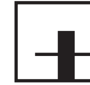

Going Global
Restrictive covenants

As your business grows internationally, protecting it becomes more complicated. The approach taken to restrictive covenants can differ hugely depending on the country you are operating in. Some areas, like the UK and most of Europe will enforce reasonable restrictions, while other jurisdictions, including several states in the USA, are far more reluctant to do so. In this briefing, Part Three of our *Going Global Guide*, we consider how to limit unlawful competition and protect your client relationships and information in an international context.

Do you need restrictive covenants to protect your business?

Before imposing restrictions on employees, consider whether they are necessary. For junior employees or those with limited access to business critical information/connections you may decide against them. Alternatively, the sector you operate in may not tend to use restrictions and insisting on these could discourage candidates from joining you. Restrictive covenants are normally considered at the outset of the employment relationship and should be kept under review and re-stated when necessary to ensure that they remain fit for purpose.

Garden leave provisions are often used alongside restrictive covenants, as another way of protecting your business while the employee is under notice. An employee on garden leave remains employed on full pay and is bound by their duties as an employee, but you can restrict their activities by excluding them from work premises and preventing them from dealing with customers, clients, suppliers or competitors. However, in some jurisdictions, including a number of states in the USA, garden leave provisions are prohibited, often because they are seen to breach the principle of 'employment at will'. Don't assume that you can rely on garden leave clauses in all countries.

What do you need to protect?

In the UK, and many other jurisdictions, the court's starting position is that restrictive covenants are unenforceable as a restraint on an employee's ability to trade, unless they are necessary to protect the business. Therefore, to maximise the enforceability of the restrictions, they must be tailored to

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the individual and kept as narrow as possible. Common restrictions include post-termination prohibitions on competing with the company, working with your suppliers, customers or clients, and poaching your employees. The extent to which each of these is relevant will depend on the nature of your business, the sector you operate in and the role of the employee.

How long do you need to be protected?

If a restriction lasts too long (in the eyes of the court) it will not be enforceable at all under UK law and similar rules apply in many other jurisdictions. You should consider not only how long you would like a particular restriction to last, but also what makes that time period necessary to protect your business interests. For example, if supplier contracts are negotiated twice a year, a nine-month restriction on dealing with suppliers may be appropriate. Just because a period is appropriate for one type of restriction, does not mean it should be used for all.

Where do you need the protection?

If your business operates globally, you may wish to restrict employees' activities across the globe too. However, some common problems can arise:

- Firstly, in many jurisdictions non-compete restrictions are unenforceable. For example, in California it is extremely difficult to enforce such a restriction. However, just because a restriction may not be enforceable, doesn't mean you shouldn't include it: even unenforceable restrictions can deter employees from acting in a certain way.
- Secondly, restrictions must be reasonable. While the business may operate globally, it is less likely that the individual employee will. Consider which territories are relevant to the particular employee and ensure that restrictions are not so onerous they are held to be unenforceable. In some (probably rare) cases, a worldwide restriction will be reasonable, for example, where work relates to technology where the market is very much a global one.

How to draft the restrictions?

Taking legal advice is recommended when drafting restrictive covenants. This is particularly important when you have employees working internationally. Often the first consideration is whether to use one contract to document all the restrictions across many jurisdictions, or whether to enter into a number of separate agreements. As a rule of thumb, using one agreement may initially be favoured by parties as it is simpler and more likely to tie in with the style contract normally used across the business. However, there is a risk that in trying to make one agreement work in a range of jurisdictions, you may end up with a compromise which does not offer sufficient protection in any jurisdiction.

Which law should you choose?

If you have opted for separate agreements for each country, then you will have the freedom to choose the most relevant law for each agreement after taking local advice.

If you are incorporating global restrictions into one agreement, then the appropriate choice of law may not be obvious. UK law permits restrictive covenants provided they restrict the employee no more than is necessary to protect the legitimate interests of the business. However, the law in some other countries is less flexible.

While employees may need to work in areas where restrictions cannot be enforced, you can ensure that you do not select these laws to govern your global contract.

Enforcing a restrictive covenant often involves acting quickly to prevent a breach or limit the damage.

How do you enforce the restrictions?

Enforcing a restrictive covenant often involves acting quickly to prevent a breach or limit the damage. If the dispute cannot be resolved by agreement, and/or by the employee signing an undertaking, court action may be necessary. Where there are international issues to consider, this can become far more complex.

Single jurisdiction

The simplest situation is where everything relates to one country: for example, a UK employee is restricted from competing with your business in the UK under a contract governed by UK law. In these circumstances, the employer would commonly seek an interim order from the relevant courts in the UK to prevent the employee from breaching the restrictions pending a full hearing on whether the restriction is enforceable, and whether it has been breached. If there has been a breach the court will issue a judgment on that basis. If the employee continues to ignore the restrictions and/or breaches a court order, the employer can take steps within the UK to enforce that order or claim damages for the breach. Penalties for breaching a court order can include fines and even imprisonment. While each country's court system will have different procedures, costs and timescales, many follow a similar format.

Cross border litigation

The legal process becomes far more complex where there is a cross border element. For example, a US company may employ a UK national to work in their London office under an employment contract governed by the laws of Massachusetts. The court will need to determine whether it has jurisdiction to hear the claim. Even if it does, it may need to hear evidence from an expert in the governing foreign law (Massachusetts in our example). This can significantly add to the time and expense of proceedings.

Enforcing the court's judgment

Enforcement is likely to be relatively straightforward in the jurisdiction where the judgment of the court was given. However, it is not uncommon for an employer who receives a court order in one jurisdiction, to want to enforce it in another. For example, a UK court may decide that an employee is restricted from working for a competitor business anywhere in the world for a set period. If the employee ignores this and takes a job with a foreign competitor, the employer is then faced with the problem of enforcing the UK judgment in a foreign jurisdiction.

Employers should consider whether it is practical to take enforcement action via the relevant courts in the UK, and if not, how to enforce the judgment overseas. International agreements between various countries govern whether and how to enforce foreign judgments within certain territories. The first step is to determine if such an agreement exists between the country where the judgment was delivered, and the country in which you are seeking to enforce it. Even if such an agreement exists, if the right that you are trying to enforce is not one recognised by the country in which you are trying to enforce it (for example, a country which does not recognise the concept of restrictive covenants) you could be left without a remedy as the court may not be prepared or required to uphold the judgment of the foreign court to prevent a person engaging in what would otherwise be legal conduct within their territory.

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Summary

To help protect your business, it is worth carefully considering restrictive covenants at the recruitment stage; having a rough plan of how you would react to a breach (and before which country's courts); and seeking international legal support so that you are aware of any potential pitfalls well in advance. Restrictions should also be reviewed on promotions/changes in role. Don't be discouraged from trying to protect your global business, just make sure you know how to do it effectively.

This briefing is Part Three of our six-part *Going Global Guide* to international employment issues**.** The complete guide includes:

- Part One: Territorial scope of UK employment law
- Part Two: Employment contracts
- **Part Three: Restrictive covenants**
- Part Four: Employment checklist
- Part Five: Secondments
- Part Six: International employees working in the UK

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This briefing contains a summary of general principles of law. It is not a substitute for specific legal advice.

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