



EMPLOYMENT LAW

NON-COMPETITION CLAUSES IN EMPLOYMENT CONTRACTS

FRANCE

Non-Competition Clauses are dealt with under commercial law and are designed to limit, or to differ, an employee's competitive practice after the termination of employment. Depending on the terms of the clause, the employee is forbidden to work for, or be involved with, directly or indirectly, paid or unpaid, any person, organisation or company pursuing activities in competition with that of his/her former employer.

In France, there is no statute regulating non-competition clauses. The French Code only sets up a general principle according to which the employer cannot limit either the rights of employees or their individual or collective liberties, other than by justifying that such restrictions are necessary because of the nature of functions and proportionate to "the aim to be reached". As a general rule, these restrictions must be justified and proportionate.

The major principles concerning non-competition clauses have been derived from case law.

Judges have effectively already admitted the validity of non-competition clauses under the principle of contractual liberty, but for several years it has been subject to more and more restrictive conditions.

In addition, collective bargaining agreements can also include non-competition clauses.

EMPLOYMENT CONTRACT

Validity conditions

In order to be valid, a non-competition clause must be incorporated into the contract and satisfy four criteria:

- It must be essential for the protection of the company's legitimate interests: this condition is qualified, on the one hand, according to the nature of the activity of the company and, on the other hand, according to the nature of the job, the qualifications and the functions of the employee.

In other words, there must be a real risk of competition to the company.

- It must be limited in time and space: the clause must specify both a period and a geographical area within which the employee is not permitted to compete.

There are no legal temporal limits but collective bargaining agreements may fix a certain minimum or maximum limit. In practice, non-competition clauses are usually limited to 1 or 2 years.

There are also no set criteria for the geographical limitation albeit the employee must not be prevented from finding a job corresponding to his/her skills and professional experience. In addition, the Supreme Court has recently ruled that the geographical limitation of a non-competition clause must be clearly determined.

- It must take into account the specificities of the employee's job: as previously mentioned, the employee must not be prevented by the non-competition clause from finding a job corresponding to his/her skills and professional experience. So judges will assess, in concrete terms, if the employee is able to work regarding his/her qualifications, career and also his/her age.

- It must include financial compensation for the employee: since 2002, a non-competition clause must provide for reasonable financial compensation. However, even if the clause does not include a provision on financial compensation, it may nevertheless be valid if the employment contract refers to a

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collective bargaining agreement which does provide for financial compensation.

If the conditions above are not observed, the non-competition clause will be judged null and void.

Only the employee is entitled to take advantage of any such invalidity, i.e. the employer cannot refuse to pay financial compensation in respect of a non-competition clause which does not meet the conditions.

If the clause is found to be invalid, there are two possible consequences: either the employee is free to ignore the clause and compete against his former employer; or, if the employee has respected the null clause, s/he is entitled to the payment of damages. With regard to the latter point, the Supreme Court has recently ruled that respecting a void non-competition clause results in loss to the employee, therefore, the employee is automatically entitled to damages. The amount of damages is set by the court.

Moreover, if a contentious non-competition clause meets the above conditions, the Supreme Court has ruled that judges can reduce its scope if the restrictions are obviously excessive.

Thus if the clause prevents the employee from practising an activity in accordance with his/her education and career, judges can reduce its implementation by limiting its effect in time or geographical area.

Waiver

The employer can waive the application of the non-competition clause, provided such a possibility is expressly provided for in the employment contract or in the collective bargaining agreement, and provided the waiver itself is express and precise.

Breach of non-competition clause

When a non-competition clause is valid, the employee is bound by it. In case of breach, the former employer is entitled to claim the re-imbursalment of all financial compensation paid. Moreover, it is possible to state in the clause that in case of breach, the employee will have to pay a penalty (liquidated damages).

The invalidity of the clause does not prevent the employer from suing an employee who would be guilty of unfair competition. Tribunals do not normally have jurisdiction. Proceedings should usually be brought in the Commercial Court.

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ISRAEL

The issue of non-competition clauses in Israeli Law has undergone extensive upheaval over the years.

Prior to the establishment of special courts in 1969, regular courts tended to accept non-competition clauses mainly in accordance with general principles of freedom of contract. For about 20 years, from the beginning of the 70s, where the then newly-established labour courts took over jurisdiction from the regular national courts as a starting point. Step by step, the courts restricted the recognition and acceptance of non-competition clauses, mainly in accordance with the “[reasonable test](#)”, examining different factors of the clause and deciding on a case by case basis. However, this process resulted in an almost impossible burden on the party (usually the employer) seeking to enforce the non-competition clause.

Before discussing the current situation in Israel, it is worth noting some of the issues at stake and the criteria that were examined by the labour courts in each case, in order to decide whether a non-competition clause should be approved.

There are 2 main issues that are usually considered by the courts and these are examined below:

- [The non-competition clause after the conclusion of the employer-employee relationship](#) – Is such a covenant enforceable?

- [The non-competition clause during the employer-employee relationship](#) – Is the employee entitled to work for his employer's competitor without the permission of his employer?

Those 2 questions are normally examined in light of the following topics:

- What is the proper balance between the employer's right to property (since the Israel Labour Courts long ago recognized the right of an employer to treat employees as property at the place of work) and/or the worker's freedom of occupation and freedom of contracts?

- What are the social and economic factors involved in this balance?

- To what extent should social and economic considerations justify the non-enforcement of non-competing covenants?

It is important to understand that, in Israel, no specific law exists to deal with the question of non-competition clauses in labour agreements. The legal sources used by the courts when dealing with such questions are, on the one hand, the basic law called “Basic Law – Human Dignity and

Freedom”, as well as general basic principles of human rights, freedom of occupation, freedom of mobility in between working places, and on the other hand and the right of the employer to its property, the legitimacy of preserving and defending his commercial interests and the right of an employer to defend legitimate trade secrets.

As mentioned previously, non-competition covenants have been examined in light of reasonableness, which in fact requires examination of the different aspects below:

- the question of the legitimacy of preserving an employer's economic interest;

- the factors of time and space/territory to which the non-competition covenant applies, including questions of proper economic compensation to the employee in case of an enforceable non-competition clause;

- whether a clear written agreement exists;

- whether the employee acquired special knowledge by special training by the former employer;

- whether the employee did indeed engage in unfair competition or acted in a disloyal manner.

These tests are continuously at odds with two basic principles, namely:

- the protection of competition (which is necessary for a competitive market); and

- the protection of the right of employees to choose their own place of work.

[The basic presumption under the Israel jurisdiction is that a covenant not to compete is not binding, even if it is clearly expressed in a written agreement signed by the parties, unless:](#)

- [the employee is using trade secrets of his former employer.](#)

- [the employee is not acting in good faith.](#)

- [The employee received remuneration in return for their promise not to compete.](#)

In general, non-competition covenants can be justified and enforced only when the former employer has a legitimate, proven and recognized interest (recognized as such) in preventing his former employee from working with his competitor.

[Trade Secrets and how they relate to non-compete covenants](#)

Israel, like most other countries, has a law protecting trade secrets. Protection of a trade secret can, in fact, require the enforcement of a non-competition covenant if (1) the information is a secret (in the plain

and simple meaning of the word) and (2) reasonable steps have been taken to protect the secret. Otherwise, the information is not considered to be a trade secret). Since trade secrets are protected by law, there is no need for a written contract to protect them.

Payment to a worker for his agreement not to compete

Providing remuneration to an employee in return for the employee upholding the non-competition covenant is an effective method to uphold the covenant, as long as the payment is reasonable.

Written contract

Under Israeli law, there is no need for a written contract not to compete. However, the written contract is important in cases where the employer needs proof to persuade the court to enforce a non-competition covenant. Nevertheless, the Israeli courts tend to enforce a non-competition covenant where an employee is using trade secrets or any of the protected confidential information at his new place of work.

Further information on this topic:

- **Unfair dismissal** – A covenant will generally not be enforceable when the employee was dismissed unfairly. If, on the other hand, the dismissal was fair, the covenant should undergo full examination and in most cases, will probably not be enforceable.

- **Burden of proof** – This burden will always fall on the shoulders of the employer, who must prove that the non-competition clause meets all the requirements and is therefore enforceable. With regard to the question of trade secrets, there is no assumption that an employee will use a trade secret and it is for the employer to prove this.

- **Remedies** – In cases where a non-competition covenant is found to be enforceable, courts may impose the following remedies: an injunction enforcing the covenant, damages and, in cases where the former employer's property has been misappropriated, the former employer may receive an order to seize this property even at the new place of work.

- **Suing the new employer** – The former employer can, in such cases, also bring proceedings against the new employer. However, normally, the former employer may succeed in such a claim only in cases where trade secrets must be protected or in cases where it can be proven that the new employer was involved in unlawful acquisition of information which is deemed to be the former employer's property.

Finally, the existing Israeli Labour Court's approach can be summarized as follows:

Non-competition covenants will not be enforced unless the former employer proves that:

- his former worker is using his trade secret in a new position;
- the worker received special payment for not working for a competitor;
- the worker was not acting in good faith; and
- the non-competition covenant protects employers' interests which are proven to be legitimate and real.

(Part of this general introduction is based on a report presented by Judge Steve Adler, President of the Major Labour Court in Israel at the XIVth meeting of the European Labour Court Judges, on 4 September 2006.)



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ITALY

The Italian Civil Code regulates the non-competition obligation of the employee towards his employer both during the work relationship and after its termination.

During the performance of the work contract the employee is bound by a duty of loyalty. S/he may neither carry on business, even on behalf of third parties, in competition with the employer, nor can s/he disclose any information concerning the organisation, production methods and know-how of the employer company which may damage its activity.

The employee's duty of loyalty is provided by law (Section 2105 of the Civil Code) and is deemed to be included in the work relationship as an additional obligation. Therefore, it is automatically in force and no special provision for it is required in the employment contract.

Breach of this obligation entitles the employer to dismiss the employee for subjective justified reason or even for just cause, depending on the seriousness of the alleged infringement. Disciplinary measures for the employee are also provided.

Non-competition rules are only effective during the work relationship, and cease to have effect after termination of the work relationship, unless the parties have signed a non-competition agreement agreeing to extend the ex-employee's duty of loyalty.

More precisely: after the termination of the work relationship, the employee can freely perform his work activity by using his acquired experience in the same field and in the same geographical area as the employer. The obligation not to compete after termination may be agreed by the parties as the object of a clause originally included in the work contract, or as a specific undertaking subsequently arranged at any time during the work relationship.

The non-competition discipline provided by the Section 2125 applies to all employees, with executive duties or non intellectual functions, the only relevant issue being the potential risk of damage suffered by the employer. In drafting such an agreement, a balance must be struck between, on the one hand, the interests of the employer which are not to be damaged by the future activity of the ex-employee and, on the other hand, the interests of the employee himself who should be placed in a position to express his freedom of occupation and to continue his work activity by making use of the acquired experience.

Since a post-employment non-competition covenant equates to a restriction of the right to work, private economic enterprise and competition (rights protected by the Italian Constitution at Sections 4, 35 and 41), strict requirements for its validity are provided for by the Civil Code. The covenant must be:-

- in written form;
- with proper consideration;
- limited in object, geographical area and duration



The maximum duration is 5 years for managers and 3 years for all other workers and if a longer term is agreed by the parties, it is automatically reduced to the maximum duration prescribed by law.

As far as consideration is concerned, it must meet a proportionality test, for it should include proper economic compensation which is in proportion to the reduction of the employee's earning capacity. The law does not specify anything further in respect of what factors are to be taken into account when assessing the consideration.

The Labour Courts have established that the consideration:

- can be paid either during the work relationship (as a fixed sum or a percentage linked to the salary), at the end of it, or after its termination;
- cannot be automatically considered as a part of the salary, as it is instead a distinct element related to an obligation which is different and subsequent to the work obligation. Consequently it is relevant with reference to the obligations to contribute and provide a severance payment only if paid monthly and in addition to the normal salary.

As a contractual obligation, a non-competition agreement can be cancelled by mutual consent of the parties, unless the unilateral withdrawal of the employer is originally agreed (in which case this right can be exercised only before the termination of the work relationship).

Section 2125 only provides for non-competition clauses agreed with employees. Different rules apply in respect of self-employed workers and commercial agents (Sections 2596 and 1751 of the Civil Code), providing for specific maximum terms of validity (5 years and 2 years respectively).

In the event that the clause is breached, the burden of proof rests on the (former) employer.

Judicial remedies available to the former employer (in the form of preliminary injunctions issued by Labour Courts) against the employee in breach of the covenant not to compete are:-

- order to stop the work activity performed in breach of the clause;
- order for reimbursement of the consideration paid;
- order for the payment of a penalty (if any);
- order for compensation of damages.

The former employer cannot sue the new employer that has employed a worker who

is in breach of a non-competition clause before the Labour Courts, but can instead claim unfair competition before the Civil Courts.



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SPAIN

The Workers' Statute contains only one article (Article 21) on the regulation of non-competition clauses which provides the following:

- a worker may not work for several employers when there is unfair competition or when a full time working arrangement is agreed by means of express financial reward in accordance with the agreed terms and conditions;
- a non-compete covenant which expires after the employment contract has ended may not have a term of more than two years for technical workers and six months for other workers. In addition, it is only valid under the following circumstances: "the employer must have actual industrial or commercial interest therein; and the worker must be paid an appropriate financial reward."

The actual tenor of the article gives rise to the following situations:

Situations that refer to the term of the contract of employment:

- under no circumstances may the worker provide or carry out services for others if there is unfair competition (Article 21.1);
- even if there is no unfair competition, the employee cannot work for other employers or institutions if a full time agreement has been reached with express financial reward (Articles 21.1 and 3).

Situations that refer to the time after the contract of employment has expired:

The employer and the worker may reach an agreement whereby the latter may not carry out any activity whatsoever which represents competition to the employer. However, this will be valid in accordance with the terms and conditions provided in Article 21.2.

UNFAIR COMPETITION

The obligation not to enter into unfair competition is one of the basic duties of workers as provided in the Workers' Statute. The said obligation to not enter into competition with the employer comes from the duty to act in good faith, with the respect and loyalty that may be required of workers, who must refrain from carrying out activities that compete with the employer as self-employed workers or as workers employed by others. There is no requirement for a written record of such an obligation. By virtue of the aforementioned obligation, the worker may not legally compete with the employer unless s/he is expressly authorised by the employer to do so.

It is possible that a worker could enter into unfair competition in the following circumstances:

- the work carried out corresponds to the same sector or branch of industrial or commercial production;
- s/he proceeds without the employer's consent;
- the work carried out competes with the employer;
- the employer has an actual commercial and industrial interest therein;
- there is real or potential damage.

The worker entering into unfair competition during the term of his/her labour relations violates his/her contractual duty of good faith and abuses the trust placed in him/her by the employer. This may be sufficient cause for a disciplinary dismissal by the employer.

AGREEMENT ON FULL-TIME EMPLOYMENT

By virtue of such an agreement, the worker undertakes to provide his/her services exclusively for one employer, receiving the financial reward specified in the contract. By signing the contract, the worker waives his/her right to multiple employments, also including work that does not compete with the employer.

In accordance with section 3 of Article 21:

"In the event of financial reward for full-time employment, the worker may terminate the agreement and recover his/her freedom of

employment in another job, notifying the employer in writing with 30 days' advance notice. In this case, he/she loses the financial reward or other rights associated with full-time employment."

COVENANT AGAINST POST-CONTRACTUAL COMPETITION

An agreement to this effect provides that the worker undertakes not to carry out competitive activities and not to accept employment from an employer who is competing with his/her former employer for a certain term, whilst the employer undertakes to pay the appropriate financial reward in return.

The covenant against competition can be agreed by the employer and worker at the beginning of the labour relationship, during the term thereof or on the expiry of the contract of employment.

Requirements

- The employer must have and demonstrate that it has actual industrial or commercial interest which justifies the signing of the agreement under penalty of nullity. This interest is proven if, by virtue of the employee breaching the non-competition covenant, the employer suffers effective damage as a result.

- The employer must pay the worker an appropriate financial reward for depriving the employee of his employment opportunities, where the validity and legality of the agreement is an essential requirement. Otherwise, the agreement will be null and void "ab origine" and, therefore, rendered ineffective.

In relation to the quantification of such financial reward, the Statute only provides that it must be "appropriate". Should conflicts arise, it will be for the labour courts to determine this issue. In the most recent case law, the amount considered to be "appropriate" financial reward is increasing. This highlights the need for proportionality between the term of the covenant and the amount of the reward.

In order to guarantee the validity of the agreement, the worker should be given a reasonable financial reward, such as a percentage of his/her salary for the term during which competition is prohibited. Other factors that should be taken into account include the worker's specialisation, since the possibility of a highly specialised worker being able to find suitable employment will be more limited than for others and s/he will have fewer options of alternative work. It, therefore, follows that the financial reward for such cases should be greater than for others.

There is no single method for quantifying the amount of financial reward. A fixed percentage of the worker's salary may be agreed upon and paid when the contract of employment is terminated. Alternative methods may be: a fixed monthly amount, a specified proportion of the most recent salary or a percentage of the average that corresponds to a preset period of the worker's salary etc..

The time for payment of the financial reward is a question for the parties themselves. The courts have declared various types of agreements as valid, such as an advanced payment; a lump sum; a single payment at the end of the term during which the worker has a commitment to refrain from competitive activities; or a payment at the end of every six-month period during the term of the non-competition covenant.

- The prohibition of competition cannot run for a term of more than two years for technical employees and six months for other workers. The concept of a technical employee is not limited to qualified workers, but also includes workers with knowledge of business techniques (TS- 28.06.90). In the case of commercial representatives and senior management personnel, the maximum term is two years. Exceeding the allowed maximum terms does not imply that the entire agreement is void but that instead part of it may be null and void. More specifically, the excessive term would be reduced to that provided for in the Workers' Statute. Consequently, if the agreement has been breached, any compensation due must be reduced proportionally.

Expiry

If the employer's interest, on which the agreement was based, is considered no longer to exist (e.g. the employer's company has closed or changed its activity), there is no possibility of extrajudicial, unilateral abandonment of the non-competition covenant by either the employer or the worker. However, the party interested in the expiry of the agreement must file for the said expiry in court. Should the judge declare the covenant against competition null and void and the worker has already received the financial compensation before the non-compete undertaking has been implemented, the worker must repay the amounts received.

Most of the case law has repeatedly provided that the clauses whereby the employer provides for a unilateral possibility of waiving the effectiveness of the agreement are null and void. Accordingly, Article 1256 of the Civil Code provides that, "the validity and fulfilment of the contracts cannot be left to the decision of the parties thereto". Therefore, even if the employer abandons the agreement, s/he must pay the financial compensation.

Breach

- By the employer: in this case, the worker may not unilaterally terminate the agreement, but instead must file for a judicial decision releasing him/her of his/her respective obligations.

- By the worker: in this case, the employer can stop paying the financial reward and file for the termination of the agreement in court. In addition, the employer may file against the worker for damages in court, where the agreement has expired but the worker has been paid a financial reward. There are several options regarding the compensation to be paid by the worker:

- Penalty clause: the parties may set the compensation that is to be paid beforehand, i.e. they may establish a penalty clause. The return of the payment by the employer as economic compensation for the worker is commonplace, although both amounts do not necessarily have to coincide. The penalty clause may be greater than the financial reward for the worker, comprising a surplus for damages caused by breach.

- Lack of notice by the parties: in this case, the compensation for damages must be determined by the court on the basis of the individual circumstances of the case.



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