competitor's affiliate or a competitor of an affiliate of the employer; setting up a competing business within the geographic area in which the employer or an affiliate is doing business; financial investment in a competing business. The agreement may also name competing companies for which services shall be prohibited.

ii. Unreasonable

Overly broad clauses such as "any kind of professional activity" without further description.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable? Yes

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

The facts that exist when the employment ends and the post-employment prohibition starts.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

If agreement is in compliance with the law, its wording is decisive. If it is not in compliance with the law, it is not enforceable.

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

Those set out in the statute. It will determine all circumstances of the case to determine whether the agreed scope will unreasonably impede the individual employee's professional development.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

No.

a. If Yes, How Does It Affect Enforcement?

N/A

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

Yes, the employer may agree to release the employee from a non-compete provision. While such release may be conditioned upon some behavior or action, usually the employer will not receive consideration or compensation from the employee.

a. If Yes, under What Conditions?

Subject to agreement between the parties.

b. Is Consideration/Compensation Required to Be Paid?

Nothing is required by law.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

The parties are free to choose the law of another country as the governing law (Art. 3 of the Rome I Regulation). However, this choice of law will only be respected as long as it does not undermine mandatory law of the state in which the services are to be performed as well as such regulations which are more beneficial to the employee.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

Yes, the court will apply the law chosen in the agreement only if it provides the same level of protection of the employee (e.g. if the law of the chosen country does not provide for mandatory compensation for a post-employment non compete covenant, German courts

will apply the German law regarding the non compete covenant). Hence, as long as the employee works in Germany, a post-employment non-compete covenant will be governed by sec. 74 et seq. Commercial Code (*Handelsgesetzbuch*) even if the parties agreed on a different jurisdiction.

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

No. The parties cannot agree on a specific forum. The choice of law has no effect on the forum. As long as the employee is employed in Germany, all claims in connection with the employment must be filed either with the labor court in the city where the employee resides or in which the employee performs his/her work.

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

No. Such an agreement would be void.

11. Leading Cases/Current Trends

Due to mandatory financial compensation, employers are reluctant to include enforceable post-employment non-compete covenants if not of true importance for their business.

Note: The situation with CEOs is very different. The Federal Court of Justice has not yet decided whether CEOs are generally entitled to compensation and if so how high an adequate compensation should be. If a non-compete covenant with the CEO is vital to the company, the advice therefore must be to provide for compensation in the amount of 50% of the CEO's remuneration.

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

The employee has the right to work. In practice, employees are only sent on Garden Leave during the notice period after being notified that their employment will end and before the non-competition period begins. During Garden Leave, because the employment has not yet ended, the employee is entitled to the regular salary.

b. Non-Solicitation of Customers?

Non-solicitation clauses are most likely only enforceable if the employee is compensated with 50% of most recent salary, however, this issue is yet undecided by the courts. Customer lists are part of confidential information. Therefore an employee is prohibited from gathering any such lists or single contacts when leaving the employer's business. But former employees are not prohibited to build up their own (even competing) business once

their employment ended and that even includes contacting any customer of the former employer. So as long as the employee did not steal contact lists but simply remembers individuals and finds their contact information on his own, he/she is free to contact them after the employment ended. Therefore we assume that a non-solicitation clause will only be enforceable if compensation is granted.

c. Other?

Confidentiality and non-disclosure provisions are recommended in all cases.

E. India

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1. Country Legal System – Common Law

a. Type of Court/Tribunal to Hear Matter?

In India, legal disputes take an exceedingly long time to resolve. A commercial court would hear any dispute regarding a post-employment covenant not to compete.

b. Who Has the Burden of Proof?

Covenants not to compete are a restraint of trade and are void, *ab initio*.

c. Statute of Limitations for Bringing an Action?

2. Source of Law Governing Non-Compete

a. Statutory Law

The Indian Contract Act governs the law on contracts involving covenants not to compete. Covenants in restraint of trade, profession or employment of a person is void *ab initio*. Non-

compete agreements are only available for the sale of business goodwill, so long as the terms are reasonable.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

a. Must the Agreement Be in Writing?

N/A

b. Is There a Language Requirement for the Agreement to Be Enforceable?

N/A

c. Are There Limits to the Type or Level of Employee Covered?

N/A

d. Are There Limits to the Length of Time That Is Allowed under Law?

N/A

e. Are There Limits to the Geographic Reach Established by Law?

N/A

f. Any Other Details or Essential Elements of the Agreement?

N/A

4. What Kind of Consideration Is Required?

N/A

a. Monetary or Financial Consideration?

N/A

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

N/A

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

N/A

iii. If Paid at the Time of Entering the Agreement, How Much and How Is This Identified or Accomplished?

N/A

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

N/A

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

N/A

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

N/A

e. May a Non-Compete Agreement Be Introduced for the First Time in a Termination Agreement in Which Additional Benefits to Be Paid upon Termination May Also Be Offered?

N/A

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

N/A

b. What Remedies?

N/A

c. Must Remedies Be Listed in Agreement?

N/A

d. Is Injunctive Relief Available?

i. If So, What Is the Standard?

N/A

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

If a non-compete is presented to a court based on the sale of a business, the court has the authority to modify it to make it reasonable.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

Blue penciling options are automatic and not dependent on the language of the agreement.

c. Drafting Considerations

i. Nested Clauses?

N/A

ii. Other Options to Allow for Blue Penciling?

N/A

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

N/A

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

N/A

ii. Unreasonable

N/A

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

N/A

i. Reasonable

N/A

ii. Unreasonable

N/A

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

N/A

i. Reasonable

N/A

ii. Unreasonable

N/A

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable? Yes

N/A

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

N/A

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

N/A

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

N/A

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

N/A

a. If Yes, How Does It Affect Enforcement?

N/A

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

N/A

a. If Yes, under What Conditions?

b. Is Consideration/Compensation Required to Be Paid?

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

If another country's law is to be applied, it is recommended that the action take place in the other country's court. That said, enforcement of a foreign judgment in India require meeting series of criteria that are extensive. Alternatively the foreign judgment could be the basis of the suit in India, but the judgment would be evidence only, and would still be subject to litigation. Disputes litigated in India take years to resolve.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

N/A

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

N/A

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

Yes; however the result of applying Indian law in the arbitration would render the agreement void.

11. Leading Cases/Current Trends

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

Garden leave that is subject to reasonable terms is recognized in India as a viable alternative to non-compete restrictions. Nevertheless at least one court (in Bombay) has returned a judgment finding garden leave to be a restraint of trade.

b. Non-Solicitation of Customers?

A non-solicitation of customers provision is currently enforceable.

c. Other?

Confidentiality and non-disclosure provisions are highly recommended as best practices. In India, these provisions provide the first line of protection for employers and should be detailed and specific.

F. Italy

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1. Country Legal System – Civil Law

a. Type of Court/Tribunal to Hear Matter?

All employment matters are required by law to be heard by labor courts.

b. Who Has the Burden of Proof?

The burden of proving that a non-compete provision is enforceable against an employee is on the employer.

c. Statute of Limitations for Bringing an Action?

A claim for enforcement of a non-compete provision must be brought within 10 years of the date of the alleged breach of the provision.

2. Source of Law Governing Non-Compete

a. Statutory Law

Italian Civil Code Art. 2125 governs the terms of a non-compete. Strict compliance with statutory terms is required for enforcement. Also National Collective Labor Agreements may govern non-competition provisions.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

a. Must the Agreement Be in Writing?

Yes.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

The agreement must be in Italian to be valid?

c. Are There Limits to the Type or Level of Employee Covered?

Restrictive covenants are valid for a variety of classes of employees.

d. Are There Limits to the Length of Time That Is Allowed under Law?

Managers may be restrained for up to 5 years. All other employees may be restrained for up to 3 years.

e. Are There Limits to the Geographic Reach Established by Law?

Yes. The geographic limits are based on the facts of the employee's position, location of influence. The validity of the non-compete agreement is subject to a principle of reasonability and justification.

f. Any Other Details or Essential Elements of the Agreement?

Restraints can extend to any employment activity in competition with the employer and are not limited to what the employee did for the employer. The employee must still be able to use his or her skills to work, however.

4. What Kind of Consideration Is Required?

The non-compete agreement must be separate from an employment agreement. It must be supported by adequate consideration based on the likely hardship associated with its terms. The amount of consideration may be challenged by the employee as insufficient.

a. Monetary or Financial Consideration?

Consideration must be more than a token amount, and cannot be unfair or disproportionate to the employee's ability to earn a living. An acceptable range of consideration is usually 15 to 35% of the employee's ordinary salary depending on the position of the employee and the sacrifice the employee is making to comply with the agreement.

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

Compensation associated with the non-compete agreement may be paid during the course of employment.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

Compensation associated with the non-compete agreement may be paid in a lump sum at the termination of employment if it was not paid during the course of employment.

iii. If Paid at the Time of Entering the Agreement, How Much and How Is This Identified or Accomplished?

N/A

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

Employment is a separate relationship supported by agreement. Employment is not sufficient consideration to support an agreement not to compete following employment.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

No.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

No. Compensation supporting the non-compete agreement must be paid separately.

e. May a Non-Compete Agreement Be Introduced for the First Time in a Termination Agreement in Which Additional Benefits to Be Paid upon Termination May Also Be Offered?

Yes, so long as compensation is agreed upon and paid separately from any other payments required to be paid.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

The employer may enforce the agreement against the employee for breach of the agreement.

b. What Remedies?

Injunctive relief is available to prohibit the employee from taking prohibited employment.

Penalties are commonly assessed and frequently amount to twice the consideration paid for the agreement.

Damages for loss caused by the breach.

c. Must Remedies Be Listed in Agreement?

The penalties must be agreed upon in the agreement.

d. Is Injunctive Relief Available?

Yes.

i. If So, What Is the Standard?

Injunctive relief is available to stop the employee from working in the prohibited capacity, and is granted in the court's sole judgment and discretion.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

If the duration is not identified, the court will insert the maximum amount of time authorized by law. The court has the authority to "read in" to the agreement terms that are missing or incorrect so as to make the agreement enforceable. Courts tend to modify the agreement in favor of enforceability unless the consideration paid is determined to be inadequate or is missing entirely. In that case, courts will find the agreement to be void.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

Blue penciling options are automatic and not dependent on the language of the agreement.

c. Drafting Considerations

i. Nested Clauses?

Courts will not pick and choose among options presented by the employer. Not recommended or required.

ii. Other Options to Allow for Blue Penciling?

N/A

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

Because courts have the authority to modify the agreement to make it enforceable, the main consideration is whether the compensation is paid and whether it is reasonable based on the restriction placed on the employee.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

Geographic restrictions are based entirely on the facts of each case, including the specific work area of the individual. These restrictions may extend beyond the country's borders in the event the individual participated in business in a meaningful manner outside the country.

ii. Unreasonable

Overly broad agreement such as restricting a former employee from working "all over the world." However, depending upon the circumstances, such a worldwide restriction may be permissible. Geography is subject to the facts and if the region of restriction exceeds the facts proved at court, the court can modify the geographic restriction.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Time restrictions are established by statute.

i. Reasonable

Managers may be restrained for up to 5 years. Other employees may be restrained for up to 3 years.

ii. Unreasonable

Restrictions in excess of the statute are revised to fit the statute.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Courts may revise the scope of restricted activities to meet the facts and to ensure the individual is still able to use employable skills during the restricted period.

i. Reasonable

Employees may be restricted from working for competitors regardless of the position for which they may be hired.

ii. Unreasonable

Non-compete restrictions that seek to restrict the employee from joining a business that does not (or will not) compete with the employer will not be enforceable.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable?

The facts as they exist as of termination of employment will be used to make sure the agreement is enforceable. The agreement will be considered void if it does not include a fair compensation for the restricted period within the agreement.

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

Both – for different reasons. The facts as they exist as of termination of employment will be used to make sure the agreement is enforceable. The agreement will be considered void if it does not include a fair compensation for the restricted period within the agreement.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

Yes, to the extent the employee may need relief from the restrictions in order to use his/her skills in work available to him, the court can apply a balancing test. The employee cannot be restricted from working at all.

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

The Labor Court would consider whether the compensation paid to the employee is adequate to the sacrifice required by him/her and whether the employee has the possibility to find a job outside the scope of the non-compete agreement.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

Yes.

a. If Yes, How Does It Affect Enforcement?

Potentially. Employees terminated for reasons other than just cause have a legal defense to enforcement of the non-compete. Best practice recommends that employers not automatically agree to this defense in their agreements but require the employee to raise it in court.

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

Yes, the employer may agree to release the employee from a non-compete provision. In this case the employee is entitled to keep the non-competition money paid during the term of employment, if any.

a. If Yes, under What Conditions?

Subject to agreement between the parties.

b. Is Consideration/Compensation Required to Be Paid?

Nothing is required by law.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

No. Italian courts do not recognize a choice of law in employment matters.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

N/A

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

N/A

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

No.

11. Leading Cases/Current Trends

A trend is that courts are scrutinizing non-competition agreements more carefully and look very closely at the scope of the non-compete agreement.

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

No. Garden leave is not authorized under Italian law. Notice periods are either worked or the employee receives payment in lieu of working.

b. Non-Solicitation of Customers?

It is common to include non-solicitation of customers in the non-compete agreement.

c. Other?

Confidentiality and non-disclosure provisions are strongly recommended as an added means of protection.

G. Japan

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1. Country Legal System – Civil, Common Law, Other.

a. Type of Court/Tribunal to Hear Matter?

In cases where either an employer or an employee file an action against a party regarding a non-compete agreement, the petitioner must file the claim in district court.

b. Who Has the Burden of Proof?

The employer maintains the burden of proving that a non-compete agreement is enforceable against an employee.

c. Statute of Limitations for Bringing an Action?

There is no specified statute of limitations specific to non-compete covenants under Japanese law. The standard statute of limitations applicable to agreements executed between employees and employers is five years, which would apply in these cases.

2. Source of Law Governing Non-Compete

a. Statute

There is no law specifically providing for a non-compete duty on employees. Such laws are governed by general contract law.

b. Constitution

The Japanese constitution can be a basis for invalidating a non-compete agreement if it restricts an employee's freedom to freely choose his or her own work.

c. Case Law

Previous cases dealing with the validity or invalidity of non-compete agreements can be used by courts as guidance, but the decisions in such cases are not binding on other courts.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

a. Must the Agreement Be in Writing?

The post-employment non-compete agreement can be concluded orally; however, in practice, such agreements are difficult to evidence. As such, it is typical for post-

employment non-compete agreements, among others, to be concluded in writing.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

No, the agreement can be written in any language and still be enforceable.

c. Are There Limits to the Type or Level of Employee Covered?

No, any employee, no matter the level, can be bound by a non-compete agreement. However, in the case of a dispute, a non-compete agreement between an employer and an employee with access to larger amounts of know-how and proprietary information of the employer may be easier to enforce.

d. Are There Limits to the Length of Time That Is Allowed under Law?

No, there is no specified time limit for an enforceable non-compete agreements. However, in the case of a dispute, the longer the non-compete obligation, the more likely the obligation will be held to be invalid.

In practice, non-compete agreements in Japan are typically for a period of several months to one year, but there are cases where they can extend to two or even three years.

e. Are There Limits to the Geographic Reach Established by Law?

There are no geographical limits specified in Japanese law that restrict the geographical reach of a non-compete arrangement. However, the geographic scope of the non-compete provision is one factor in determining the validity of a non-compete agreement. In general, the smaller the geographic scope of the non-compete requirement, the more likely the provision will be held valid in the case of a dispute.

f. Any Other Details or Essential Elements of the Agreement?

There are no essential elements necessary for creating a binding non-compete agreement. However, there are several factors that are weighed and evaluated together, without any being determinative alone. Factors include: (i) position of the employee, (ii) time period of the non-compete obligation, (iii) geographic area, (iv) scope of prohibited work, and (v) existence of consideration in exchange for the non-compete obligation.

4. What Kind of Consideration Is Required?

No consideration is required. However, the existence of consideration is one factor in determining validity of a non-compete obligation.

a. Monetary or Financial Consideration?

Consideration, when provided, is typically financial. However, it is not always salary-based. Retirement allowance agreed to at the time of resignation can also be considered

consideration for a non-compete obligation.

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

No consideration is required. However, the existence of consideration is one factor in determining validity of a non-compete obligation.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

Consideration is also not necessary for post-employment non-compete obligations. However, the existence of consideration would be one factor in determining the non-compete provision's validity.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

It is unclear under Japanese law whether the offering of employment would be considered consideration for entering into a non-compete agreement. However, consideration is not a requirement for creating a valid non-compete obligation.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

It is unclear under Japanese law whether continued employment would be considered consideration for a continued obligation to comply with a non-compete duty. However, consideration is not a requirement for creating a valid non-compete obligation.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

It is unclear under Japanese law whether a change in the terms of employment would be deemed consideration for any new or revised covenant not to compete. If, for example, an employer provides a wage increase to an employee directly in exchange for the employee's agreement to a non-compete covenant, then it would likely be deemed consideration. However, consideration is not a requirement for creating a valid non-compete obligation.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

The employer may enforce the agreement against the employee for breach of the non-compete agreement.

b. What Remedies?

There are three types of remedies available to employers. The remedies include: (i) injunction to prevent the former employee from entering into an engagement with the new employer, (ii) compensation for any damages, and (iii) return to the employer all or a portion of the former employee's retirement allowance (if any).

c. Must Remedies Be Listed in Agreement?

No, a non-compete agreement does not need to provide for damages in the agreement. However, if an employer seeks return of the former employee's retirement allowance, a basis for such return is required. Such a basis can be set forth in the employer's Work Rules (which set out certain binding terms and conditions of employment), the non-compete agreement, or an individual employment agreement.

d. Is Injunctive Relief Available?

Yes, injunctive relief may be available to employers seeking remedy for a former employee's breach of a non-compete covenant.

i. If So, What Is the Standard?

If there is a strong likelihood that the breach of the non-compete covenant will impact or actually does have an impact on, the employer's profits from the business, injunctive relief may be available.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

A court has discretion to decide whether part of the obligations in the covenant (e.g., the non-compete time period) will be held invalid, while enforcing other parts.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

This is automatic and the agreement does not need to acknowledge the court's ability to make changes. Severability provisions in Japanese contracts are not typical, although the concept exists and is practiced by courts in certain cases.

c. Drafting Considerations

i. Nested Clauses?

It is possible for contract drafters to include a provision whereby, for example, if a time period for the non-compete covenant is held invalid, then a shorter time period shall be the required period of the covenant. These types of provisions can be enforceable under

Japanese law, although they are very uncommon in Japanese practice.

ii. Other Options to Allow for Blue Penciling?

No, this is not part of common Japanese practice.

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

Time, geography, and scope are simply factors in the overall evaluation of the validity of a non-compete obligation. There are no specific provisions in Japanese law that draw a clear line for what is considered reasonable in this regard. As such, this analysis is extremely fact intensive.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Geographic restrictions are simply factors in the overall evaluation of the validity of a non-compete obligation. There are no specific provisions in Japanese law that draw a clear line for what is considered reasonable in this regard. As such, this analysis is extremely fact intensive. Generally, narrowly-tailored geographic restrictions are looked upon with favor, and overly-broad geographic restrictions are unlikely to be enforced.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Time restrictions are simply factors in the overall evaluation of the validity of a non-compete obligation. There are no specific provisions in Japanese law that draw a clear line for what is considered reasonable in this regard. As such, this analysis is extremely fact intensive. Generally, non-competition periods of one year or less are looked upon with favor, and periods greater than one year are closely scrutinized.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

The scope of the non-compete is simply a factor in the overall evaluation of the validity of a non-compete obligation. There are no specific provisions in Japanese law that draw a clear line for what is considered reasonable in this regard. As such, this analysis is extremely fact intensive.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable?

Yes, both are important in such analysis. The analysis is extremely fact intensive, and courts will closely examine the case-specific facts and circumstances when asked to enforce a non-

compete agreement. Unfortunately, there are no bright lines to guide practitioners in drafting and enforcing non-compete agreements.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

Yes. In Japan, the enforcement of non-compete clauses involves a balancing between the employer's interests, e.g. protecting confidential information and trade secrets on the one hand and the employee's Constitutional Right to freedom to choose occupation and employment.

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

Please see our response to question 3(f).

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

No, there is no provision under Japanese law that would affect the validity of a post-employment non-compete agreement based on the manner of termination.

a. If Yes, How Does It Affect Enforcement?

N/A

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

In practice, the employer can unilaterally terminate a post-employment non-compete agreement because the burden in such an agreement is the employer's burden. The employee would suffer no damage in such a unilateral termination, so a claim challenging the unilateral termination would not be successful.

a. If Yes, under What Conditions?

b. Is Consideration/Compensation Required to Be Paid?

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

Generally the court will apply the governing law of the non-compete agreement, although there are exceptions. For example, if the employee performed his or her duties in Japan, and enforcing the non-compete agreement would affect the employee's civil rights, then the court can apply Japanese law.

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

Generally the court will apply the forum selection clause of the non-compete agreement, although there are exceptions. One exception relates to a case where the forum selection clause provides for a court in a non-Japanese jurisdiction. If in such a case, the employee performed his or her duties in Japan prior to termination, and enforcing the non-compete agreement would affect the employee's civil rights, then the court has discretion to hear the case in Japan.

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

The general rule is that an agreement in a non-compete covenant which provides for the parties to submit to arbitration is unenforceable. Under the Arbitration Act of Japan, an arbitration agreement between an employer and an employee regarding a future employment dispute (such as a dispute over a non-compete obligation) is invalid.

11. Leading Cases/Current Trends

There are no leading cases in this area, as this is not a major source of dispute in Japan. There are few court precedents that provide non-binding guidance to courts, two of which are *Tokyo Kamotsusha case* (Tokyo District Court, January 27, 1997) and *Venice* (Tokyo District Court, September 29, 1995).

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

Japan does not have a statutory requirement providing for garden leave. However, in practice, there would be no prohibition for an employer to carry out such a policy at the employer's discretion.

b. Non-Solicitation of Customers?

In Japan, a non-compete duty typically includes non-solicitation. These two concepts are not clearly distinguished in Japanese legal practice.

c. Other?

No.

H. Mexico

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In Mexico non-compete covenants for employees or former employees are non-enforceable; this based in Mexico's Federal Constitution that foresees an individual guarantee of "freedom to work" which provides that no individual may be prohibited from engaging in any kind of lawful activity; no time, place or activity limits set in non-compete covenants will work to make them enforceable. Best alternative is to enter into an agreement with an employee at the time the employment relationship terminates, setting forth a "negative covenant" whereby, the company will pay the former employee a consideration as long as the employee refrains from engaging in "x", "y" or "z" actions. Breach of the negative covenant by the former employee, however, will only result in recovery of the consideration paid to the former employer as the sole remedy for the company; no other recourse or injunction is available.

1. Country Legal System – Civil, Common Law, Other:

Civil Law.

a. Type of Court/Tribunal to Hear Matter?

Commercial Court.

b. Who Has the Burden of Proof?

Former employer.

c. Statute of Limitations for Bringing an Action?

10 years.

2. Source of Law Governing Non-Compete

Mexico's Federal Constitution, in the sense that it virtually prohibits non-compete covenants for individuals through the "individual guarantee" of "freedom to work".

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

a. Must the Agreement Be in Writing?

Yes.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

No.

c. Are There Limits to the Type or Level of Employee Covered?

No.

d. Are There Limits to the Length of Time That Is Allowed under Law?

No.

e. Are There Limits to the Geographic Reach Established by Law?

No.

f. Any Other Details or Essential Elements of the Agreement?

The agreement cannot be called a "non-compete"; it needs just to specify that the company will pay the former employee a consideration so long as the former employee refrains from engaging in a certain activity.

4. What Kind of Consideration Is Required?

Any that the former employee agrees to.

a. Monetary or Financial Consideration?

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

Non-compete covenants, not being enforceable in Mexico, should not be set forth in the employment agreement, nor any referral to such.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

This is what a former-employee will generally request in order to accept to execute the agreement.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

No offering of employment and no non-compete covenant in employment agreements are possible.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

No.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

No.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

By a commercial court.

b. What Remedies?

Sole remedy is recovery of any consideration paid.

c. Must Remedies Be Listed in Agreement?

No.

d. Is Injunctive Relief Available?

No.

i. If So, What Is the Standard?

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

None.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

The court does not have this ability.

c. Drafting Considerations

None

i. Nested Clauses?

Other options to allow for blue penciling?

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

No. This criteria does not exist for the agreements that may be entered into with a former employee.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

ii. Unreasonable

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

ii. Unreasonable

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

ii. Unreasonable

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable?

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

Not in a legal way; from a practical point of view, if an employment relationship terminates for cause, typically the former employee will not cooperate with the company and will not want to enter into this type of agreement, or else will request a huge consideration to do so.

a. If Yes, How Does It Affect Enforcement?

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

Yes, if the agreement provides the company such right.

a. If Yes, under What Conditions?

As set forth in the agreement, if any.

b. Is Consideration/Compensation Required to Be Paid?

As per what the agreement provides for.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

Yes, so long as the agreement is drafted in the negative covenant manner, because a non-compete covenant is contrary to Mexico's Constitution, any foreign law judgment/award issued by a foreign tribunal dealing with such unconstitutional subject may not be enforced in Mexico.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

Yes, courts generally require a "point of contact" of the parties with the selected law.

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

Yes.

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

Limits are that the agreement must be drafted in the manner of a "negative covenant."

11. Leading Cases/Current Trends

None exist. Because non-compete agreements are not enforceable there is not a great deal of activity in this regard, except to circumvent the Constitutional prohibition by preparing an agreement with negative covenants, executed by the employee at the time of the

termination of employment, with the limits in remedies.

12. Are There Alternatives to Non-Competes Recognized in Your Country?

No.

I. The Netherlands

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1. Country Legal System – Civil Law

a. Type of Court/Tribunal to Hear Matter?

The Cantonal Court (*Kantonrechter*) decides on employment matters including any dispute regarding a non-compete provision. Dutch law has two procedures, summary proceedings aimed at a primary preliminary decision on a matter and the procedure on the merits of the case. In summary proceedings a court can only suspend the enforceability of a non-compete provision. In a procedure on the merits of the case, the court can declare a non-compete provision is void or amend its duration and/or geographical scope. Also in that procedure a court can award damages to the (former) employer in case of violation of the non-compete provision by the (former) employee.

b. Who has the burden of proof?

The employer has the burden of proof to demonstrate an employee has violated the non-compete provision.

c. Statute of limitations for bringing an action?

An action to adhere to the non-compete clause is an action for performance, and the statutory period of limitation is five (5) years.

2. Source of Law Governing Non-Compete

a. Statute

Article 7:653 of the Dutch Civil Code regulates the use of a non-compete provision in an employment agreement.

b. Case Law

There is extensive case law of validity and enforceability of a non-compete provision in an employment agreement. This case law gives guidance on the interpretation of existing non-compete provisions, in particular the maximum duration and limitations in geographical scope of a non-compete provision.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

a. Must the Agreement Be in Writing?

Yes, a non-compete provision in an employment agreement should be in writing with an employee who has reached the age of 18. In principle, a non-compete provision can only be included in an employment agreement for an unlimited period of time. A non-compete provision in an employment agreement for a fixed period of time is only permitted in case the employer can demonstrate it has material business reasons that justify the use of a non-compete provision. These material business reasons have to be confirmed in writing as part of the employment agreement.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

There are no specific language requirements that apply for a non-compete provision to be valid.

c. Are There Limits to the Type or Level of Employee Covered?

In principle non-compete provisions are only valid in employment agreements for an unlimited period of time. There are no restrictions as to the type and level of employee that can be covered by a non-compete provision. In practice however, non-compete provisions are typically used for more senior roles.

d. Are There Limits to the Length of Time That Is Allowed under Law?

The Dutch Civil Code does not specify a time limit for non-compete provisions. Based on case law however, courts do not accept non-compete provisions for an extended period of time. As a general rule, a non-compete for a period of 12 months would normally be considered reasonable. In exceptional circumstances a non-compete provision for a period of 18 or 24 months has been ruled as acceptable.

e. Are There Limits to the Geographic Reach Established by Law?

The limits to the geographic reach are dependent on the nature of the business that should be protected with a non-compete provision and the markets in which the employer operates. Also the position and seniority of the employee are considered as well as the position of the employee on the labour market.

f. Any Other Details or Essential Elements of the Agreement?

In the Netherlands it is not possible to negotiate a non-compete clause through a collective bargaining agreement.

4. What Kind of Consideration Is Required?

a. Monetary or Financial Consideration?

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

No.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

No, a court can however for the duration of a non-compete provision award financial compensation to an employee. A request in that respect has to be filed by the employee.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

Please note that Dutch law does not recognize the concept of consideration. A non-compete can either be agreed upon at the start of the employment relationship or during, for example when an employee is promoted to a more senior role in the company.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

Please note that Dutch law does not recognize the concept of consideration. A non-compete can either be agreed upon at the start of the employment relationship or during, for example when an employee is promoted to a more senior role in the company.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

Please note that Dutch law does not recognize the concept of consideration. A non-compete

can either be agreed upon at the start of the employment relationship or during, for example when an employee is promoted to a more senior role in the company.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

The (former) employer.

b. What Remedies?

Summary proceedings with a court order to refrain from any activities that are considered a violation of a non-compete provision, including penalty payments payable by the employee in case of violation of the court order. In addition the (former) employer can initiate legal proceedings on the merit of the case seeking damages as a result of a violation of the non-compete provision. Furthermore an employer can initiate court proceedings against the new employer based on an unlawful act (*onrechtmatige daad*) on the grounds that the new employer unlawfully benefits from a violation by a former employee of his non-compete provision.

c. Must Remedies Be Listed in Agreement?

Not necessarily but in practice employers include a penalty clause in the employment agreement whereby the employee forfeits an immediately payable penalty in case of violation of the non-compete provision and a penalty for each day the violation continues.

d. Is Injunctive Relief Available?

Yes it is through summary proceedings in court.

i. If So, What Is the Standard?

In summary proceedings a court cannot give a final judgment but can order the (former) employee to refrain from any activities that violate the non-compete provision until a final decision has been rendered in a procedure on the merits of the case. Alternatively, at the request of the employee, a court can order that the enforceability of a non-compete provision is (temporarily) suspended.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

A court can limit a non-compete provision both in geographical scope as in time. In its decision a court will balance the business interests of the employer that need protection against the personal interests of the employee to among others be able to find suitable alternative employment in the industry.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

This right for the employee follows from the Dutch civil code.

c. Drafting Considerations

i. Nested Clauses?

It is recommended to make non-compete provisions specific rather than generic. This increases the chances that a non-compete will be upheld in court. Also it helps to clearly describe the business reasons for using a non-compete provision in relation to the specific position of an employee.

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

Yes, when a non-compete provision is specific and reasonable in terms of time, this tends to increase successful enforcement.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

Limit non-compete to areas where the company operates and where the employee had responsibilities.

ii. Unreasonable

A generic clause covering a large(r) area than necessary to protect the business interests of a company.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

One year. In case of fixed term employment agreement less, for example three to six months.

ii. Unreasonable

Any period beyond one year.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

Business activities in which the employee was directly involved.

ii. Unreasonable

Include business activities in which the employee did not have any actual involvement or knowledge of.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable?

They are. As a rule when an employer has terminated the employment agreement unlawfully or not renewed a fixed term employment agreement unlawfully, this renders a non-compete provision unenforceable. Furthermore, a court can award a reasonable compensation to the employee for upholding a non-compete provision, depending on the circumstances of the case.

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

Facts as they exist at the time of enforcement but also facts when the non-compete was agreed are taken into account, in particular to determine what parties aimed to cover at that time. An important element to determine enforceability is whether the position of the employee has changed over time. To the extent during his employment the employee's position has changed, as a result of which the non-compete provision that was initially agreed upon became more restrictive and the non-compete was not renewed when the employee was promoted, a court can rule that as a result of this the non-compete is no longer enforceable.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

There is a balancing of interests to determine enforceability of a non-compete provision.

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

Factors that are taken into account are the business activities of the company, the market it operates in as well as the position of the employee on the labour market and position and seniority of the employee.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

It does, when the employer has unlawfully terminated the employment, it renders the non-compete unenforceable.

a. If Yes, How Does It Affect Enforcement?

When an employer has terminated the employment agreement unlawfully or not renewed a fixed term employment agreement unlawfully, this renders a non-compete provision unenforceable. Furthermore, a court can award a reasonable compensation to the employee for upholding a non-compete provision, depending on the circumstances of the case.

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

a. If Yes, under What Conditions?

It can waive its rights under a non-compete.

b. Is Consideration/Compensation Required to Be Paid?

No not in case the company terminates the post-employment non-compete.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

No it will not as the rules on non-compete provisions are of mandatory law and normally set aside a choice for the laws of a different jurisdiction that provides less protection for the employee.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

The court will look at mandatory rules of Dutch law in case the employee normally works in the Netherlands and these set aside a choice for the laws of a different jurisdiction that offers less protection for an employee.

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

No it will not. Dutch rules of employment law are fairly strict on this. The place where the employee normally works or the place of residence of the employee determines which court can hear the dispute.

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

An arbitration clause is possible but not commonly used.

11. Leading Cases/Current Trends

Leading cases are Philips/Oostendorp (requirement that non-compete is agreed in writing) Brabant/Van Uffelen and AVM/Spaan (renewal of non-compete in case position employee changes), and Hydraudyne/Van der pasch and Ibes/Atmos (non-compete in case of a transfer of undertaking and automatic transfer of employment).

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

Although the garden leave concept is not recognized under Dutch law, it is used in employment agreements as an alternative for a non-compete in particular for senior/executive positions.

b. Non-Solicitation of Customers?

Yes, commonly used in combination with a non-compete.

c. Other?

No.

J. Russia

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1. Country Legal System – Civil Law

a. Type of Court/Tribunal to Hear Matter?

A dispute connected with non-completion of a covenant not to compete will be settled by the state court of general jurisdiction.

b. Who Has the Burden of Proof?

Each party will have to prove the facts it refers to.

c. Statute of Limitations for Bringing an Action?

Since the covenant not to compete is not regulated by law and is, in general, considered as violating the constitutional right of employees to freedom of labor, there is no transparency in which statute of limitations should be applied to employers' claims regarding violation by employees of non-compete covenants. Nevertheless, after analyzing the relevant statutory norms, the following conclusions may be made:

If the covenant not to compete is established in an employee's employment agreement, employment termination agreement or any internal policy of the employer and the employer claims damages incurred due to employee's incompliance with the covenant, the statute of limitations will be 1 (one) year as of the date when the employer has revealed the damage. If the covenant not to compete is established in a civil-law agreement concluded between the employer and the employee or the employer claims injunction rather than damages, a general statute of limitations of 3 (three) years as of the date when the employer has found out or must have found out of violation of the covenant should be applied.

2. Source of Law Governing Non-Compete

a. Statute

There is no statute regulating non-compete in the employment relations.

b. Constitution

The Constitution of the Russian Federation in its Article 37 sets a fundamental right of each individual to freedom of labor. Article 34 of the Constitution provides for the freedom to use the individual's abilities and assets for entrepreneurial and other economic activity not forbidden by law. The same Article explicitly bans monopolistic activities and unfair competition.

Although the covenant not to compete is not directly prohibited by the Russian law, it is mostly considered as violating the constitutional rights of individuals and, therefore, is not enforceable in Russia. Thus, until there is a special statutory regulation of the con-compete covenant, it will create mostly ethical rather than legal obligations for individuals under Russian law.

Nevertheless, it is currently possible to provide for payment of compensation to employees subject to their compliance with non-compete restrictions so that employees have material interest in adhering the covenants which may assist with the effectiveness of these provisions from a practical perspective. Such compensation, however, will not improve the enforceability of the covenant.

c. Case Law

N/A

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

N/A, since a post-employment non-compete agreement is unenforceable under any condition.

a. Must the Agreement Be in Writing?

N/A

b. Is There a Language Requirement for the Agreement to Be Enforceable?

N/A

c. Are There Limits to the Type or Level of Employee Covered?

N/A

d. Are There Limits to the Length of Time That Is Allowed under Law?

N/A

e. Are There Limits to the Geographic Reach Established by Law?

N/A

f. Any Other Details or Essential Elements of the Agreement?

N/A

4. What Kind of Consideration Is Required?

N/A, since a post-employment non-compete agreement is unenforceable even upon provision of consideration.

a. Monetary or Financial Consideration?

N/A

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

N/A

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

N/A

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

N/A

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

N/A

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

N/A

5. How Are Post-Employment Covenants Not to Compete Enforceable?

N/A, since a post-employment non-compete agreement is unenforceable under any condition.

a. By Whom?

N/A

b. What Remedies?

N/A

c. Must Remedies Be Listed in Agreement?

N/A

d. Is Injunctive Relief Available?

N/A

i. If So, What Is the Standard?

N/A

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

N/A, since a post-employment non-compete agreement is unenforceable under any condition.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

N/A

c. Drafting Considerations

i. Nested Clauses?

N/A

ii. Other Options to Allow for Blue Penciling?

N/A

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

N/A

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

N/A

i. Reasonable

N/A

ii. Unreasonable

N/A

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

N/A

i. Reasonable

N/A

ii. Unreasonable

N/A

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

N/A

i. Reasonable

N/A

ii. Unreasonable

N/A

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable?

N/A

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

N/A

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

N/A

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

N/A

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

N/A

a. If Yes, How Does It Affect Enforcement?

N/A

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

N/A

a. If Yes, under What Conditions?

N/A

b. Is Consideration/Compensation Required to Be Paid?

N/A

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

Irrespective of the law applied, the non-compete covenant will not be enforceable in Russia.

It is possible for the non-compete covenant to be governed by a foreign, non-Russian law if there is a foreign element (e.g., if the relevant non-compete agreement is concluded by an individual with a foreign entity within the same group of companies). Note, however, that while this may help with enforceability elsewhere, Russian courts will not enforce it in Russia even if there is a decision of a foreign court in favour of the employer.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

N/A

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

N/A

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

N/A

11. Leading Cases/Current Trends

To the best of our knowledge, there are currently no court cases dealing purely with con-compete covenants.

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

The concept of garden leave (i.e., placing of an employee on unpaid leave without his/her consent) is not supported by Russian law.

b. Non-Solicitation of Customers?

This may be enforced via disclosure or illegal use by an individual of confidential information of the employer.

c. Other?

N/A

K. Singapore

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1. Country Legal System – Common Law

a. Type of Court/Tribunal to Hear Matter?

The court which would hear the matter in Singapore would be either the Magistrates' Courts, the District Courts or the High Court, depending on the quantum of damages in relation to the claim. Magistrates' Courts deal with cases involving claims which do not exceed S$60,000, District Courts deal with cases involving claims which do not exceed S$250,000, and the High Court deal with cases involving claims which exceed S$250,000.

b. Who Has the Burden of Proof?

For civil claims, the party who is bringing the claim bears the burden of proof. For enforcement of non-compete claims, the employer who is seeking to enforce a post-termination non-compete clause will be required to discharge the burden of proof on a balance of probabilities.

c. Statute of Limitations for Bringing an Action?

Any claim in relation to a breach of a contractual provision (such as a non-compete clause) has to be brought within 6 years from the date on which the cause of action accrued.

2. Source of Law Governing Non-Compete

a. Statute

There are no statutory provisions governing non-compete provisions in Singapore.

b. Constitution

The Singapore Constitution does not govern non-compete provisions.

c. Case Law

In Singapore, restrictive covenants clauses such as non-compete and non-solicitation clauses are governed by common law, which has been developed through case law.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

Generally, non-compete clauses are not enforceable under Singapore law unless they are reasonably required to protect a legitimate proprietary interest of the party who is seeking to enforce the non-compete clause, and enforceability of the non-compete clause is also reasonable in respect of the interest of the parties concerned and is reasonable in the interest of the public.

a. Must the Agreement Be in Writing?

Generally, there are no strict legal requirements in Singapore to require agreements to be in writing for them to be enforceable. However, post-employment non-compete agreements are typically clearly set out in writing, to prevent disputes from arising subsequently. Further, it will be more challenging for the party seeking to enforce the non-compete clause to prove in court that the non-compete clause is reasonable if it is not in writing.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

There are no strict language requirements under Singapore law for the agreement to be enforceable. However, please note that the Singapore courts require every document which is intended for use in court proceedings to be accompanied by an English translation certified by a court interpreter or verified by the affidavit of a person qualified to translate it, and as such, if a party wishes to enforce a non-English non-compete agreement in Singapore, such party will need to translate the agreement into English language prior to admitting such an agreement in court.

c. Are There Limits to the Type or Level of Employee Covered?

Even though there are no strict limits as to the enforceability of non-compete clauses on specific type/level of employees, typically only senior employees are subjected to non-compete clauses as non-compete clauses are meant to provide protection to the employer's legitimate proprietary interest. Generally, it will be the senior employees/management who are responsible for key operational strategies, trade secrets and sensitive information in relation to a company's operations and future developments. Therefore, it might be difficult for an employer to justify that it is reasonable to subject junior employees to non-compete clauses.

d. Are There Limits to the Length of Time That Is Allowed under Law?

There are no strict legal limits to the length of time that a non-compete restriction can be. However, in order to be enforceable, the length of the restriction needs to be reasonable. In determining what constitutes a reasonable length of time, courts will consider the following factors: the particular industry, the nature of work performed by the employee, his seniority level and his skill level. We typically see non-competes ranging from 6 months to 2 years.

e. Are There Limits to the Geographic Reach Established by Law?

There are no strict legal limits to the geographic reach of a non-compete restriction in Singapore, subject to the reasonableness requirement, which will be determined by the facts and circumstances of every case. Previously, Singapore courts have found that the geographic area should be co-extensive with the protection of the legitimate interests of the employer, as the aim of the geographic scope of the non-compete clause is to protect the actual and existing business interest, rather than to protect the possibility of acquiring future business.

f. Any Other Details or Essential Elements of the Agreement?

There are no strict legal requirements for other details or essential elements to ensure the enforceability of non-compete clauses. However, every element of the non-compete agreement will be subjected to the reasonableness requirement.

4. What Kind of Consideration Is Required?

There are no specific types of consideration required. Consideration is generally required to be sufficient but need not be adequate.

a. Monetary or Financial Consideration?

Monetary or financial consideration is preferred, but it is not mandatory due to the general consideration rule where consideration is required to be sufficient but not adequate.

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

Compensation does not necessarily have to be assigned to non-compete clauses during the employment relationship.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

Compensation is not strictly required to be paid during the post-employment non-compete period. However, provision of compensation during the non-compete period may increase the chances of the non-compete being found to be reasonable, and therefore enforceable.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

Where the non-compete provision is included in the employment contract at the beginning of the employment, offering employment will be sufficient to provide consideration. The non-compete provision can be introduced at any point during the employment or post-termination.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

Continued employment is already contemplated as part of the parties' contractual agreement, and as such, is unlikely provide adequate consideration for a non-compete that is introduced during the term of employment.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

A change of the terms of employment could provide sufficient consideration, depending on what the changes of the terms are. For instance, where the change includes an increase in salary or introduction of a share option scheme, and it is made clear to the employee that such changes of the terms of employment is tied to the introduction of the non-compete provision, the change will likely be found sufficient.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

Typically, the post-employment covenants will be enforced by the employer, against the employee himself or against the new company which the employee is working for (in breach of the non-compete obligations).

b. What Remedies?

For breach of non-compete provisions, the most common remedy is damages, followed by injunctions.

c. Must Remedies Be Listed in Agreement?

The remedies do not need to be listed in the agreement.

d. Is Injunctive Relief Available?

Injunctive relief is available, but rare.

i. If So, What Is the Standard?

Injunctive relief is available, and employers will typically seek a court order to restrain either the employee or the new prospective employer's activities, in so far as such activities breach the terms of the restrictive covenants sought to be protected by the former employer. Nevertheless, injunctive relief is equitable relief, and the granting of injunction is at the complete discretion of the court.

In certain urgent circumstances, injunctions may be granted in the interim, until the time where the case is concluded in court and the court either lifts the interim injunction or grants a final injunction. In general, Singapore courts tend to prefer damages as a remedy as opposed to injunctive relief.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

Under Singapore law, if the Singapore courts find that a certain restrictive covenant is unduly wide, it will "cut down" the ambit of the clause e.g. reduce the period of restriction from 3 years to 1 year. However, in a recent judgment, the Singapore Court of Appeal examined the applicability of the doctrine of severance in Singapore even though the issue had not arisen before it. In particular, the Court of Appeal, while acknowledging that the law in Singapore currently recognises two forms of severance (the severance of entire or whole clauses in a contract and the "blue pencil test" of severing parts of a clause), observed that the Supreme Court of Canada had rejected the application of notional severance for restrictive covenants in the employment context, and expressed their agreement with that approach. Having said that, the Court of Appeal had merely indicated that they agree with this position, but such indication does not amount to a change in Singapore law at this juncture as this issue was not before the Court of Appeal. Given the Court of Appeal's latest indication of its preferred position to abolish the doctrine of notional severance in the employment context, it is likely that the Singapore Courts will adopt the same position. In other words, if a clause is found to be unduly wide, the Courts will strike down the entire clause and not re-write the contract for the parties.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

Under Singapore law at present, this remedy is at the court's discretion and the agreement need not specifically acknowledge the court's ability to make changes.

c. Drafting Considerations

i. Nested Clauses?

At present, majority of the non-compete clauses are accompanied by language which provides that if the restrictions are adjudged to go beyond what is reasonable and necessary in the circumstances for the protection of the company's legitimate commercial interest, but would be adjudged reasonable if a particular restriction was deleted or modified, or if any part of the wording of a particular restriction is deleted, then the non-compete clause shall apply with such deletions and/or modification, as the case may be.

ii. Other Options to Allow for Blue Penciling?

No.

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

Yes, they are relevant.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Singapore case law has provided that the geographic restriction must at the very least seek to protect what is reasonable to be protected, and the reasonable geographic scope has to be determined, bearing in mind the nature of the business and the scope of the employment duties of the employee.

i. Reasonable

The geographic area should be co-extensive with the protection of the legitimate interest of the employer. The aim of geographic restriction must be to protect the actual and existing business interest, and the courts have held that whether a geographic restriction will be found to be reasonable is dependent on the facts of each case.

ii. Unreasonable

A geographic restriction which aims to protect the possibility of acquiring future businesses will be found to be unreasonable.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Singapore case law has provided that the time restriction must at the very least seek to protect what is reasonable to be protected, and the reasonable length of the restraint imposed on the employee, bearing in mind the specific skills sets of the employee, the nature of the specialization that he has and the seniority of his position.

i. Reasonable

Generally, the nature of the work performed by the particular employee, his seniority level and the particular industry in which the employee operates will be relevant factors in determining whether a restraint is reasonable or not.

ii. Unreasonable

The nature of the work performed by the particular employee, his seniority level and the particular industry in which the employee operates will be relevant factors in determining whether a restraint is unreasonable or not.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Case law has provided that the restriction on scope of activities must at the very least seek to protect what is reasonable to be protected, bearing in mind the specific duties that the employee has undertaken, who he came into contact with, the type of information he acquired, and what specifically his employment duties extended to.

i. Reasonable

The scope of the non-compete provision will be found to be reasonable where the employer is able to prove that the non-compete provision necessary to protect legitimate interest, rather than it being intended to prevent the employee from ever competing with the employer.

ii. Unreasonable

Generally, it is not possible to set out precisely as a principle of law, what scope of activities will be found to be reasonable, as the legitimacy of the scope of every non-compete clause depends on the particular facts of each case.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable?

In addition to the terms of the agreement, the facts and circumstances at the time during the termination and post-termination periods will be relevant in determining whether the agreement/non-compete provision is enforceable.

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

Typically, courts will consider all relevant facts, which include, but will not be limited to both facts existing at negotiation of the agreement, as well as facts existing at the time of enforcement.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

The balancing of interest is mainly between allowing enforceability of the non-compete provision due to the need for an employer to protect its proprietary information, and unenforceability of the non-compete provision due to public policy reasons where society should not be deprived of an individual's labour, skill or talent by a contract which he enters into. Hence, any interference with an individual's right to make a living has to be justified by the special circumstances of a particular case, such that the non-compete is reasonable in reference to the interest of the parties concerned interests of the public, while at the same time being in no way injurious to the public.

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

The over-arching factors which the Singapore courts will consider in determining whether time, geographic or scope restrictions in a covenant are reasonable can be summarized as follows: (i) is there a legitimate proprietary interest to be protected; (ii) is the restrictive covenant reasonable in reference to the interests of the public; and (iii) is the restrictive covenant reasonable in reference to the interest of the public.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

a. If Yes, How Does It Affect Enforcement?

Generally, the manner of termination will not affect enforcement of the post-employment non-compete agreement, save for circumstances where there is a repudiatory breach of the employment contract by the employer (i.e. the employer not holding up to their obligation under the employment contract), such that the employee will have the right to terminate the employment contract, including the non-compete provision.

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

Yes.

a. If Yes, under What Conditions?

Generally, employers may choose to unilaterally release the employee from non-compete obligations as a goodwill gesture, or in exchange for the employee agreeing to waive all claims against the employer.

b. Is Consideration/Compensation Required to Be Paid?

Consideration and compensation is not strictly required, and it will be subjected to what the employer and employee agree on.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

Yes, the Singapore courts will enforce a choice of law provision which is not the country in which employment services are performed. It was found in a case where the Singapore court has found that in determining the choice of law of a contract, the first stage will be to examine the contract itself to determine whether it states expressly what the governing law should be.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

Typically, Singapore courts will uphold the choice of foreign law, and apply the standards required under the foreign law.

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

Yes.

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

Yes, an agreement to submit to arbitration will be enforced. However, parties typically will not turn to arbitration for an employment dispute since it might be harder for the employer to obtain an injunction. Further, the employer will also face difficulty should he wish to enjoin the employee's future employer in the dispute.

11. Leading Cases/Current Trends

In Singapore, the courts have repeatedly held that legitimate proprietary interests that the courts have held to be worth protecting include:

Trade secrets - a trade secret is generally defined as information that affords the owner a competitive advantage and is not available to the general public; and that the owner has taken reasonable steps to keep confidential.

Special trade connections. Employees with unique customer relationships or personal knowledge of (and influence over) the customers of the employer have been found to meet this criterion.

Maintenance of a stable, trained workforce. Employers may seek to uphold non-solicitation clauses out of a need to maintain a suitably trained workforce, in the absence of which the ability of the employer to carry on business may be threatened.

As for reasonableness, a Singapore court will consider whether the clause as drafted is no wider than is necessary to protect the employer's legitimate proprietary interests. The factors a Singapore court would consider are amongst other things, the scope, duration and geographical extent of the restriction.

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

The employer can choose instead to place the employee on garden leave, where during the period, the employer may prohibit contact between the employee and customers of the company, and prevent the employee from engaging in work for any future employers. This could still assist the employer in achieving the intended outcome of non-compete provisions, however, the downside to the garden leave approach would be that the employer has to continue to pay the employee salary for the period of garden leave.

b. Non-Solicitation of Customers?

An alternative to the non-compete provisions would be a non-solicitation clause, if there are proprietary client, customer, supplier or business information to be protected. There has been circumstances to show that the non-solicitation clause, when drawn up together with a confidentiality clause, has been effectively used to prevent poaching of current employees by the ex-employee (whose employment has been terminated).

c. Other?

The employer could also include confidentiality clauses in the employment agreement, rather than non-compete, to achieve the result of preventing the employee from divulging the company's trade secrets and confidential information. Confidentiality clauses generally have no time limit to their applicability insofar as the information is not within the public domain.

In addition to confidentiality clauses, intellectual property clauses can also be used to restrict the employee from using intellectual property discovered by them during the course of their employment or those belonging to the former employee. Such intellectual property clauses typically do not have time limits to it as well.

Another alternative would be to provide the employee with deferred bonuses, and forfeiture of bonuses if the employee leaves to join a competitor within a pre-agreed period of time.

L. South Africa

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1. Country Legal System – Common Law

a. Type of Court/Tribunal to Hear Matter?

Any application by an employer to enforce a restraint of trade agreement (non-compete covenant) in an employment contract will typically be brought in the High Court or the Labour Court of the province where the employee worked.

b. Who Has the Burden of Proof?

The employer has the onus to prove the non-compete covenant and the breach thereof. Thereafter the onus shifts to the employee who seeks to resile from the agreement to prove the agreement is unreasonable and therefore unenforceable.

c. Statute of Limitations for Bringing an Action?

Any claim to enforce compliance with the non-compete covenant or to claim damages as a result of the breach will prescribe three years after the breach, or if it is a later date, three years after the employer or former employer becomes aware of the breach.

2. Source of Law Governing Non-Compete

Whether a non-compete covenant is enforceable is determined by factors established at common law as developed through case law.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

The agreement must provide that the employee is restrained from competing with the old employer for a specified period of time within a specified geographical area.

a. Must the Agreement Be in Writing?

There is no specific obligation at law that requires the agreement to be in writing. However, as a practical matter it is difficult for an employer to prove the existence of an oral non-compete covenant and a court is unlikely to enforce an oral non-compete covenant.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

No.

c. Are There Limits to the Type or Level of Employee Covered?

There are no specific limits, however, for the restraint to be reasonable, the court will have to be satisfied that the employer has a proprietary interest in the form of customer connections or confidential information that the employee was exposed to or had access to that would potentially harm the business of the employer if the employee were permitted to compete. This means that the employee must generally be of a senior level.

d. Are There Limits to the Length of Time That Is Allowed under Law?

There are no specific limits, but case law has shown that the length of the restraint must be reasonable. To be reasonable, it must be of a length necessary to provide the protection. If the period is too long, it will result in the non-compete clause being unreasonable and therefore unenforceable. As a general rule of thumb, unless there is confidential information that will remain relevant for longer than two years, the maximum period of a restraint is likely to be limited to two years. In respect of customer connections, it is unlikely that a restraint longer than one year will be enforced.

e. Are There Limits to the Geographic Reach Established by Law?

There are no specific limits, but case law has shown that the geographical reach of the restraint must be reasonable. To be reasonable, it must be limited to the area in which the employer conducts business and the area in which the employee was employed. If the area is too wide, it will result in the non-compete clause being unreasonable and therefore unenforceable.

f. Any Other Details or Essential Elements of the Agreement?

In addition to a reasonable scope as it relates to time and geography, the non-compete covenant will also need to be limited in terms of the scope of business. A provision that limits an employee working for a competitor in any capacity is unlikely to be enforceable. The provision will need to limit the employee's ability to compete only insofar as he or she may be employed in a role where they may be in a competitive relationship with the employer.

4. What Kind of Consideration Is Required?

South African law does not require any valuable consideration for a valid contract. Mutual consent is sufficient. Thus, no consideration is required. However, an agreement to pay the employee their normal remuneration for the period that the non-compete is sought to be enforced is a factor a court may consider when contemplating the reasonableness of the non-compete covenant.

a. Monetary or Financial Consideration?

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

No requirement.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

Not required, but an agreement to pay the employee their normal remuneration for the period that the non-compete is sought to be enforced is a factor a court may consider when contemplating the reasonableness of the non-compete covenant.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

The offer of employment alone can be sufficient consideration for a non-compete covenant. There is no requirement that this type of provision be introduced only at the beginning of employment.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant not to Compete Introduced During the Term of Employment?

Yes. However, if the non-compete provision is introduced at a later stage, additional consideration may be required to obtain the employee's consent to agree to the terms of the non-compete provision.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant not to Compete Introduced During the Term of Employment?

A positive change in the terms of employment (*e.g.*, a promotion with increased compensation package) can provide sufficient consideration to support a non-compete provision.

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A positive change in the terms of employment (*e.g.*, a promotion with increased compensation package) can provide sufficient consideration to support a non-compete provision.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

The employer may enforce a non-compete provision against the employee for breach of the agreement.

b. What Remedies?

The employer can seek an interdict (injunctive relief) to prevent the employee from working

in violation of the non-compete provision. Injunctive relief will generally only be appropriate where the employer could not otherwise be adequately compensated by damages. The employer can also bring an action for damages for breach of the non-compete covenant. With such a claim, since punitive damages are not claimable under South African law, the damages will generally be assessed taking into account the actual losses to the employer's business resulting from the employee's actions.

c. Must Remedies Be Listed in Agreement?

There is no requirement for the remedies be listed in the agreement, however, it is common for parties to include a provision recognizing that a breach of the non-compete provision will result in injury to the employer which is not adequately compensated through damages, such that injunctive relief may be an appropriate remedy. It is also common for parties to include language acknowledging that the employer's business will suffer financial hardship in the result of a breach, to support a later damages claim if necessary.

d. Is Injunctive Relief Available?

Injunctive relief is available.

i. If So, What Is the Standard?

The test for final relief in the form of an injunction is that the employer has a clear right which has been breached, that the employer has no alternative remedy, and that the balance of convenience favours the employer.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

South African courts will generally not amend or modify an ambiguous or overly-broad non-compete agreement to make it compliant with the law. Generally, the parties will be held to the terms negotiated and, if they are ambiguous or unreasonable, the provision will be void and unenforceable. However, South African courts have been willing either of their own accord or at the request of the applicant to read down a non-compete covenant to make it reasonable. For example, a court may reduce the period from 12 months to 9 months if it considers 12 months to be too long and therefore unreasonable. The court may also be willing to permit the enforcement of a non-compete clause in a specific province in South Africa even if the non-compete covenant was initially for the whole of South Africa. Notwithstanding the court's willingness to do so, employers are well-advised to draft non-compete provisions narrowly and not rely on the courts to amend the language to bring it into compliance with the law.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

It is automatic.

c. Drafting Considerations

i. Nested Clauses?

ii. Other Options to Allow for Blue Penciling?

There is no requirement to provide for the reading down or severing of the agreement in the clause. The inclusion of such a clause will provide little assistance as the question is one of reasonableness and the court will enforce a more limited restraint if it considers it reasonable to do so.

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

Yes. The onus is on the employee who seeks to avoid the non-compete covenant to demonstrate that the covenant is unreasonable either because there is no proprietary interest worth protecting or that the time, geography or the scope of the covenant goes further than is necessary to protect the proprietary interest.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Reasonableness is determined by case law.

i. Reasonable

The geographic scope of a non-compete clause should be as specific and limited as possible to protect the employer's interests and should be expressly stated in the non-compete provision. A geographic scope provision is more likely to be considered reasonable if it is limited to the area in which the employee carried out his or her responsibilities during the course of his or her employment. While a geographic scope clause may cross provincial or national boundaries, this also leaves the provision more susceptible to challenge, particularly if the scope of the employee's influence did not extend beyond provincial or national boundaries.

ii. Unreasonable

A non-compete provision that does not include a geographic scope at all is likely to be found unreasonable, although there may be limited circumstances where the nature of the work or the type of non-competition provision drafted (*e.g.* a provision where the non-competition provision restricts the employee from working for a particular entity as opposed to in an entire sector of business) make a geographic scope provision unnecessary.

Similarly, a geographic scope clause that seeks to limit an employee's ability to compete outside the jurisdiction where he or she performed the material duties of the position is less likely to be considered reasonable.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Reasonableness is determined by case law.

i. Reasonable

The period should generally be limited to the period of time required for the employer to repair or solidify its business relationships following the departure of the employee bound to the agreement. In most cases, a reasonable non-compete provision in the employment context will not exceed twelve to eighteen months. The shorter the period of the non-compete provision, the more likely it is to be upheld by the courts.

ii. Unreasonable

An employer is likely to have difficulties enforcing a non-competition provision in excess of twenty four months, absent compelling circumstances to justify why it would take a longer period to insulate the employer from the potential impact of the employee engaging in competition. An example of such circumstances may be where the employee had access to confidential information or trade secrets that remain relevant for such a long period of time.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Reasonableness is determined by case law.

i. Reasonable

As with the geographic limit and the period of the non-competition provision, the scope of business covered by the agreement should be as narrow as possible. A non-compete provision is more likely to be considered reasonable if it defines the scope of the employer's business concisely. A reasonable provision limits the employee's ability to work in a competing capacity for a business that, at the time of termination competes or is likely to compete with the business in which the employee was materially involved with in a limited period (usually no more than two years) prior to termination of employment.

An employer may wish to limit the non-compete covenant's scope to only a select number of direct competitors, as opposed to restricting the employee from working for any competitors within an entire sector of industry generally. This may increase the likelihood of the agreement being found enforceable.

ii. Unreasonable

Non-compete provision that seeks to restrict the employee from working for a company

that does not compete, or has not competed in recent years, with the employer is not likely to be enforceable. This may arise where the definition of the employer's business is overly broad in the provision itself. Similarly, a non-compete provision may not be enforceable if it seeks to restrict the employee from working for a competitive business entirely, even where the employee might be engaged in a capacity unrelated to the business of the employer.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable?

Courts have held the circumstances surrounding the agreement will be relevant in assessing its enforceability, in addition to the language of the clause itself. The employee has the onus to prove that the terms of the agreement are unreasonable and so unenforceable.

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

The court will consider facts as they exist at the time of enforcement. The facts to be considered are whether the employer has a proprietary interest that it seeks to protect and if so, whether the terms of the agreement go too far in providing such protection.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

There is a balancing test. There are five legs to the test as determined by case law:

- Is there an interest of the one party which is deserving of protection at the termination of the agreement?
- Is such interest being prejudiced by the other party?
- If so, does the interest of the party asserting the interest outweigh the interest of the other party being economically productive?
- Are there any public interest considerations militating against the enforcement of the non-compete covenant?
- Does the non-compete covenant go further than is necessary to protect the interest claimed?

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

Generally speaking, non-compete provisions are viewed as a restraint of trade and against the public interest in that they impose restrictions on an employee's ability to seek new employment post-termination. As such, in determining whether a non-competition provision is enforceable, a court will balance the interests of the employer in protecting its business interests and being able to repair and solidify business relationships after the employee's departure against the employee's interest in being able to find new employment

in his or her area of expertise. Only where a non-compete provision restricts the employee as narrowly as possible to achieve its objectives will it be enforceable.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

The manner of termination generally will not impact on the enforcement of a post-employment non-compete provision.

a. If Yes, How Does It Affect Enforcement?

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

Yes. The employer can always elect not to enforce its rights under the agreement.

a. If Yes, under What Conditions?

There are no requisite conditions to a release from a non-compete covenant, however, this generally occurs as a component of a negotiated resolution with the employee.

b. Is Consideration/Compensation Required to Be Paid?

No.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

No.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

A court may enforce an agreement to go to private arbitration, but it will not enforce a forum selection clause beyond this.

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

An agreement to submit to private arbitration is enforceable. There are no limitations, other than those set out in the agreement.

11. Leading Cases/Current Trends

Leading cases:

- *Basson v Chilwan and Others* 1993 (3) SA 742(A)
- *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A
- *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 488 SCA
- *Sibex Engineering Services (Pty) Ltd v van Wyk and* Another 1991 (2) SA 482 (T)
- *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D)

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

Garden leave can be considered as an alternative to non-compete provisions, but are not regularly used by employers as it deprives them of the option of deciding to enforce the non-compete covenant. It also comes with the additional cost of remunerating the employee while on garden leave.

b. Non-Solicitation of Customers?

Reduced non-compete undertakings such as non-solicitation of customers or employees are common place to protect employers where the enforcement of a comprehensive non-compete provision may be unreasonable.

c. Other?

Employers may also use stringently drafted confidentiality and non-disclosure agreements to provide explicit protection against disclosure of information obtained in the course of employment.

M. United Arab Emirates

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1. Country Legal System – Civil Law

a. Type of Court/Tribunal to Hear Matter?

If an employer brings an action to enforce a post termination non-compete restrictive covenant against an employee, the employer must file its case before the Ministry of Human Resources and Emiratisation (formerly known as the Ministry of Labour) ("MOL") in the first instance. Following this, if the matter is not settled amicably, the employer may take the matter to the courts and make a claim for damages.

b. Who Has the Burden of Proof?

Usually, the burden of proof lies on the employer, or the party bringing the action. However, where an employment contract has a liquidated damages clause, the burden of proof shall transfer to the employee in the first instance and the employee will need to demonstrate that the amount claimed by the employer as set out in the liquidated damages clause is not reasonable.

c. Statute of Limitations for Bringing an Action?

The statute of limitations for labour cases is one year from the date of alleged breach of a non-compete clause.

2. Source of Law Governing Non-Compete

a. Statute

Non-competition is briefly touched upon under Article 127 of Federal Law No. 8 of 1980, as amended (the "Labour Law"). Subsequently, a more recent Ministerial Resolution No. 297 of 2016, reiterates Article 127 and states that an employee who breaches a non-compete clause may have their work permit (with a competitor) revoked. The practical effects of this resolution are not clear as yet, but may act as a further deterrent to errant employees.

The key issue in respect of non-compete clauses is the ability to legally compel employees to comply with them via the UAE courts. In particular, the courts do not grant interim relief (such as injunctions) for the enforcement of post-termination restrictions. In practice

an employer is therefore unable to physically prevent (via a Court Order) an employee from acting in breach of a non-compete clause. (Although, please note that injunctive relief is available in two federal financial free zones in the UAE – the Dubai International Financial Centre ("DIFC") and the Abu Dhabi Global Market ("ADGM"). For the purpose of this article, we have focused on the UAE local courts including other free zones.).

In the event of a breach of a non-compete clause, the main recourse available to an employer would be to commence a civil claim for damages. In order for a claim for damages to succeed, not only would the non-compete clause have to be deemed reasonable, the employer would need to adduce documentary evidence to show that it has sustained financial loss as a result of the employee's breach.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

a. Must the Agreement Be in Writing?

Yes, it must be in writing,

b. Is There a Language Requirement for the Agreement to Be Enforceable?

Agreements must either be made in English or in Arabic.

c. Are There Limits to the Type or Level of Employee Covered?

No, there are no official limits to the type or level of employee covered. In practice however, an employee's seniority would likely determine whether or not he/she has access to business secrets, which could be used against the employer's best interests if he/she was to breach a non-compete agreement. Regardless, an employer would have to prove any damages as a result of the employee's breach of a non-compete clause – which would likely limit the scope to senior level employees.

d. Are There Limits to the Length of Time That Is Allowed under Law?

A non-compete provision is generally accepted as being reasonable for a duration of up to 6 months however, it is not entirely unheard of for the courts to accept a non-competition restriction of up to 12 months.

e. Are There Limits to the Geographic Reach Established by Law?

A non-compete provision is generally accepted as being reasonable with a geographic scope limited to the Emirate within which the employee has been working, for example, Abu Dhabi, unless there are specific reasons unique to the particular employee which means that a wider restriction is necessary.

f. Any Other Details or Essential Elements of the Agreement?

N/A

4. What Kind of Consideration Is Required?

No separate consideration is required in order to enter into a non-compete agreement or clause.

a. Monetary or Financial Consideration?

Monetary or financial consideration is not required (although a non-compete clause is usually worked into an employment agreement).

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

Not required.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

Not required.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

There is no requirement that a non-compete agreement be introduced at the beginning of employment only. However, changing terms of employment, including the implementation of a non-compete agreement, mid-way through employment must be approved by the employee in writing.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

There is no requirement to provide any extra consideration, including a contract to continue employment. The employee's approval is required for any reduction to his fundamental terms including in this situation.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

No, it must be by agreement if it is a reduction to the employee's terms.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

Non-compete covenants are not enforceable, in the sense that interim relief (via an injunction to stop working with a competitor) is not available through the UAE courts. The MOL may not issue a work permit or may revoke a work permit if it is found that an employee is in breach of his non-compete restrictions, but this is only applicable after a final court judgment.

b. What Remedies?

UAE courts do not grant interim relief (such as injunctions) for the enforcement of post-termination restrictions. In practice, employers are therefore unable to physically prevent an employee from acting in breach of a non-compete restriction.

The main remedies available to an employer are to 1) commence a civil claim for damages and/or 2) pursue a criminal action case.

- The test for pursuing a civil claim for damages is the following:
  - The court will initially consider whether the relevant non-compete restriction is reasonable.
  - If the non-compete restriction is deemed to be reasonable, the court will consider whether the employee has acted in breach of any such provision.
  - If the employee is deemed to have breached the provision, the court will consider whether the employer has suffered direct financial loss as a direct consequence of such breach. The employer would be required to adduce documentary evidence to demonstrate that it suffered direct and actual financial consequential loss arising from the employee's breach. This evidence is generally difficult, if not impossible to obtain.

It is important to note however that the court may accept a reasonable liquidated damages clause (if present). The effect of such a clause is that the burden of proof shall transfer to the employee in the first instance and the employee will need to demonstrate that the amount claimed by the employer as set out in the liquidated damages clause is not reasonable.

As a general observation, a civil claim for damages is usually an expensive and often lengthy process in the UAE courts, and in our experience, is extremely difficult to prove.

- Criminal action: In addition to a civil claim for damages an employee who uses company secrets is likely to have breached the UAE Federal Penal Code (Federal Law No. 3 of 1973) (the "Penal Code") and/or the UAE Federal Law No. 5 of 2012 on the Prevention of Information Technology Crimes (the "Cyber Crimes Law"). Any such offences are considered to amount to a

criminal act, punishable by a fine and/or imprisonment. It is often more difficult to argue a breach of the Penal Code but can be easier to argue a breach of the Cyber Crimes Law if it is evident that an employee has taken (electronically) any data etc.

Any criminal complaint would need to be filed with the police in the first instance, who would investigate the matter before determining whether it is appropriate to forward the complaint on to the Public Prosecutor. To successfully present a criminal complaint in this regard, the employer would be required to demonstrate that the employee has taken, divulged and used confidential information and that the employee or the new employer has acquired business as a result of any such breach.

c. Must Remedies Be Listed in Agreement?

No, there is no requirement to list remedies in the agreement, although a liquidated damages clause is very beneficial and highly recommended.

Is injunctive relief available?

d. Is Injunctive Relief Available?

i. If So, What Is the Standard?

N/A

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

The courts do not generally "blue pencil" overbroad agreements and simply strike it out in its entirety if is considered unreasonable in time, place/geographical scope and/or nature or business sought to be restricted.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

N/A

c. Drafting Considerations

i. Nested Clauses?

There is no uniform approach by the courts in relation to nested clauses, they may pick and choose among options presented by the employer or may simply disregard the options entirely.

ii. Other Options to Allow for Blue Penciling?

N/A

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

Yes – time, geography and scope of the agreement are relevant to the court's evaluation and enforcement of a post-termination non-compete agreement.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

Where applicable, the non-compete provision should be limited to the Emirate within which the employee has been working, for example, Dubai, unless there are specific reasons unique to the particular employee which means that a wider restriction is necessary.

The UAE Labour Law states that non-compete clauses must be restricted in terms of geographical location, but does not state exact limits. The UAE courts however have been known to restrict the applicability to a single Emirate.

ii. Unreasonable

A non-compete clause would usually be considered too wide if the restriction limited the employee to work outside of the physical boundaries of the Emirate within which he initially worked.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

A non-compete provision is generally accepted as being reasonable with a time restriction of up to 6 months.

The UAE Labour Law states that non-compete clauses must be restricted in terms of time, but does not state exact time limits. The UAE courts however generally restrict the applicability to 6 months (Although the courts have accepted restrictions of up to 12 months in rare extenuating cases).

ii. Unreasonable

A non-compete clause would usually be considered unreasonable where it was for over 6 months post-termination.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

It is recommended that the activity sought to be restricted is well defined and specific. A reasonable non-compete clause would mention that the employee must not solicit or entice any clients or other employees, should not seek to procure orders or carry on business with any clients and should not render services or invest in or consult a competing business within the certain period of time and location.

The UAE Labour Law states that non-compete clauses must be restrictive in terms of nature of business to the extent necessary to safeguard the employer's legitimate interests.

ii. Unreasonable

Vague restrictions would not be acceptable, e.g. a clause that states that an employee is not allowed to "directly or indirectly accept employment with or render services on behalf of a competitor…". It is important that the activity sought to be restricted is well defined and specific.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable?

Yes the courts would consider actual facts or circumstances to determine whether or not a non-compete agreement is enforceable.

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

The courts will consider facts as they exist at the negotiation of the agreement as well as facts as they exist at the time of enforcement.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

The courts are employee friendly. Where the courts find that an employee's breach of a non-compete clause does not harm the interests of an employer, the non-compete restriction will not be enforced.

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

There is a time limitation of 6 months within the Emirate and applying to the same activity. A broader restriction would only be countenanced based on extenuating factors.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

Courts are more likely to apply the restriction where the employee resigns as opposed to being terminated.

a. If Yes, How Does It Affect Enforcement?

Courts are more likely to apply the restriction where the employee resigns as opposed to being terminated.

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

Yes.

a. If Yes, under What Conditions?

An employer may unilaterally terminate the non-compete agreement on the basis that it is releasing the employee from an obligation. The employer will not be entitled to receive consideration or compensation from the employee for this.

b. Is Consideration/Compensation Required to Be Paid?

No

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

No.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

N/A

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

N/A

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

No. Article 203(4) of Federal Law No. 11 of 1992 on the Civil Procedure Code states that "It shall not be permissible to arbitrate matters in which conciliation is not permissible". Article 7 of UAE Labour Law states that any condition contrary to the provisions of the law shall be null and void unless the condition is more advantageous to the employee.

The UAE courts view their jurisdiction over labour disputes as a matter of public policy. Therefore, even if the parties agree to an arbitration clause in their contract, it is not permissible under UAE law.

11. Leading Cases/Current Trends

While the UAE Labour Law does provide for non-compete clauses, such clauses have been difficult to enforce due to the fact that injunctive relief is not usually available in the UAE courts. Therefore, until recently, an employer's only option was to rely on a claim for damages caused by an employee's breach. While the recently released Ministerial Resolution No. 297 of 2016 aims to enforce non-compete clauses (stating that the MOL may refrain from issuing a work permit or may withdraw a work permit if an employee is found in breach of a non-compete clause), it does reference the need for a "final court judgment", and therefore does not take matters forward that much. As such, until date in the UAE, non-compete clauses have, for the most part, deterrent value only.

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

Yes Garden Leave is recognized.

b. Non-Solicitation of Customers?

A non-solicitation of customers clause is often seen in post-termination restrictions, along with the non-compete clause, especially for senior staff or those employees who would have regular contact with customers.

A non-solicitation clause is often better regarded than a non-compete clause as it tends not to restrict an employee's ability to work. As such, the courts are likely to enforce a longer duration of non-solicitation than a non-compete clause.

c. Other?

The breach of a confidentiality or non-disclosure clause is a potential criminal matter and will, if reported to the police, be taken seriously and investigated. In our experience these issues are regularly intertwined with breach of post termination restrictions and can have a dampening effect on the willingness of the former employee to continue to be in breach of

post termination restrictions.

N. United Kingdom [England and Wales]

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1. Country Legal System – Common Law

a. Type of Court/Tribunal to Hear Matter?

If an employer brings an action to enforce a post-termination non-compete restrictive covenant against an employee, the employer must file its case before the High Court or County Court, depending on the value of the claim. Claims presented against employers by employees are required to be filed in the Employment Tribunal, which is the usual venue for UK employment-related claims.

b. Who Has the Burden of Proof?

The burden of proving that a non-compete provision is enforceable against an employee is on the employer, or the party bringing the action.

c. Statute of Limitations for Bringing an Action?

A claim for enforcement of a non-compete provision must be brought within six years of the date of the alleged breach of the provision. A court has some limited discretion to extend this period beyond 6 years. If, however, the employer wants to pursue injunctive

relief, then the claim should be brought as soon as possible without delay.

2. Source of Law Governing Non-Compete

a. Case Law

The origin of a non-compete agreement arises from the need for employers to protect against the loss of their investment in their employees by preventing employees from using employer-developed knowledge and information for the benefit of a third party. It is a common law concept that is developed through case law only.

3. What Are the Details Required to Be Included in a Post-Employment Non-Compete Agreement for It to Be Enforceable in Your Country?

a. Must the Agreement Be in Writing?

There is not a specific obligation for the agreement to be in writing. Nevertheless courts are unlikely to enforce a verbal non-compete provision due to the highly technical and detailed requirements necessary for the agreement to be enforceable.

b. Is There a Language Requirement for the Agreement to Be Enforceable?

There is no specific language requirement, although an agreement would be expected to be concluded in English unless there is a good reason for the agreement to be concluded in a different language, such as that the employee was not a native English-speaker.

c. Are There Limits to the Type or Level of Employee Covered?

As a basic rule, any contractual term restricting an employee's activities after termination is void and unenforceable for being in "restraint of trade" and contrary to public policy, unless the employer can show that:

- It has a legitimate proprietary interest that it is appropriate to protect; and
- The protection sought is no more than is reasonable having regard to the interests of the parties and the public interest.

An employee's seniority is typically an important factor in a court's assessment of whether a non-compete is reasonable. For example, where a senior employee is privy to major and strategic operational decisions or has access to manufacturing processes or confidential trade secrets that cannot be protected by confidentiality terms, a non-compete provision might be justified. By contrast, an employer is unlikely to be able to justify enforcing a non-compete provision against a junior employee who does not have access to information that could damage the employer's business if he goes to work for a competitor.

Ultimately, it is a matter of "fact and degree" and it is not possible to make general assumptions about the level of employees who may be bound by a non-compete provision.

d. Are There Limits to the Length of Time That Is Allowed under Law?

The determination of time limits is based on court assessment of all the facts. Most courts do not recognize non-compete provisions that require compliance beyond one year.

e. Are There Limits to the Geographic Reach Established by Law?

The determination of geographic limits is based on court assessment of all the facts, including the type of business involved. Courts will review the type of business and breadth of protection given the facts of the case and will decide on that basis. The key question is whether the new enterprise competes, irrespective of where it is geographically located (although enforcement may become more difficult if the new enterprise is located outside the UK).

f. Any Other Details or Essential Elements of the Agreement?

There are a variety of requirements used by courts to determine the proper balance between employment freedom and protecting employer interests. These are discussed more fully below.

4. What Kind of Consideration Is Required?

Consideration offered at the time the agreement is entered is sufficient to support the agreement's validity.

a. Monetary or Financial Consideration?

If the non-compete is introduced at a time other than the commencement of the employment relationship then financial compensation or other significant consideration is required for the agreement to be binding. Thus if the non-compete is introduced after the employment relationship begins it should be tied to a bonus or other significant compensation that is newly introduced as part of the agreement. There is no legal standard against which consideration is judged.

i. Required to Have Compensation Assigned to Non-Compete Clause During Employment Relationship?

Not required.

ii. Required to Have Compensation Paid During Post-Employment Non-Compete Period?

Not required to enforce the non-compete so long as the non-compete was supported by consideration at the time the parties entered the agreement. Nevertheless, receipt of post-employment termination payments may be conditioned upon compliance with the terms of the applicable non-compete.

iii. If Paid at the Time of Entering the Agreement, How Much and How Is This Identified or Accomplished?

If a non-compete provision is proposed at the beginning of the employment relationship,

the remuneration package and on-going employment should be sufficient consideration.

b. Is Offering Employment Itself Enough to Provide Consideration; or Is There a Requirement That Any Non-Compete Agreement Be Introduced at the Beginning of Employment Only?

Offering employment, along with the benefits package, is sufficient consideration for entering a non-compete agreement. There is no requirement that the non-compete be entered at the beginning of employment. The only requirement is that some additional consideration be offered in exchange for the non-compete whenever it is agreed upon.

c. Will Continued Employment Provide Adequate Consideration to Support a Covenant Not to Compete Introduced During the Term of Employment?

It is debatable whether continued employment by itself is adequate consideration to support a new or amended non-compete provision that is introduced during employment, and the sufficiency of continued employment as consideration will depend on the particular facts in each case. It is usually advisable to provide some form of consideration, e.g. by making a discretionary salary increase or bonus payment conditional on the employee's agreement to the new or amended non-compete provision. It may also be possible to execute a new or amended non-compete provision by "deed" (a more formally executed document than a simple agreement), in which case consideration is not required.

d. Will a Change in the Terms of Employment Provide Sufficient Consideration to Support a New or Revised Covenant Not to Compete Introduced During the Term of Employment?

A positive change in the terms of employment for the employee, e.g. a salary increase, when specifically linked to the introduction of a non-compete provision, should be effective.

e. May a Non-Compete Agreement Be Introduced for the First Time in a Termination Agreement in Which Additional Benefits to Be Paid upon Termination May Also Be Offered?

Yes, although for tax purposes it is advisable to assign (taxed) consideration to the non-compete provision.

5. How Are Post-Employment Covenants Not to Compete Enforceable?

a. By Whom?

The employer may enforce the agreement against the employee (for breach of the agreement) and the potential new employer (for inducing the employee's breach of the non-compete provision).

b. What Remedies?

Two main remedies:

- Injunctive relief: an order preventing the employee from breaching the non-compete provision by joining a competing employer. The court will generally grant an injunction only if the employer could not be adequately compensated by damages.
- Damages for losses caused by the employee's breach of the non-compete provision. Damages are assessed by reference to the former employer's financial loss, subject to usual contractual principles in relation to recovery of damages. It is not enough for the former employer to show that the employee has breached an enforceable non-compete provision. Rather, it needs to show that this caused loss, which will usually involve demonstrating that it would have retained certain business if not for the employee's breach of contract.

c. Must Remedies Be Listed in Agreement?

No requirement to list remedies in the agreement.

d. Is Injunctive Relief Available?

i. If So, What Is the Standard?

An employer may obtain a prohibitory injunction, which is an order requiring the employee not to join a competing employer, but only in the event that the employer could not be adequately compensated by damages if the employee were to join the competing employer. Often, a court will order an interim injunction as an emergency or temporary measure until matters can be fully explored at trial. A final injunction may be granted at trial, following the court's detailed consideration of the witness evidence and the parties' submissions.

6. Modification, Severability and "Blue Penciling" Overbroad Agreements

a. What Freedom Does the Tribunal Have to Change the Agreement to Make It Compliant with the Law?

Uncertainty or ambiguity in the wording of a non-compete provision is likely to lead to difficulties for the employer when attempting to enforce the provision, as courts are not usually willing to come to an employer's assistance in upholding a defective covenant. For example, where the duration of the non-compete provision goes beyond what is reasonably necessary to protect the company's legitimate proprietary interest (see further below), a court will not reduce the length of the provision. Instead, the non-compete provision will be void in its entirety.

One exception is where a defective non-compete provision can be deleted without needing to add to or modify the remaining wording (the "blue pencil" test) in which case a court

will consider rectifying the provision. While use of cascading terms would not necessarily render a non-compete provision unenforceable, it is usually advisable to keep a non-compete provision as concise and tightly drafted as possible.

b. Is This Automatic or Does the Agreement Need to Acknowledge the Tribunal's Ability to Make Changes?

Blue penciling options are automatic and not dependent on the language of the agreement.

c. Drafting Considerations

i. Nested Clauses?

Courts will not pick and choose among options presented by the employer. They will only deal with the agreement the employer and employee made and if it can be saved by deleting language, the court may do so. If it cannot be saved, the court will not modify the terms.

7. Are Time, Geography and Scope (i.e. the Work or Activities of the Individual During the Time and in the Geography) of the Agreement Relevant to Evaluation and Enforcement of a Post-Employment Non-Compete Agreement?

In general terms, geographical restrictions are becoming less common, as many businesses are less reliant on a physical presence and use electronic communication. However, they can still be appropriate for certain kinds of businesses, such as smaller businesses operating in or servicing a defined geographical area.

a. What Geographic Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

i. Reasonable

Where applicable, the non-compete provision should be restricted to such areas in which the employer (or any group company) carries on business upon termination of the employee's employment and in respect of which the employee carried out his material duties at any time during a limited period (usually a year) prior to termination. Where possible, the non-compete provision should set out in detail the geographical areas covered by the restriction.

The rules surrounding geographical restrictions are derived from case law.

ii. Unreasonable

If a geographical restriction is appropriate, a restriction covering areas outside the area in which the employee was materially engaged is unlikely to be enforceable. The standard is whether the extent of the restriction is limited to the specific locations of responsibility held by the employee during employment. Geographic restrictions may extend beyond the

physical boundaries of the country so long as they are limited to locations actually serviced by the employee.

b. What Time Restrictions Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

The duration of an enforceable non-compete provision will vary on a case by case basis and will depend on a number of factors, including the seniority of the employee and the nature of information to which he has access. These time restrictions are based on case law and subject to court interpretation.

i. Reasonable

In general terms, the top end for enforceability in UK courts tends to be around the 12 month mark. For more junior employees, a shorter duration of 3 to 6 months may be appropriate depending on the nature of their role.

ii. Unreasonable

It is likely that an employer would struggle to enforce a non-compete provision that is longer than 12 months. For certain junior employees, such as those who do not have access to significant sensitive information about the company, it is possible that the employer will not be justified in imposing any duration of non-compete provision.

c. What Restrictions Related to the Scope of the Non-Compete Are Reasonable or Unreasonable and Identify the Source, Whether Statutory, Constitutional or Case Law?

Where possible it is advisable to specify (on a non-exclusive basis) particular businesses that compete with the employer. This makes enforcement easier and clearer. The rules related to determining the scope of the non-compete are derived from case law.

i. Reasonable

The non-compete provision should be limited to any business that at the termination of the employee's employment (i) competes or (ii) will compete or (iii) is likely to compete with the business in which the employee was materially involved during a limited period (usually a year) prior to termination. The non-compete provision may cover the employee acting either alone or jointly with or on behalf of any other person, firm or company, in whatever capacity. A Court may uphold a non-compete provision even where the employee is hired by a competitor in a completely different capacity to his former role, if there remains a risk that information may be revealed irrespective of the capacity in which the employee is employed.

ii. Unreasonable

Non-compete restrictions that seek to restrict the employee from joining a business that does not (or will not) compete with the employer will not be enforceable.

d. Are Facts or Circumstances (Rather Than Terms in the Agreement) Evaluated to Determine if the Agreement Is Enforceable?

The actual facts or circumstances existing on termination of the employee's employment are as important as the terms of the agreement in determining whether the non-compete provision is enforceable.

i. If So, What Facts Are Considered: Facts as They Exist at Negotiation of the Agreement or Facts as They Exist at the Time of Enforcement?

As a starting point, a court will look at the facts as they exist at the negotiation of the agreement, i.e. the employee will be restricted from competing with his employer in respect of the business he is hired to carry out during his employment. However, to the extent the facts change, for example where the employee works for a different group entity or in a different part of the business, then the court may be prepared to take this into account.

In practice, the possibility of the scope of the employee's role changing should be built into the terms of the non-compete, e.g. it should cover all group entities for whom the employee works (rather than just the employer) and the full range of work that he carries out, in each case during a period (usually 12 months) prior to termination.

e. Is There a Balancing Test of Interests Between Employer and Employee or Is Enforcement Strictly by the Terms of the Agreement?

The court will need to balance the employee's right to make a living against the employer's right to protect its legitimate business interests. In general, a court will scrutinise non-compete covenants very carefully, as they amount to a "restraint of trade" and have been described by the courts as "the most powerful weapon in an employer's armoury."

f. What Factors Will the Tribunal Consider in Determining Whether Time, Geographic or Scope Restrictions in the Covenant Are Reasonable?

Including a (without limitation) list of competitors would help to avoid debate about whether that entity is within the scope of the covenant.

8. Does the Manner of Termination of Employment Affect Enforcement of the Post-Employment Non-Compete Agreement?

a. If Yes, How Does It Affect Enforcement?

Potentially. If an employer has committed a breach of the employment contract which is so serious that the employee is entitled to treat the contract as terminated, then the employee may resign and claim that the employment contract (including the non-compete provision) has fallen away.

If the employer was in breach, the entire non-compete provision would be unenforceable.

9. Can the Company Unilaterally Terminate the Post-Employment Non-Compete Agreement?

Yes, the employer may agree to release the employee from a non-compete provision. While such release may be conditioned upon some behavior or action, usually the employer will not receive consideration or compensation from the employee.

a. If Yes, under What Conditions?

Subject to agreement between the parties.

b. Is Consideration/Compensation Required to Be Paid?

Nothing is required by law.

10. Will the Tribunal Enforce a Choice of Law Provision That Chooses the Law of a Country That Is Not the Country in Which Employment Services Are Performed?

In principle, yes. But, to the extent the parties choose a governing law that would allow the employer to enforce a more onerous non-compete provision than permitted under UK law, the UK court would not enforce such a provision.

a. If a Choice of Law Is Considered, Is There a Standard by Which the Tribunal Determines Whose Law Applies?

In general, a UK court will apply the choice of law, save to the extent it denies rights to the employee that are available under UK law – in which case the court will "overlay" the relevant provisions of UK law.

b. Will the Tribunal Enforce a Forum Selection Clause, Such as Determining the City in Which the Dispute May Be Brought, or Determining Which Tribunal Will Hear the Dispute?

It would be unusual to include a contractual provision specifying in which city a dispute in connection with a non-compete provision may be brought and (in any case) this would be unlikely to prevent a court from transferring the proceedings to another venue. Only a competent court will hear a dispute in connection with a non-compete provision, i.e. the High Court or County Court (depending on the value of the claim).

c. Is an Agreement to Submit to Arbitration Any Disputes over a Post-Employment Non-Compete Agreement Enforced in Your Country? Any Limitations or Restrictions?

Yes. However, agreeing to arbitration in respect of a non-compete provision is not advisable as it might limit the employer's ability to (a) obtain injunctive relief and (b) join a third party (e.g. the former employee's prospective new employer) to the enforcement

proceedings for inducing breach of contract.

11. Leading Cases/Current Trends

This is a constantly developing area of law and specialist advice should be sought when drafting non-compete provisions (along with any other post-termination restrictive covenants).

In terms of current trends:

- The courts are increasingly willing to enforce non-compete provisions that are not limited by geographical region in respect of businesses that are not reliant on a physical presence (e.g. because they use electronic communication), meaning competition can take place from any location;
- Very generally, the trend is toward the court's enforcement of non-compete provisions (rather than refusal to enforce) and a toughening of its approach towards "team moves" (i.e. where two or more employees decide to leave and either set up in competition or join a competitor).

12. Are There Alternatives to Non-Competes Recognized in Your Country?

a. Garden Leave?

Garden leave tends to be a more effective means of preventing an employee from competing than a non-compete provision because, during garden leave, the employee remains in employment and so is subject to the normal restrictions in the employment relationship, including a duty of fidelity (which generally prohibits competition).

Note that garden leave can normally only be imposed during the employee's notice period, which (save for very senior employees) tends not to exceed three to six months. Furthermore, the UK courts would usually expect any non-compete provision to be reduced by the amount of time the employee spends on garden leave, as during that period the employee is prevented from competing.

Unlike a non-compete provision, where the duration of garden leave is found to be unenforceable a UK court may reduce the duration to a more reasonable time frame rather than treating the entire provision as void.

b. Non-Solicitation of Customers?

It is common to include a non-solicitation of customers provision as well as a non-compete provision in employment agreements for senior staff.

Non-solicitation provisions tend to be easier to enforce than non-compete provisions, as they tend to have less of an impact on the employee's ability to work. As such, the courts may be prepared to enforce a longer duration of non-solicit than non-compete.

If an employer is adequately protected by a non-solicitation provision, it may be more difficult to enforce a non-compete provision covering the same employee.

c. Other?

Confidentiality and non-disclosure provisions may be adequate in respect of more junior employees where restrictive covenants and garden leave are not appropriate.

III. About Greenberg Traurig's International Employment, Immigration & Workforce Strategies Team

A. Creative Strategies for Global Workplace Challenges

The world's ever-changing economy brings new workplace challenges every day. Employers managing a global workforce are continually faced with a myriad of state, federal and international regulations in wide-ranging transnational jurisdictions. Navigating this complex maze is a daunting task, especially when it comes to ensuring compliance.

Today's global organizations must comply with employees' legal rights under regulatory frameworks that vary from country to country. Whether domestically or globally, and in addition to complying with applicable laws, businesses must meet their employees' professional and personal needs – all while being mindful of cultural considerations.

Greenberg Traurig's Global Workforce Strategies team offers labor, employment and immigration experience in countries around the world, and advises businesses both inside and outside the United States on human resource and compliance issues regarding employees. We work with employers to stay ahead of the curve on global workplace risk, partnering with them to manage issues before they arise.

We counsel U.S. entities operating in foreign countries, U.S. entities engaging labor from both within and outside of the United States, and foreign entities operating and/or engaging labor within the United States. To ensure that our clients' legal needs are addressed efficiently, effectively and in a manner that considers the critical issues, our multidisciplinary approach brings together lawyers and professionals from across the firm and with experience in practice areas such as Tax, Global Benefits & Compensation, Labor & Employment, and Immigration & Compliance to provide companies with legal and practical solutions and services to address their most complicated human capital

challenges.

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[1] The term "nested" clauses, also known as "cascading" or "alternative" clauses," refers to separate and independent provisions, severable from other restraints, which apply in the event one or more such provisions is held to be invalid.