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Restrictive covenant clauses Q&A: France

by Philippe Thomas and Maëlle Chausse, Dechert LLP

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France-specific information concerning the key legal and commercial issues to be considered when drafting restrictive covenant clauses for use in the terms of employment between the employer and employee. See Standard clauses, Restrictive covenant clauses: International, with country specific drafting notes and Standard document, Terms of employment: International.

Restrictive covenants

1. In your jurisdiction, can Standard document, Restrictive covenant clauses: International be used in the following documents:

- Terms of employment with the employee at the start of employment?
- A simple separate agreement?
- A deed?

Article L.1222-1 of the French Labour Code provides that "the employment contract shall be executed in good faith". As a result, under French law, during the performance of their employment contract, employees are bound by an obligation of loyalty which prohibits them, among other things, from undertaking competing activity (*French Supreme Court, Employment Division, 28 June 1994 n°90-43.660*). However, once the contract is terminated, the default position is that they regain, in principle, complete freedom of activity and competition.

To limit the risks to which employers are exposed to post-termination under the law, recourse to post-termination restrictive covenants has been expanded.

These may be included:

- In the employment contract, when it is entered into.
- In a simple separate agreement, during the course of employment.

It is worth noting that, exceptionally, some collective bargaining agreements (CBAs) provide for a mandatory non-compete clause. In these cases, a non-competition obligation can arise from the CBA, if the employee is made aware of this when they are hired.

Any restriction on an employee's freedom to work must be sufficiently clear, so the employer cannot reserve the right to potentially impose a non-compete clause in the future. As an illustration, the French Supreme court has ruled that "a clause included in an employment contract under the terms of which the employer reserves the right, after termination of the employment contract, to impose a non-competition obligation on the employee is invalid" (*French Supreme Court, Employment Division,12 February 2002, n° 00-41.765*).

These provisions cannot therefore be unilaterally imposed in a termination letter, but they could be entered into, in a separate agreement, before or after notification of the termination.

2. Is it possible in your jurisdiction for employers to use restrictive covenants to protect their business by restricting an employee's activities for a period of time after their employment has ended?

Yes. Employers may restrict an employee's activities for a specific period by using post-termination restrictive covenants.

No specific period is provided for by statute. The parties will agree on the duration of the restrictions, taking into account case law and the applicable CBA. It usually varies between one and two years after the termination of the employment relationship (see Question 20).

Definitions

3. Is there any definition of confidential information in your jurisdiction that is required by law or standard practice in restrictive covenants?

There is no definition of confidential information that is required by law or that is standard practice in restrictive covenants.

The parties can agree on the scope and definition of the information that should be protected as "confidential information" under a confidentiality clause.

(In practice, a confidentiality clause differs from a non-competition clause because it does not limit the employee's ability to compete after the termination of the employment contract.)

4. Is the term "group company" recognised in your jurisdiction? If so, please can you set out an appropriate definition for Standard document, Restrictive covenant clauses: International.

The Commercial Code does not define the term "group company".

A group is generally defined commercially as a set of several companies, each with their own legal existence but all belonging ultimately to the same company, the "parent company", which:

- Holds the others under its control.
- Exercises control over the whole group.
- Ensures that a unity of decision prevails.

The individual companies are group companies.

"Group" has a more economic than legal meaning; in particular, a group company does not have legal personality.

5. Are the terms "subsidiary" and "holding company" defined and recognised under the laws of your jurisdiction? If so, please can you set out an appropriate definition for Standard document, Restrictive covenant clauses: International.

The term holding company has never been defined in the Commercial Code, and does not have a particular legal status.

It is generally understood commercially to be a company whose purpose is to hold shares in companies to ensure a unity of management and control.

The term "subsidiary" is defined as follows in the Commercial Code:

> "When a company owns more than half of the capital of another company, the latter is considered as a subsidiary of the former." (*Article L.233-1, Commercial Code*).

6. In your jurisdiction, where an employer wrongfully dismisses an employee or the employee resigns in response to a repudiatory breach, is the employee released from any restrictive covenants?

No. The method of, or the reasons for, the termination of the employment relationship do not have any legal consequences regarding restrictive covenants. Restrictive covenants will still be binding on both the employer and the employee unless they are expressly and validly waived.

7. If the answer to the question above is "yes" can the employer attempt to get around this by stipulating that the restrictions apply on Termination which includes in its definition "on termination howsoever caused", or "on termination whether lawful or not"? Would these be enforceable?

N/A.

Restrictions

8. Are all the restrictions in Standard document, Restrictive covenant clauses: International: clauses 2.1 (a) – (f) recognised in your jurisdiction?

The restrictions set out in Standard document, Restrictive covenant clauses: International: clauses 2.1(a), (d) and (e) are not valid as currently drafted, as they do not provide for any financial compensation or geograpical scope.

In order to be valid, they must:

- Be necessary for the protection of the company's legitimate interests.
- Be limited in time and geographical scope.
- Take account of the specific features of the employee's position.
- Provide for appropriate financial compensation.

Generally speaking, however, the effectiveness and enforceability of all clauses will depend on the circumstances of the individual case.

The restriction set out in *clause* 2.1(b) is valid and not subject to any condition.

The restriction set out in *clause* 2.1(c) is unusual, because it may constitute an unlawful restraint on the former employee's freedom to work (see Question 10).

The restriction set out in *clause* 2.1(f) is rarely encountered in practice, because there would be other legal recourses available without having to justify a contractual breach, for example, based on civil law principles.

9. In your jurisdiction, is it common practice to include a restriction on the employee leaving the employer to work for a customer?

Post-termination restrictive covenants, and in particular, non-compete obligations, can prevent the employee from working for a designated customer. However, to be valid they will need to comply with the conditions set out in Question 8.

10. Specifically, is Standard document, Restrictive covenant clauses: International: clause 2.1(c) which restrains the employee from employing or facilitating the employment of their former colleagues usually included as a restriction in your jurisdiction? If so, is it likely to be enforceable?

This clause is unusual, because it may constitute an unlawful restraint on the employee's freedom to work.

As a result, enforceability is unlikely.

Limitations on restrictions

11. In Standard document, Restrictive covenant clauses: International: clause 2.2, what percentage (%) shareholding is commonly inserted into a clause such as this clause in your jurisdiction?

A clause like Standard document, restrictive covenant clauses: International: clause 2.2 does not usually target listed competing companies; for non-listed competing companies, a percentage shareholding of 5% would be commonly inserted.

Ambit of the restrictions

12. In your jurisdiction, does Standard document, Restrictive covenant clauses: International: clause 2.3 have the effect of ensuring that the covenants apply when necessary, even if the individual is simply providing information to others in order to allow them to compete, rather than acting in breach of the covenants themselves?

Yes, this would generally have the intended effect. However, practice illustrates that it is difficult to prove the competing activity in these cases.

Enforceability

13. In your jurisdiction, are restrictive covenants void as an unlawful restraint of trade?

No, but they may be deemed an unlawful restraint on the freedom to work if they do not meet the conditions in Question 8.

14. In your jurisdiction are restrictive covenants only enforceable if they are narrowly drafted?

Yes. Post-contractual non-compete obligations must be narrowly drafted to be enforceable.

15. What terminology may be used in your jurisdiction in relation to the scope of the restrictions?

There is no specific terminology that must be used, but it should include:

- Details of the company's activity and legitimate interests in the clause.
- Details of the employee's job and role.
- Specific geographical limits.
- Specific time limits.
- Specific appropriate financial compensation to be paid after the end of the employment relationship.
- Methods for waiver of the clause, if this option is open to the employer.

16. To increase the enforceability of restrictive covenants in your jurisdiction, is it beneficial for the covenants to explain why the employer needs to have the protection contained in the restrictions?

Yes; while this is not common practice, it will help to illustrate that the covenant is necessary for the protection of the company's legitimate interests (see Question 17).

17. What legitimate business interests may be recognised in your jurisdiction as being capable of protection by restrictive covenants?

A non-competition clause is lawful only in so far as the restriction of freedom which it entails is necessary to the protection of the company's legitimate interests, assessed on the basis of the employee's role and job level (see Question 22), such as:

- Client base.
- Manufacturing process.
- Pricing.
- Strategy.

The employer must establish that the company would be likely to suffer effective damage if the employee were to carry out their professional activity in a competing company (*Dijon Court of Appeal, 22 May 2001, RJS 2002, n° 378, Paris Court of Appeal,19 May 2020, n°18/01931; Paris Court of Appeal,19 May 2020, n°18/01931*).

18. To increase the enforceability of restrictive covenants in your jurisdiction, must they be limited in terms of the restricted activities?

Yes, restricted activities should be limited by being precisely defined.

A non-compete clause should leave the employee with the possibility of exercising a professional activity in accordance with their training and professional experience.

As an illustration, a restrictive covenant drafted in such general terms that it prohibits an employee from carrying on a professional activity corresponding to their professional experience acquired over 20 years is likely to be void.

19. To increase the enforceability of restrictive covenants in your jurisdiction, should any competitors be specifically listed? Are there any potential disadvantages or consequences of listing the competitors, that is, those not listed may not then be included?

Yes, it is possible to list the competitors specifically and to draft the clause in such a way that the list is not understood as a restrictive list (that is, competitors not listed will still be included).

This is recommended, because if the clause is instead drafted in such a way that it is considered to constitute a comprehensive list of competitors, then as competition within the market evolves, the list may no longer be up-to-date, and any change to the list will require the employee's consent.

20. To increase the enforceability of restrictive covenants in your jurisdiction, must they be limited in terms of the restricted period of time? If so, what is this period likely to be in practice?

Yes, it is compulsory for restrictive covenants to be limited in terms of their time period.

Standard practice would typically provide for a restrictive covenant of one to two years' duration.

However, CBAs may provide for a different period which must not be exceeded. If the non-compete obligation agreed to is for a longer period than the one provided for in the CBA, a judge may either decide that it is void altogether, or reduce it.

21. To increase the enforceability of restrictive covenants in your jurisdiction, must they be limited in terms of the restricted geographical area? If so, what is this geographical area likely to be in practice?

Yes, it is compulsory for restrictive covenants to be limited in terms of the restricted geographical area.

In practice, the scope of the prohibition's application will depend on a number of factors, including the perimeter of activity of the employee.

As an illustration, a court has recently considered that a non-competition clause covering the whole of

Europe and Asia-Pacific was not of itself unlawful, since it was not demonstrated that "the employee was unable to carry out an activity in accordance with her training, knowledge and professional experience" (*French Supreme Court, Employment Division, 3 July 2019, n°18-16.134*).

This was, however, quite exceptional. In another recent court decision, the Supreme Court considered that a non-competition clause covering the whole world was not properly restricted in terms of geographical area (*French Supreme Court, Employment Division, 8 April 2021, n°19-22.097*).

A careful balance must be struck between the duration of the prohibition and its geographical or professional scope (that is, a long-term commitment can be compensated by a more restricted geographical area, and vice versa).

22. In your jurisdiction, is it necessary for the restriction to reflect the employee's role and job level?

Yes; the courts will assess the protection of the company's legitimate interests in light of the employee's role and job level; this is one of the main conditions for the validity of the restrictive covenant (see Question 17).

The employer must establish that the company would be likely to suffer effective damage if the employee were to carry out their professional activity in a competing company (*Dijon Court of Appeal, 22 May 2001, RJS 2002, n° 378; Paris Court of Appeal,19 May 2020, n° 18/01931*).

In assessing this, the courts take account of various factors, such as among other things:

- The employee's qualifications.
- The nature of the duties performed by the employee.
- The conditions under which those duties are performed (in particular, whether customer contacts and knowledge have been acquired).

23. Will the reasonableness of any restraints be considered more by reference to the status of the employee at the time of entering into the restraint as opposed to on termination of their employment?

French case law considers that the validity of the non-competition clause must be assessed on the date the agreement was concluded; that is, at the time of entering into the restraint, as opposed to on termination of the employee's employment.

Garden Leave

24. Can an employee be placed on garden leave prior to termination in your jurisdiction, that is a period during which the employee remains employed and bound by their employment terms but is released from their duties, usually prior to termination (see Standard document, Restrictive covenant clauses: International: clause 2.4)?

No, the concept of garden leave does not exist under French law.

On termination of employment, an employer has two options available:

- To exempt the employee from work during all or part of the notice period and offer pay in lieu of notice.
- To require the employee to work until the end of the notice period.

If the employee is exempted from work during the notice period and if the employer has the contractual option to waive the non-compete, the latter must immediately let the employee know whether the non-compete is going to be waived (*French Supreme Court, Employment Division, 22 June 2011, 09-68.762*).

An employee exempted by their employer from working the notice period may take up a new job during the notice period, even though the employment contract is not terminated. In this situation, if the non-compete has been waived, the employee may therefore immediately compete. If the non-compete is not waived, it applies as soon as the employee physically leaves the company.

25. If the answer to the question above is "yes", will the inclusion of a clause such as Standard document, Restrictive covenant clauses: International: clause 2.4 (which reduces the period of the restriction by the garden leave period) increase the likelihood of the restriction being enforceable?

See Question 24.

Potential future employer

26. Is the requirement for the employee to give any person making an offer to them a copy of these restrictions, as set out in Standard document, Restrictive covenant clauses: International: clause 2.5, permitted and enforceable in your jurisdiction?

This requirement is quite unusual.

It is unlikely to be enforceable, given that it could be considered an unlawful restraint on the employee's freedom to work.

27. Is the requirement for the employee to tell their employer the identity of any person and business concern making an offer to the employee, as set out in Standard document, Restrictive covenant clauses: International: clause 2.5, permitted and enforceable in your jurisdiction?

This requirement is quite unusual.

It is unlikely to be enforceable, given that it could be considered an unlawful restraint on the employee's freedom to work.

Separate legal advice

28. Is it common practice to include the wording of Standard document, Restrictive covenant clauses: International: clause 2.6 in restrictions in your jurisdiction (that is, stating that the parties have entered into the restriction having obtained separate legal advice) so as to increase the likelihood of the restriction being enforceable?

No, it is not common practice to include this wording, nor for employees to obtain separate legal advice before signing their employment contracts.

It will not have the effect of increasing the likelihood of the clause being enforceable.

Severability

29. Is a severability clause as set out in Standard document, Restrictive covenant clauses: International: clause 2.7 likely to be valid and enforceable in your jurisdiction?

No, it is not common practice to include a severability clause like this under French law.

Where a non-competition clause does not meet the conditions of validity set out in Question 8, it is, in principle, void. A severability clause cannot have the effect of making the judge enforce one specific restriction (for example, the geographical scope only).

That being said, regardless of the inclusion of a severability clause, the judge can "blue pencil" the clause to moderate any covenants deemed excessive, for example by reducing their scope or duration.

Transfer of a business

30. Is Standard document, Restrictive covenant clauses: International: clause 2.8 (requiring the employee to enter into a corresponding agreement with any new employer on the transfer of the employer's business) common practice and likely to be enforceable in your jurisdiction?

No, it is not common practice to require the employee to enter into a corresponding agreement with any new employer on the transfer of the employer's business.

This type of provision is very unlikely to be enforceable, given that it imposes important commitments on both the employee and the new employer, impeding their freedom to contract with other employers and leaving the employee's situation uncertain as to the extent of their freedom to seek work following termination with the new employer (because the competitors, trade secrets and business connections of the new employer may different to those of the existing employer) (see Question 1).

31. On the transfer of a business in your jurisdiction, will any agreement (containing restrictive covenants) entered into between the original employer and the employee transfer to the new employer automatically?

Yes, where the employees are automatically transferred as a result of the transfer of a business, the employment contract continues with the new employer under the conditions in force at the transferor's establishment at the time of the transfer (*Article L.1224-1, French Labour Code; French Supreme Court, Employment Division, 15 October 1997, n°95-42.454*). The restrictive covenants are therefore transferred to the transferee.

32. If the answer to the above question is "yes", will any post-termination restrictions that automatically transfer continue to relate to the original employer/the transferor's business (that is, because this was the entity that the subject matter of the restrictions applied to at the time the agreement was entered into)?

Yes, any post-termination restrictions that automatically transfer continue to relate to the original employer's business.

To enhance the protection, the restrictive covenant could be amended to mirror all the transferee's business activity.

Where the employment contract transfers with the employee's consent (that is, not automatically), we therefore recommend including an adapted version of the restrictive covenant to match the transferee's business activity in the document effecting the transfer of the employee. This document must be signed by the transferring employee.

This may prove difficult in an automatic transfer as it would require the employee's consent. However, in practice, we recommend amending the restrictive covenant in this way upon the transfer, if possible.

Group companies

33. At the start of Standard document, Restrictive covenant clauses: International: clause 2.1, is the inclusion of wording that the employer is taking the benefit of the restrictive covenants "for and on behalf of any Group Company" likely to enable the interests of group companies to be protected in your jurisdiction?

A restrictive covenant is designed to prevent the employee from competing directly or indirectly with their former employer, not the group to which it belongs.

As a result, the restrictive covenant cannot be to the direct benefit of the group company, regardless of the inclusion of such wording. However, referring to "Group Companies" in the covenant does not invalidate it. It could indirectly protect the group company's interests if the other companies in the group carry on a similar activity to that of the employer company, as their interests would fall within the protection of the legitimate interests of the employer.

34. If a clause seeking to include the interests of group companies in relation to any restrictions is permitted in your jurisdiction, would the interests of the following entities be protected:

- Subsidiaries?
- Parent company?
- Other companies in the group?

Any of these companies can be protected to the extent that a legitimate interest exists (see Question 33).

35. Is Standard document, Restrictive covenant clauses: International: clause 2.9 (requiring the employee to enter into a separate agreement with any group company in respect of the restrictions) common practice and likely to be enforceable in your jurisdiction?

No; restrictive covenants are agreed on between the employer and the employee. It is not common practice to require an employee to enter into a separate agreement with any group company in respect of the post-termination restrictions, and this is unlikely to be enforceable.

36. Is there any third-party rights legislation in your jurisdiction that would enable any group company to enforce restrictive covenants that are entered into:

- in the initial contractual terms of employment between the employer and the employee; or
- in a separate agreement containing the restrictions between the employer and employee (for example, a termination or settlement agreement)?

There is no third-party rights legislation in France that would enable a group company to enforce restrictive covenants, regardless of whether the covenants were agreed in the employment contract itself or in a separate agreement (see Question 1).

Only the parties themselves should be able to enforce them, notably to claim compensation in the event of a breach of the covenant.

Consideration

37. In your jurisdiction, at the time of entering into these restrictions, does the employer need to provide consideration to the employee?

No, the employer does not have to provide any consideration at the time of entering into the covenant.

38. If consideration is required, what can this consideration be in your jurisdiction?

N/A.

39. If it is permissible in your jurisdiction for the restrictions to apply to any group company, will that entity need to provide separate consideration from that provided by the employer when the employee entered into the restrictions?

No separate consideration is required.

40. What are the consequences in your jurisdiction if the employer does not provide any consideration to the employee when they enter into restrictive covenants (for example, will the restrictive covenant be void and unenforceable)?

N/A.

Compensation

41. In your jurisdiction, is the employer required to provide compensation to the employee in relation to the restrictive covenants (for example, payments for the period of restriction)?

Yes; under French law, a non-competition clause that does not include an obligation for the employer to pay the employee financial compensation is void (*French Supreme Court, Employment Division, 30 June 2004, n°01-47.082*).

The financial compensation must be provided for in the employment contract or the separate non-compete agreement (*French Supreme Court, Employment Division, 15 November 2006, n°04-48.599*).

The financial compensation cannot be paid before the termination of the employment contract (*French Supreme Court, Employment Division, 7 March 2007, n°05-45.511*).

Only the amounts paid after the termination of the employment contract can be taken into account in assessing the lawfulness of the clause (*French Supreme Court, Employment Division, 22 June 2011, n°09-71.567*).

42. If the employer is required to pay compensation to the employee, how much is payable?

The amount of the financial compensation must be agreed on by the parties in the employment contract or the separate non-compete agreement.

The applicable CBA may provide for minimum compensation.

Compensation is generally proportional to the employee's salary and to the duration of the prohibition of competition.

A paltry financial consideration for the non-competition clause in an employment contract is equivalent to no consideration at all.

As an illustration, financial compensation ranging from 30% to 50% of an employee's monthly salary is generally regarded as reasonable, whereas compensation equivalent to 2.4 months' salary for a period of 24 months has been deemed insufficient (*French Supreme Court, Employment Division, 15 November 2006, n°04-46.721*).

Financial compensation cannot vary depending on the way an employee's employment was terminated. For example, the non-competition clause cannot provide that the financial compensation paid in case of resignation would be different from that awarded in case of dismissal (*French Supreme Court, Employment Division, 21 October 2020, n°19-18.928*).

43. If the employer is required to pay compensation to the employee, when is the compensation payable?

The employer can only pay compensation after the termination of employment.

The compensation is generally payable at the end of each month for which the restriction applies.

44. Is the employer able to waive any restrictive covenants at the time of termination in your jurisdiction? If so, how can the employer do this?

The employer can waive the non-competition clause unilaterally only if this option is provided for in the non-compete clause or, failing that, in the collective agreement to which the contract of employment refers. Otherwise, the employee's agreement is required (*French Supreme Court, Employment Division, 22 February 2006, n°04-45.406 and 17 February 1993, n°89-43.658*).

The employer must comply with the terms of the waiver set out in the employment contract or CBA (for example, the clause will provide for a specific time limit during which the non-competition clause can successfully be waived or a specific procedure to follow to waive the clause, for example by sending a registered letter with acknowledgment of receipt). In any event, the waiver must be unequivocal, and the employee must be individually notified of it (*French Supreme Court, Employment Division, 30 May 1990, n°87-40.485, 21 October 2009, n°08-40.828 and 21 October 2020, n°19-18.399*).

A waiver releases the employer from the obligation to pay the employee the compensation provided for in the non-competition clause, unless the clause itself or the relevant CBA provide otherwise. In return, the employee is released from their obligations under the clause.

An employer that does not follow the required waiver process, or that waives some but not all of the obligations, will not be released from the obligation to pay the financial compensation (*French Supreme Court, Employment Division, 13 October 1988, n°58-43.261*).

45. Will the employer still have to pay the compensation during the post-termination period of the restriction even if the employee finds alternative employment that does not breach the restrictive covenants with the employer?

Yes. The entitlement to compensation is based on:

- Termination of the employee's employment.
- Compliance with the non-competition clause.
- The absence of a waiver of the restriction by the employer.

The employer will therefore still have to pay the compensation during the post-termination period of the restriction if the employee finds alternative employment, provided that they have complied with the non-competition prohibition.

46. If the employer is able to waive the restrictive covenants, what amounts may be payable to the employee (for example, is the compensation still payable to the employee in full or a reduced sum)?

When the employer successfully waives the restrictive covenants, it is released from the payment of compensation, unless the non-compete clause itself or the relevant CBA provide otherwise (see Question 44).

Execution and other formalities

47. Do restrictive covenants have to be in writing in your jurisdiction to be valid and enforceable?

Statutes or case law do not expressly state that restrictive covenants have to be in writing. However, such a requirement is often set out in the CBA, and for evidentiary reasons a written document is necessary.

To be valid and enforceable, restrictive covenant will have to meet the conditions set out in Question 8. A verbal contract of employment cannot meet these conditions.

Case law has considered that it was inferred that an employee hired under a verbal employment contract was not bound by any non-competition clause (*French Supreme Court, Employment Division, 21 January 1987, n°84-40.673*).

48. What execution and other formalities are required for restrictive covenants to be valid and enforceable in your jurisdiction?

No execution or other formalities are required, but French courts often consider that the employee's written signature on the document demonstrates their consent to the non-compete.

49. In your jurisdiction do the restrictive covenants need to be registered or require any formal approval?

No.

General

50. Are any of the restrictive covenant clauses set out in Standard document, Restrictive covenant clauses: International not legally valid and enforceable or not standard practice in your jurisdiction?

Clause 2.1(c) is not standard practice under French law and is likely to be considered both unlawful and unenforceable, given that it may constitute an unlawful restraint to freedom to work (see Question 10).

The restriction set out in clause 2.1(f) is rarely encountered in practice, because there would be other legal recourses available without having to justify a contractual breach (see Question 8).

Clause 2.4 is irrelevant to French law, since the concept of garden leave does not exist, and the restrictive covenant will be deemed to apply on departure of the employee if they are exempted from working their notice period (see Question 24).

Clause 2.5 is not standard practice in France. It could be considered an unlawful restraint on the employee's freedom to work, and is unlikely to be enforceable (see Question 26 and Question 27).

Clause 2.6 is rather unusual and does not correspond to local practice (see Question 28).

Clause 2.8 is unusual and likely to be found invalid, as it imposes too great a commitment on both the employee and the employer, impeding their freedom to contract and leaving the employee in a situation of uncertainty as to the extent of their freedom to seek work (see Question 30).

Clause 2.9 is not common practice and is unlikely to be enforceable, as a restrictive covenant can only be to the direct benefit of the employer (as opposed to any group company) and because an employee cannot be forced to enter into subsequent separate agreements with a group company (see Question 33 and Question 35).

51. Are there any other clauses that would be usual to see in restrictive covenant clauses and/or that are standard practice in your jurisdiction?

It is standard practice under French law to provide additional explanations regarding the payment of the financial compensation.

Such a clause could be drafted as follows:

> "For the entire duration of the non-compete clause, the employer shall pay the employee a monthly indemnity amounting to [amount] % of the total remuneration received over the last 12 months by the employee for each month that the non-compete clause applies."

A penalty clause is sometimes included for the employer to obtain a lump-sum compensation without having to prove the exact damage suffered if the employee breaches their restrictive covenants.

In the absence of a penalty clause, a court will assess the damages based on the elements brought forward by the parties.

If a penalty clause is included, a court may increase or decrease the penalty set out in the clause only if it is deemed manifestly excessive or derisory.

The penalty clause could be drafted as follows:

> "Any infringement of the non-compete obligation releases the company from the payment of the financial compensation and makes the employee liable for the reimbursement of any sums received in that respect.
>
> Any failure to comply with this non-competition clause will automatically render the employee liable to pay a penalty to its employer of € [amount], without the need for a formal notice to cease the competitive activity."

Remedies for breach

52. What remedies are available for breach of restrictive covenants? How long will each remedy take to obtain in your jurisdiction?

Where the employee even temporarily breaches the restrictive covenant, the employer can bring summary proceedings, to seek an injunction to remedy the circumstances.

In summary proceedings, the judge has limited power: they can only prescribe precautionary measures or measures of reinstatement in order to prevent or stop the breach, or remedy it. This would include issuing an injunction ordering the former employee to cease certain competing actions, or to give an amount of money as an advance on damages to be claimed in an action on the merits. Such a decision can only be obtained if the existence of the non-compete obligation is not seriously questionable and when the recurrence and duration of the breach require such an immediate decision.

They cannot order the judicial termination of the employment contract concluded with the new employer, nor a measure obliging a former employee to terminate

that employment relationship (*French Supreme Court, Employment Division, 30 May 2013 n° 12-14.289*).

It is only if the employer brings a full claim on the merits that the employee may be ordered, subject to a penalty payment, to terminate the employment contract concluded in breach of the non-competition undertaking (*French Supreme Court, Employment Division, 16 October 1958, n°57-10.297*).

An employee who even temporarily breaches the contractual non-compete obligation loses the right to the financial compensation associated with the non-compete.

They may also be ordered to reimburse the sums received in this respect, except for those paid for the time during which the obligation was complied with.

The employee may also be ordered to pay compensation for the damages incurred by their former employer.

In parallel, the new employer will also be liable if it hired the employee while knowing they were bound by a non-compete clause. This is because hiring an employee in violation of a non-competition clause is a tort that would give rise to liability for the damages incurred, irrespective of potential unfair competition liabilities.

While summary proceedings are likely to take a few weeks, securing a hearing on the merits before the Employment Tribunal can take up to two years.

53. Would a successful party be able to recover its costs from the losing party for any successful action for breach of restrictive covenants?

These decisions are taken by a judge on a case-by-case basis, and only allow for a very limited recovery.

54. If there are no restrictive covenants with the employee, can the employer rely on any other actions or remedies to protect its business, clients, customers or confidential information in your jurisdiction?

Regardless of whether an employee is bound by a restrictive covenant, acts of unfair competition remain prohibited (*Articles 1240 and 1241, French Civil Code*).

While the notion of unfair competition is not defined by statute, it is considered that wrongful acts which entail the following consequences are classified as unfair competition:

- Disorganisation of the former employer's business (for example, a leaving employee hiring all of their previous colleagues to their new place of work, forcing the former employer to hire and train new employees).
- Commercial disturbance caused to the former employer.
- Creation of confusion in the minds of the employer's customers and/or in the minds of specialists in the field of activity in question.

The former employer may bring an action for unfair competition against its former employee or against the new employer. This action must generally be brought before the judicial court (as opposed to the employment court).

Judges have full latitude to assess the amount of damages to compensate for the loss suffered by the former employer.

Contributor profiles

Philippe Thomas, Partner

Dechert LLP

T +33 1 57 57 80 91

E philippe.thomas@dechert.com

Areas of Practice: Labour and Employment.

Maëlle Chausse, Associate

Dechert LLP

T +33 1 57 57 80 81

Areas of Practice: Labour and Employment.