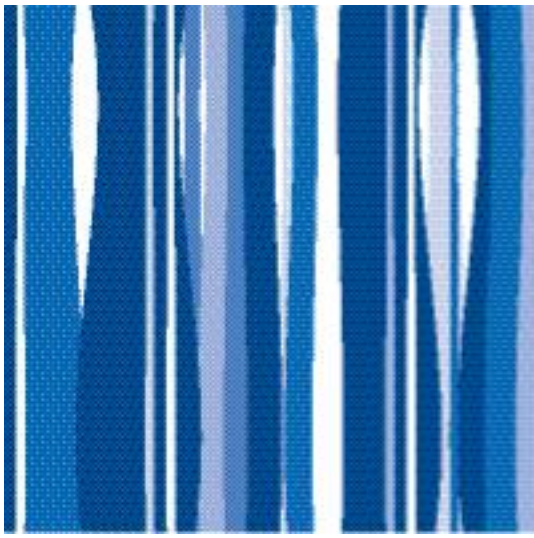
FRESHFIELDS BRUCKHAUS DERINGER

Restrictive covenants across Europe and Asia



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For further information please contact

Jean-François Gerard
Bastion Tower
Place du Champ de Mars/
Marsveldplein 5
B-1050 Brussels
T +32 2 504 7697
F +32 2 404 7697
E jean-francois.gerard@freshfields.com

www.freshfields.com

Introduction

Recent studies confirm that the scramble for global talent is high on employers' agendas. Global companies that were largely introspective, focusing on cost-cutting and downsizing during 2009, are now considering how best to adapt to dealing with those long-awaited 'green shoots of recovery'. The steps taken during 2009 to reduce head count may not have left companies with the right blend of employee skill and experience to maximise the opportunities for recovery and therefore the search for global talent is now on. Employers are considering not just their own key staff, but, more important, are looking at the talent of their competitors.

It is critical that employers are alive to this possibility and consider now how best to protect both their workforce and their business. This will be of particular relevance for those employers who kept investing in their key people during the downturn and don't want these employees leaving and potentially damaging the business.

To do this effectively, employers need to understand the best ways of protecting their businesses using restrictive covenants. Global employers will also need to be conscious of the different approaches to these issues taken by courts across the globe and to understand how best to put in place protection in each of the jurisdictions in which they operate.

This guide considers these issues and gives guidance on how best to protect your workforce in a period of economic recovery. It gives a flavour of the types of protections available and associated issues that arise in some key jurisdictions.

Austria

Are post-termination restrictive covenants enforceable?

As a general rule, post-termination restrictive covenants are enforceable against employees who receive a gross monthly salary in excess of €2,329 in their last month of employment (this is the 2010 figure; it increases yearly). Non-compete clauses are valid as long as the restriction applies only to the employer's line of business, does not exceed one year and does not cause an undue hardship in preventing the employee from finding a suitable position on the job market.

As a general rule, a restrictive covenant will be enforceable only if the employee resigns, is dismissed for cause or if the employer undertakes, at the time of termination, to pay full salary and benefits during the entire restriction period.

Are there different types of restrictive covenants?

There is no statutory differentiation between types of restrictive covenants.

What are the procedural requirements of a restrictive covenant?

A restrictive covenant is considered to be part of the employment contract and must be mutually agreed. There is no requirement that the covenant be set out in writing, but this is the preferred approach.

Is it possible to vary an employment contract to include a restrictive covenant?

Yes, provided that both parties agree to the variation.

What is the permissible term of a restrictive covenant?

It must not exceed one year.

What is the permissible scope of a restrictive covenant?

Non-compete clauses must be limited to the employer's line of business and must not cause an undue hardship by preventing the employee from finding a suitable position on the job market. The geographic reach of the covenant plays a significant role in determining whether these conditions are met, but all the circumstances of the individual case will be taken into account. For example, a judge will consider the market in which the employer operates, the geographic reach of the covenant and the specific training and experience of the employee – ie whether he has a realistic prospect of finding a suitable position in an alternative line of business or outside the covenant's geographic reach.

Does the employer have to compensate the employee for the restrictive covenant?

If the employee has resigned (without good cause) or is dismissed for cause, the employer is not required to make any payments during the life of the covenant. However, if the employment is terminated by the employer (without good cause), the employer would need to specifically undertake to compensate the employee for the period of time the covenant shall be

applicable (100 per cent of all benefits), otherwise the restrictive covenant will not be effective. In all other cases, the restrictive covenant will not be effective.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
Yes, restrictive covenants are normally preferable. The restriction on post-contractual competition is much less expensive than an extended notice period (during which the employee is always entitled to full remuneration). However, the legal protection for the employer is significantly weaker.

How can an employer enforce a restrictive covenant?
The employer can seek an injunction and/or damages (see also the following questions).

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
If the parties did not agree on liquidated damages, the employer can file for injunctive relief in relation to the employee's competitive professional activity. If the employee is in breach of the restrictive covenant, the employer can also seek damages, but these are normally difficult to prove.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Yes, liquidated damages are permitted. There are no limits on what can be agreed contractually. However, any pre-agreed sum can be reduced by a court decision on the basis of the court's equitable discretion.

If a certain sum has been agreed for damages on a breach of the restrictive covenant, the employer's claim for damages is limited to that amount. He is not entitled to further claims for damages or to seek an injunction.

Can the employer sue the new employer of an employee who is breaching his covenants?
As a general rule, no. The mere fact that the new employer has knowledge of the breach of a non-compete clause does not constitute anti-competitive conduct. The offer and acceptance of an employment contract despite the knowledge of a breach of a non-compete clause is not in itself unlawful either.

However, if the new employer solicits or incites the employee to breach a non-compete clause or assists him in any way in doing so (eg by covering the liquidated damages), this would constitute anti-competitive behaviour. If this were the case, the previous employer could claim damages from the new employer and seek an injunction against the new employer.

Belgium

Are post-termination restrictive covenants enforceable?

Non-compete covenants are enforceable provided that they comply with stringent formal requirements. These differ depending on whether the employee qualifies as:

- a sales representative (whose annual salary should amount to at least €30,327 (this is the 2010 figure; it changes each year) gross at the time of termination); or
- a non-sales representative (whose annual salary should amount to at least €60,654 (for 2010) gross at the time of termination).

For non-sales representatives, 'standard' and 'extended' covenants are available; the requirements for enforceability vary depending on which type is used.

All non-compete covenants need to relate to activities similar to those undertaken by the employee during his employment – ie professional activities with a competitor of the employer that are similar to functions undertaken by the employee while working for the employer.

A non-compete covenant for a sales representative will not be enforceable if the employee is dismissed during a trial period or, after the trial period, if the employment contract is terminated because of a serious breach by the employer. Nor will it apply if the employer dismisses the employee without serious misconduct on the employee's part. The post-termination restriction must be limited to the sector in which the sales representative performed his activities.

The standard non-compete restriction for a non-sales representative must be limited to the geographical area in which the employee can effectively compete with the employer and, in any event, its territorial scope must not exceed the Belgian territory. It will not be enforceable in the case of termination during the trial period for whatever reason or, after the trial period, if the employment contract is terminated because of a serious breach by the employer or if the employer dismisses the employee without serious misconduct on the employee's part.

An extended non-compete clause for a non-sales representative will not be enforceable if the employment contract is terminated as a result of a serious breach by the employer. In the case of termination during the trial period, it will be enforceable only for a period equal to the time that the employee worked for the employer. There is no strict legal limitation to the territorial scope, but the geographical scope must be clearly defined within the clause.

Non-compete restrictions may be difficult to enforce. This is partly because the burden of proving a breach lies with the employer and partly because they relate only to activities undertaken by the employee for the benefit of a

competitor and similar to those undertaken for the previous employer. The scope of non-compete covenants is therefore seen as limited.

It should also be noted that including a non-compete covenant in a sales representative's contract leads to the presumption that the sales representative has brought new clients to the business. This presumption eases the burden of proof for a sales representative claiming additional entitlements from his former employer on termination.

Are there different types of restrictive covenants?
Under Belgian law, there are non-compete covenants for sales representatives and two types of non-compete covenants for non-sales representatives (a standard and an extended covenant; see above). Extended covenants are an option only for companies with either: (a) international activities or important economic, technical or financial interests on the international markets; or (b) their own research departments.

What are the procedural requirements of a restrictive covenant?
A non-compete covenant should be made in writing and deal with the following matters:

- the activities to which it relates;
- the geographical scope;
- the duration; and
- for non-sales representatives, the fact that a non-compete indemnity will be paid unless the employer waives the application of the covenant within 15 days of the termination of the employment contract.

Is it possible to vary an employment contract to include a restrictive covenant?
Yes, but this will require the employee's consent.

What is the permissible term of a restrictive covenant?
For sales representatives, a restrictive covenant should be limited to 12 months.

For non-sales representatives, the standard covenant must also be limited to 12 months. For the extended covenant, the duration must pass a test of reasonableness. The maximum term considered to be reasonable is around 24 to 36 months.

What is the permissible scope of a restrictive covenant?
All non-compete covenants must relate to activities similar to those undertaken by the employee during his appointment – ie professional activities with a competitor of the employer and similar to functions undertaken by the employee while working for the employer.

A non-compete covenant for a sales representative must be limited to the sector in which the sales representative performed his activities.

A standard non-compete restriction for a non-sales representative must be limited to the geographical area in which the employee can effectively compete with the employer and its territorial scope must not go beyond Belgium.

There is no strict legal limitation of the territorial scope for an extended non-compete restriction for a non-sales representative, but this must be clearly stated within the clause.

Does the employer have to compensate the employee for the restrictive covenant?
No compensation is required for sales representatives.

For non-sales representatives (for both standard and extended restrictions), a lump sum of at least 50 per cent of the gross remuneration corresponding to the duration of the covenant must be paid to the employee. This sum is calculated by reference to the gross remuneration paid to the employee during the month preceding the date of termination. For employees who receive variable pay, the lump sum is calculated by taking an average of the pay received over the 12 months preceding the date of termination.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
Yes. From a costs perspective, a restrictive covenant is more attractive than an extended notice period on full salary.

Garden leave is not available in Belgium; an employer cannot require an employee not to attend work as normal during his notice period unless the employee consents to doing so.

How can an employer enforce a restrictive covenant?
The employer can claim financial compensation (damages) and/or an injunction.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes. If a non-sales representative breaches his non-compete covenant, he will be obliged to repay twice the amount of the non-compete indemnity received as compensation from the employer for the application of the clause.

The non-compete clause for sales representatives can provide for liquidated damages (ie payment of a pre-agreed amount if a breach occurs), but this must not exceed three months' salary.

The employer can claim damages in addition to the above, in relation to both sales and non-sales representatives, provided it can prove any additional losses incurred.

A non-sales representative can also request a reduction of the repayment obligation outlined above, taking into account loss caused to the company and the period during which he complied with the non-compete restriction.

Are liquidated damages permitted? If so, are there limits on what can be agreed?
Yes – see above.

Can the employer sue the new employer of an employee who is breaching his covenants?
Yes, provided that unfair trading practices can be proven against the new employer, such as complicity in the breach of the non-compete covenant.

China

Are post-termination restrictive covenants enforceable?
Yes, but only for employees who can be classified as senior management or senior technicians or for those employees who have access to confidential information.

Are there different types of restrictive covenants?
The only restrictions explicitly addressed in the People's Republic of China (PRC) labour laws are 'competition restrictions' preventing an employee from working for another employer that 'produces the same type of products or is engaged in the same type of business' as the current employer. Broader restrictive covenants that cover non-solicitation, non-poaching and non-dealing are not expressly dealt with under PRC laws and their enforceability is not absolute under PRC laws. It is common for employers to include these obligations as part of an employee's more conventional non-compete obligations, which prohibit an employee from working for or establishing a business that produces the same products or engages in the same type of business as the employer.

What are the procedural requirements of a restrictive covenant?
Restrictive covenants must be agreed in writing by the employer and employee. It is a relatively common practice in the PRC for restrictive covenants to form part of a separate confidentiality agreement with the employee.

Is it possible to vary an employment contract to include a restrictive covenant?
Any variation of an employment contract must be agreed in writing after fair and free negotiations. On this basis, if the only change to an employment contract is the insertion of a restrictive covenant, an employer would usually face a substantial burden in demonstrating that this variation was based on fair and free negotiations, and risks finding that the variation is unenforceable.

If an employer proposes varying an employment contract to include a restrictive covenant, the employer should document the relevant negotiations and the reason for inserting the restrictive covenant. Furthermore, it would be preferable to make some other changes to the employment contract in favour of the employee to demonstrate that the negotiations were on a fair and voluntary basis.

What is the permissible term of a restrictive covenant?
It should not exceed two years. This limit is prescribed by legislation.

What is the permissible scope of a restrictive covenant?
Restrictive covenants may only restrict an individual from working for up to two years with another employer or establishing another business that produces the same products as the current employer or engages in the same type of business as the current employer. Provided that the scope and the

geography are agreed between the employee and employer, the laws do not contain restrictions on the reasonableness of the restrictions on the individual.

Much of the present case law on restrictive covenants focuses on the amount of compensation that is payable under these arrangements. We anticipate that in the coming year or two, the labour arbitration tribunals, courts and lawmakers will issue further clarification on the appropriate scope of restrictive covenants.

Does the employer have to compensate the employee for the restrictive covenant?
Yes, monthly compensation must be paid and it is preferable if this sum is set out in the contract. If the amount is not stated in the contract, the restrictive covenant is not necessarily void, but the compensation must be paid in accordance with local regulations.

The minimum rate varies by locality but, as a general rule, 40 per cent of an employee's 'average monthly wage' tends to be suitable. In determining the average monthly wage, the generally accepted approach is to take an employee's total remuneration (including bonuses and allowances) for the previous year and to divide that by 12. However, companies should confirm the position under local regulations before finalising the contract.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
Yes, in most circumstances.

Some localities in the PRC permit contracts to have extended notice periods for senior employees to allow for an orderly handover of responsibility and key knowledge. However, this approach is problematic because it is not available in many cities and the individual must be given meaningful work to do during that period.

Garden leave is not usually challenged if an employee receives his usual pay and allowances during the relevant period. Senior employees, at times, argue that garden leave infringes their right to work. They may challenge it by arguing that the garden leave is actually an amendment to the labour contract (ie a change of the position or job description), which needs the parties' agreement. This is a matter yet to be settled by the PRC courts and lawmakers.

How can an employer enforce a restrictive covenant?
In most localities, it has become accepted practice for restrictive covenants to be enforced through the labour arbitration tribunals. On appeal, the matter is progressed through the court system.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes. The general principles under PRC contract law apply so that the aggrieved former employer is compensated for the economic loss caused by

the breach of the restrictive covenant. As a practical matter, proving the size of the economic loss is a significant hurdle and the labour arbitration tribunals are generally more sympathetic to employees. For this reason, the preferred approach in the PRC is to stipulate an amount of liquidated damages for breach (ie payment of a pre-agreed amount if a breach occurs).

Are liquidated damages permitted? If so, are there limits on what can be agreed?

As a general principle, the stipulated liquidated damages amounts are enforceable in the PRC. However, if the amount is lower than the loss incurred, the former employer can apply to the People's Court and seek an increased damages award. If the liquidated damages amount is *excessively* high, the former employee can apply to the People's Court for a reduction of the award.

Can the employer sue the new employer of an employee who is breaching his covenants?

Although PRC law does not expressly provide for this, a new employer is likely to be held by the court as jointly liable for the damages and obligations arising from its employee's breach of non-compete restrictive covenants.

In addition, a new employer is liable under PRC unfair competition law if it can be shown that the new employer is using the 'protected trade secrets' of the former employer; to this end, the way in which the new employer deploys the former employee within its business is relevant to demonstrating this cause of action.

The former employer must show that the new employer is using its trade secrets. This is a significant practical hurdle. Assuming that this can be proven, the second hurdle is that the former employer must demonstrate that the relevant trade secrets are protected in the relevant sense: that is, the information is not generally known to the public and its use can bring economic benefits to the user, and that the former employer had taken appropriate measures to protect its confidentiality. Examples of appropriate measures to protect confidentiality include entering into restrictive covenants and confidentiality agreements with senior employees and other technical staff.

Estonia

Are post-termination restrictive covenants enforceable?
Restrictive covenants are enforceable in Estonia, provided the scope of the restrictive covenant is limited to the protection of the employer's legitimate business interest, such as the need to protect production or business secrets, including confidential information (eg business strategy, client relationships, marketing, etc). Non-compete covenants must be made in writing to be enforceable.

Confidentiality obligations apply to employees automatically (without any need for any contractual obligations) provided that it is made clear to the employee which information is confidential.

Are there different types of restrictive covenants?
Employment law provides specific regulations for two types of restrictive covenants:

- non-compete clauses to prevent the employee from working for the employer's competitor or to be engaged in the same economic or professional activity; and
- confidentiality clauses to protect the employer's production and trade secrets.

In practice, non-solicitation clauses are also used to prevent the employee from soliciting (former) colleagues to work with him and from approaching the (former) employer's customers.

What are the procedural requirements of a restrictive covenant?
A restrictive covenant is part of the employment contract and should be concluded in writing. Separate agreements regarding restrictive covenants may also be concluded. The Employment Contract Act provides certain prerequisites that have to be fulfilled in order for non-compete clauses and confidentiality clauses to be valid and enforceable.

The employee's duty to maintain confidentiality is regulated in law. Thus, an agreement in writing is not necessary.

Is it possible to vary an employment contract to include a restrictive covenant?
Yes, by mutual agreement only for non-compete and non-solicitation clauses.

The obligation to maintain confidentiality applies to an employee even if it has not been agreed on in the employment contract (or in a separate agreement). The only requirement is that the scope of the confidentiality obligation must be clearly defined to the employee. Therefore, the employer is free to change the scope of the confidentiality restrictions at any time (so long as they are reasonable), by notifying the employee a reasonable period in advance.

What is the permissible term of a restrictive covenant?
A maximum of one year after the employment has been terminated is permissible for non-compete covenants. The obligation to keep confidentiality remains in force until the confidential information becomes publicly known or until the employer divulges it. This period may well be over one year after the termination of the employment contract.

What is the permissible scope of a restrictive covenant?
When agreeing non-compete clauses, the employer should define the field of activity or exact enterprises in which the employee is not permitted to work. The employer should be able to show that the non-compete clause is necessary for protecting the employer's legitimate business interest, and should not cover for example a field of activity in which the employer is or was not active. In practice, it is uncommon for the validity of non-compete clauses to be contested. Where clauses are contested, the main question that arises is the amount of reasonable compensation paid to the employee in relation to the non-compete agreement.

For non-solicitation clauses, parties may agree that it is forbidden for the employee to solicit away other employees of the former employer; and agree that the employee may not do business with the former employer's customers. A non-solicitation clause does not have to be related to the employee's field of activity while employed by the former employer. If it is necessary for protection of the employer's business interests, the non-solicitation clause might well cover all of the employer's fields of activity.

Does the employer have to compensate the employee for the restrictive covenant?
Confidentiality clause: No

Non-compete clause: If a non-compete clause is to remain in force after the termination of the employment contract, reasonable remuneration must be paid to the employee – reasonableness is assessed by reference to the scope of the non-compete clause. During the validity of the employment contract, no compensation has to be paid.

If the employer wishes to stop paying a former employee for a non-compete clause, the employer may release the employee from the non-compete clause at any time by giving 30 days' notice.

Non-solicitation clause: No

Are restrictive covenants preferable to an extended notice period combined with garden leave?
It is not possible to require an employee to give more than the statutory period of notice, although an employer may agree to give longer notice.

Further, it is possible for the employer to prevent the employee from performing his duties during the notice period if the employer and the employee agree on terminating the employment contract without adhering to the advance notice period and if the employer pays compensation to the

employee for that. Another possibility is to keep the employee hired during the advance notice period and keep paying his salary but simply not providing any job for him to do (the employer and the employee may agree that the employee is not obliged to fulfil his work obligations).

How can an employer enforce a restrictive covenant?
Restrictive covenants can be easily enforced in Estonia since an employee is obliged to provide, on request, to his employer or former employer, information about his employment, economic or professional activities during and after the term of the employment contract to the extent it is relevant to any confidentiality and/or non-compete clauses.

It is possible to apply for injunctions, however certain limitations apply. Please see financial compensation question below.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes – provided that the court finds the covenant to be enforceable and to have been breached by the employee. The employer may seek liquidated damages and damages for any additional loss. An employee can also challenge the liquidated damages amount as being disproportionate.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Employment law allows liquidated damages clauses. In relation to non-compete and confidentiality clauses, an amount corresponding to six times the monthly salary is common.

Can the employer sue the new employer of an employee who is breaching his covenants?
No, the employer is only permitted to claim against the employee himself.

Finland

Are post-termination restrictive covenants enforceable?
Yes, restrictive covenants are enforceable, although non-compete covenants are strictly regulated. There are no corresponding limitations for non-solicitation, non-dealing and non-poaching covenants, so these are only subject to general contract law principles. The main requirement is that the covenants must be fair and reasonable.

Non-compete restrictive covenants can only be enforced with certain kinds of employees and for certain kinds of employers and can (if challenged) be tested by the courts for fairness. The employer must have legitimate reasons for a non-compete restriction based on its operations, ie there must be a significant need to protect those operations and related business and trade secrets. The employee's position, duties and access to the relevant information are also considered. The more senior (in terms of duties and responsibility) an employee, the more likely it is that a non-compete restriction will be enforceable. If the employment is terminated by the employer, unless it is for reasons deriving from the employee, a non-compete restriction will not be enforceable.

A non-compete covenant for which there are grounds in the manner described above, but which exceeds limitations set by mandatory law or goes against general principles of contract law, can be adjusted by a court if challenged, ie it can be deemed partially enforceable.

Are there different types of restrictive covenants?
Yes:

- non-compete restrictive covenants prevent an employee from working in a competing business or setting up such a business interest for himself;
- non-dealing and non-solicitation restrictive covenants prevent an employee from approaching and dealing with the former employer's customers; and
- non-poaching restrictive covenants prevent an employee from soliciting former colleagues to work with him.

What are the procedural requirements of a restrictive covenant?
A restrictive covenant forms part of the employment contract. Although (employment) contracts need not be in written form, a restrictive covenant may be deemed void for uncertainty if it is not in written form.

Is it possible to vary an employment contract to include a restrictive covenant?
An employment contract may be varied only in accordance with its own terms or with the agreement of both parties. Consequently, the employer cannot unilaterally introduce a restrictive covenant.

Restrictive covenants can also be agreed in a termination agreement as part of a severance package.

What is the permissible term of a restrictive covenant?
Finnish law differentiates between non-compete restrictive covenants and other restrictive covenants. In relation to restrictive covenants other than non-compete restrictions, there are no express limitations although the term must be fair and reasonable.

For non-compete restrictive covenants, Finnish law differentiates between two categories of employees for whom non-compete restrictive covenants can be agreed:

- managerial employees, who are engaged in the management of the employing company, or an independent part thereof, as well as employees in comparably independent positions. For managerial employees, there is no strict upper time limit for non-compete restrictions; and
- regular employees, ie employees who are not managerial employees. For these employees, non-compete restrictive covenants are not enforceable in excess of 12 months. For restrictive covenants exceeding six months, the employee must be adequately compensated for the restriction.

What is the permissible scope of a restrictive covenant?
Non-compete clauses should only be wide enough to protect the employer's legitimate interests, and to cover such work as the employee has performed for the employer and/or such information to which the employee had access. A non-compete clause is more likely to be enforceable if it does not unreasonably infringe on the employee's right to earn a living. As regards the duration of the clause, please see above.

There are no specific limitations for non-dealing and non-solicitation clauses under Finnish law. However, the clause would nonetheless have to be reasonable and fair. The likelihood of enforceability may be increased if the restraint is limited to customers with whom the employee had personal dealings for a reasonable and defined period of time immediately before the termination of the employment.

Non-poaching clauses aim to protect the stability of the employer's workforce by restricting a former employee from recruiting ex-colleagues. There are no specific limitations as such for these kinds of clauses, but the clause nonetheless has to be reasonable and fair. Limiting the restraint to employees with whom the former employee had personal dealings for a reasonable and limited period of time immediately before the termination of the employment may help enforceability.

Another issue to consider with any type of restrictive covenant is its geographical scope. As a starting point, the geographical scope of the restrictive covenant would most likely be considered to be the area in which and/or regarding which the employee has performed the work. If the employer wants the restrictive covenant to apply outside this territory as well, the geographical scope should be explicitly stated and be precise in

relation to where it should apply. This kind of expansion would also require justifiable grounds.

Does the employer have to compensate the employee for the restrictive covenant?

There are no explicit requirements to compensate managerial employees for non-compete restrictive covenants, but the requirement that such clauses be fair and reasonable may lead to an agreed non-compete covenant being adjusted or deemed unenforceable if the restriction is extensive and the employee is not compensated for it.

As described above, regular employees must be compensated for non-compete restrictive covenants in force for over six months. If the employee is adequately compensated, the non-compete obligation can be extended to be in force for up to 12 months. Different models of compensation are possible. In practice, a minimum of 50 to 60 per cent of salary as at the date of termination should be sufficient, but this has not yet been tested before the Supreme Court.

Restrictive covenants other than non-compete covenants are not explicitly regulated by law, and there are also no precisely defined compensation requirements. However, the restrictive covenant must be fair and reasonable.

Are restrictive covenants preferable to an extended notice period combined with garden leave?

Restrictive covenants are preferable for a number of reasons. Firstly, notice periods longer than six months are not enforceable. Secondly, although an employer can put an employee on garden leave at any time, the employee in question naturally retains the right to resign, often with a shorter notice period than the one the employer must observe. Placing an employee on garden leave therefore does not automatically mean that the protection will continue for the period envisaged by the employer. Finally, extended garden leave comes with its own set of problems, such as potential discrimination claims.

Thus, if the employer wants protection after the employment relationship expires, restrictive covenants are the only viable option.

How can an employer enforce a restrictive covenant?

The most common and straightforward method of enforcing a restrictive covenant is to agree to liquidated damages for each breach of the covenant. For non-compete restrictive covenants, the amount of liquidated damages may not for regular employees exceed the aggregate of the employee's salary for the six months preceding the expiry of the employment. No such limitations apply for managerial employees, though the non-compete restrictive covenant should always be fair and reasonable.

There are no specific limitations on the amount of liquidated damages for other restrictive covenants, but again, fairness and reasonableness would be taken into account by a court.

With damages, although employers may be entitled to them for damage suffered due to a former employee's breach of a restrictive covenant, proving such damage and the causal link between the damage and the breach may make damages difficult to recover in practice. The amount of damages that could be awarded would also depend on the severity of the breach and the former employee's intentions.

Interim injunctions can theoretically be obtained but are unlikely in practice, unless the circumstances of the case are exceptionally unambiguous.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes. Please see above in relation to liquidated damages.

With damages, a former employee breaching a restrictive covenant may be ordered to pay an amount considered reasonable based on the extent of the caused (and proven) damage, the nature of the breach, the circumstances and need for protection of both the former employee and the employer, as well as other relevant circumstances. A former employee breaching a restrictive covenant is not liable for damages in cases of only minor negligence. The employer will also have to show causation.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Yes, please see above.

Can the employer sue the new employer of an employee who is breaching his covenants?
The employer may be able to sue for compensation and request interim injunctions under the Act on Unfair Trading Practices (1061/1978, as amended), but the Act primarily protects business and trade secrets. The employer would also have to show that the new employer was aware of the restrictive covenants.

France

Are post-termination restrictive covenants enforceable?
Yes – subject to certain requirements (see below).

Are there different types of restrictive covenants?
Yes – there are non-compete, non-solicitation of clients and non-solicitation of employees covenants.

What are the procedural requirements of a restrictive covenant?
The employment contract must provide expressly for any restrictive covenants and the employee must agree to the restrictive covenants. No other procedural steps are required.

Is it possible to vary an employment contract to include a restrictive covenant?
Yes. It is, however, necessary to obtain the employee's consent to the modification of the employment contract.

What is the permissible term of a restrictive covenant?
The maximum duration of a non-compete covenant is sometimes set out in the applicable collective bargaining agreement (CBA), but this is not the case for restrictions on solicitation of clients and/or employees. If the duration is not set out in the CBA, French law requires post-termination non-compete covenants to run 'for a reasonable time'. Generally, a two-year period following the effective date of termination of employment is the maximum that can be enforced. However, to be on the safe side, it is prudent to limit non-compete provisions to a maximum duration of 12 months. Should the term be considered excessive by French judges, they can either reduce it or declare the covenant null and void.

French case law tends to treat prohibitions on soliciting clients in the same way as non-compete restrictions, so they should be similarly limited.

However, non-solicitation of employees covenants appear to be less restrictive on the employee's freedom to work, so a two-year period may be easier to enforce than for non-compete and non-solicitation of clients covenants.

In any event, the restrictions provided in the employment contract should be strictly limited to the extent required for the protection of the employer's legitimate interests.

What is the permissible scope of a restrictive covenant?
Restrictive covenants should be limited to what is necessary to protect the former employer's legitimate interests.

Non-compete covenants should specify the geographical area in which competitive activity will be prohibited. This should be limited to the geographical area in which the employee worked during his employment contract.

A non-compete covenant should also be restricted to the business sector in which the employer operates, taking into account the nature of the employee's job, and in general should not be so wide as to make it effectively impossible for the employee to find a new job corresponding to his qualifications and experience.

Restrictions on solicitation of clients or of employees should be limited to the company's clients or employees with whom the employee was in contact during a defined period (usually six to 12 months) before termination.

Does the employer have to compensate the employee for the restrictive covenant?

Yes: a post-termination non-compete or non-solicitation of clients covenant is not enforceable unless the employer commits to paying compensation for its duration (even if the employee has resigned). For non-compete obligations, the precise amount and the intervals between the payments are sometimes set out by the applicable CBA. The CBA usually provides for a monthly payment equal to at least 33 per cent of the average monthly salary paid in the last three to 12 months. Some CBAs provide for as much as 66 per cent of average salary to be paid.

In the absence of any indication in the applicable CBA, the employer must commit to paying a reasonable amount. French courts have held that 10 per cent of the average salary of the 12 months before termination was not a reasonable amount.

If the employment contract provides for both non-compete and non-solicitation obligations, it should specify that the compensation remunerates both sets of obligations.

Under current French case law, non-solicitation of employees covenants do not have to be compensated.

Are restrictive covenants preferable to an extended notice period combined with garden leave?

Yes: post-termination restrictive covenants will be better at protecting an employer's business interests than an extended notice period. This is because:

- the duration of the notice period is limited by the CBA or the Labour Code (to three or six months); and
- during the notice period, if the employer decides to release the employee from work then, unless a restrictive covenant applies, the employee is free to take up employment with the employer's competitors or to start working with its clients immediately (during the notice period).

If the employee is not released from his duty to work, he is subject to a duty of loyalty that prevents him from seeking employment anywhere else, but this obligation ends when the notice period expires. It is then necessary to have restrictive covenants to prevent him from working for a competitor or soliciting clients or employees of the company.

How can an employer enforce a restrictive covenant?
The employer can claim damages for the harm or loss suffered due to a breach of a restrictive covenant and/or seek a court injunction requiring the employee to stop the prohibited activity (possibly through an emergency procedure, provided that the validity of the covenant is beyond serious dispute).

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes. An employer can claim damages from the employee for breach of his post-termination restrictive covenants. The judges will determine the amount of the compensation by reference to the loss resulting from the employee's breach.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Yes. The restrictive covenant can provide for liquidated damages in the event of a breach. French courts may, however, reduce or increase the sum if it is disproportionate to the loss actually suffered by the employer.

Providing for liquidated damages is unusual in clauses on non-solicitation of employees.

Can the employer sue the new employer of an employee who is breaching his covenants?
Yes. The employer can sue the new employer for unfair competition if the new employer knew that the employee was acting in breach of a post-termination non-compete covenant. Should the new employer discover after hiring the employee that the latter was subject to a covenant, he should terminate the employee's employment contract within a short period to avoid being ordered to pay damages for unfair competition.

Germany

Are post-termination restrictive covenants enforceable?
Yes, if it meets the legal requirements for restrictive covenants under German law, the employer can enforce a restrictive covenant by obtaining an interim injunction and/or damages.

In order to be enforceable, a restrictive covenant has to be in writing, must protect a legitimate business interest of the employer (with the restrictions not going further than necessary to give that interest adequate protection), must not unreasonably restrict the employee's professional advancement and has to provide for a compensation payment during its term.

Are there different types of restrictive covenants?
For post-employment non-compete clauses, it is usual to distinguish between activity-related restrictive covenants, which prohibit the performance of specific activities, and company-related restrictive covenants, which prohibit work for competing companies. Furthermore, there are customer/client protection clauses that prohibit the solicitation of customers/clients. However, the aforementioned types of restrictive covenants are all subject to the strict statutory provisions for restrictive covenants (Section 74 et seqq German Commercial Code); the differences between them lie only in their scope.

In contrast to this, non-solicitation clauses, which prohibit the poaching of employees, are not subject to Sec 74 et seqq German Commercial Code as long as the relevant clause covers only the solicitation of employees for a new employer.

What are the procedural requirements of a restrictive covenant?
In order to be valid, a restrictive covenant must be in writing. The document must be signed by the employer and then given to the employee. An employee signature is not required, however best practice is to require the employee to sign the document as well.

Is it possible to vary an employment contract to include a restrictive covenant?
Yes. However, such a variation requires the employee's consent.

What is the permissible term of a restrictive covenant?
In order to be enforceable, the term of a restrictive covenant must not be longer than necessary to provide adequate protection of the employer's business interest. The maximum term permissible for a restrictive covenant is two years following the effective date of termination.

What is the permissible scope of a restrictive covenant?
The permissible scope always depends on what is required to protect the legitimate business interest of the employer, with the restrictions not going further than necessary to give that interest adequate protection.

Legitimate business interests mainly fall into two categories: protection of trade and business secrets, and the protection of customer and supplier connections. Where the sole reason for a restrictive covenant is to block a qualified and capable employee from working for competitors or from finding alternative employment, this would not qualify as a legitimate business interest.

When considering what amounts to adequate protection, the type of restraints, the geographical scope and term of the restrictive covenant will be taken into consideration.

A fixed statutory maximum term of two years applies to restrictive covenants. However, depending on the circumstances, in order to be considered reasonable the restrictive covenant may have to be of a shorter term.

The geographical scope must be restricted to the area in which competition can occur, which is usually only the area in which the employer conducts business.

With respect to the type of restraint, as a general rule only activity-related non-competes, which prohibit business activities in the employee's former area of work, are considered as appropriate. Restrictive covenants that prohibit the employee from working for a competing company at all (without reference to the employee's former field of work) will only be accepted as permissible if special circumstances require such additional protection, eg in the case of executive staff with strategic knowledge of the company. For professionals and sales and distribution staff, usually only client/customer protection clauses are regarded as reasonable.

Does the employer have to compensate the employee for the restrictive covenant?
Yes. The employer must commit to pay monthly compensation for the duration of the restrictive covenant, amounting to at least half of the employee's last monthly salary. Where salary payments, annual benefits, benefits in kind, etc are variable, the required compensation payment is calculated on the basis of the average monthly compensation of the three years preceding termination.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
This will always depend on the individual situation.

Restrictive covenants are more attractive from a costs perspective, but always bear the risk of not being enforceable if a court finds there is a lack of a business interest that requires protection.

An extended notice period combined with garden leave offers good security against competition but bears the risk that the garden leave is not enforceable (ie the employee can enforce his employment). This risk is

particularly high in relation to notice periods longer than six to seven months.

How can an employer enforce a restrictive covenant?
The employer can obtain a court order requiring the employee to refrain from future violations of the restrictive covenant. As a temporary measure, the employer may also obtain an interim injunction for this purpose.

Such a court order can be enforced by means of a fine or by means of imprisonment of up to six months.

Furthermore, in order to be able to enforce a restrictive covenant the employer also has a right to request information from the employee about his professional activities. However, such an information request will only be permitted if there is objective evidence that the employee violated the restrictive covenant.

As an indirect means of enforcement, the employer can also obtain damages. If the restrictive covenant does not provide for liquidated damages, the employer must prove any damages that it is claimed were suffered as a result of the breach.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes, if the employer can prove that the breach resulted in material damages. There is no set formula for the calculation of the damages; the employer must prove what damages it suffered as a result of the breach. As this is usually very difficult, restrictive covenants should always contain a clause providing for liquidated damages.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Yes, it is possible and highly recommended that the parties agree on liquidated damages in the restrictive covenant.

There is no fixed maximum for liquidated damages. In general, one monthly gross salary is considered reasonable. In individual cases, a higher amount might still be considered appropriate. However, amounts exceeding three months' salary are unlikely to be permissible.

Furthermore, there are strict requirements regarding the wording of liquidated damages clauses. The clause must differentiate between one-off infringements and ongoing infringements. If there is any lack of clarity as to which penalty will apply to which particular breach of duty, the provision will be held to be void for uncertainty.

Can the employer sue the new employer of an employee who is breaching his covenants?
Under certain circumstances, the employment of an employee in breach of his restrictive covenant can amount to unfair competition, in which case the old employer can obtain damages and/or an injunction against the new employer.

The employment will be considered to be unfair competition if the new employer specifically hires the employee in order to gain knowledge of the old employer's operational and business secrets. If the new employer induces the breach of contract by the employee, eg by agreeing to pay the contractual penalty incurred by the employee, this may also be held to be unfair competition.

However, the mere knowledge of the breach of contract will not be considered as unfair competition.

Hong Kong

Are post-termination restrictive covenants enforceable?
Yes. However, the restrictions placed on an individual after termination of his employment must be appropriate, having regard to the reasonable interests of the employer. Courts will not enforce restrictive covenants that are unlawful restraints of trade.

Are there different types of restrictive covenants?
Yes:

- non-compete restrictive covenants prevent an employee from working in a competing business;
- non-dealing and non-solicitation restrictive covenants prevent an employee from approaching and dealing with the former employer's customers, regardless of who makes the initial approach; and
- non-poaching restrictive covenants prevent an employee from soliciting former colleagues to work with him.

What are the procedural requirements of a restrictive covenant?
A restrictive covenant forms part of the employment contract. Although employment contracts need not be in written form, a restrictive covenant is likely to be void for uncertainty if it is not in written form.

Is it possible to vary an employment contract to include a restrictive covenant?
An employment contract may be varied only in accordance with its own terms or with the agreement of both parties. Consequently, it may not be straightforward for an employer to insert a restrictive covenant once the employment contract has been concluded. The employer has three options:

- seek the employee's express agreement either on an individual basis or, if appropriate, through a collective agreement;
- impose the restrictive covenant unilaterally and rely on the employee being deemed to have given implied acceptance to it by continuing to work; or
- terminate the employee's employment and offer re-employment on new terms that include the restrictive covenant, although the employer should be alert to the possibility of this triggering a termination of employment that could result in a claim for unreasonable termination or a claim for severance or long-service pay.

Any variation must be accompanied by appropriate consideration.

What is the permissible term of a restrictive covenant?
The permissible term for restrictive covenants is not statutorily prescribed, and there can be no certainty that any particular restrictive covenant will be enforceable as each must be considered on its own merits. It is clear,

however, that the duration must be no longer than is necessary to protect the information. The issues to be addressed are:

- in relation to confidential information, its likely shelf-life;
- in relation to trade connections, how long it will take a replacement employee to establish relationships with enough of the employer's key clients to prevent significant loss of business by the employer to the competing employee or the company employing him; and
- in relation to workforce stability, the length of time it is likely to take for the former employee's influence over the senior staff with whom he worked to be neutralised.

If the restrictive covenant is to protect confidential information, in principle it can last for the shelf-life of the information. A non-compete covenant, on the other hand, should not last for more than six months without very good reason and never more than 12 months. A court will not rewrite a restriction that it considers too long; if too long a period is selected, the restriction falls away in its entirety.

In practice, it may be possible to enforce a longer non-solicitation covenant than the other types of restrictive covenant (because the restrictions on the employee's actions are less onerous in connection with a non-solicitation clause).

What is the permissible scope of a restrictive covenant?

With non-compete clauses, the business to be protected should be defined as that with which the former employee was actively involved within a specified period of time, immediately before termination of employment. Careful consideration must be given to the area to be protected by a non-compete covenant because it will be difficult to stop the employee working in an area where he did not work for the former employer.

Non-dealing clauses impose a greater degree of restriction on a former employee than non-solicitation clauses (see below) because they prevent the employee from dealing with the employer's clients regardless of whether the client or former client initiated the approach. The likelihood of enforceability may be increased if the restraint is limited to customers with whom the employee had personal dealings for a reasonable and defined period of time, immediately before the termination of his employment.

Non-poaching clauses aim to protect the stability of the employer's workforce by restricting a former employee from recruiting ex-colleagues. However, an employer is unlikely to have a legitimate interest in preventing any member of staff, however junior, from being poached. Consequently, the restraint is usually limited to preventing solicitation of individuals who are employed or engaged by the employer in a 'directorial, managerial, executive or technical capacity'. If it is possible to refine the categories of employee for whom protection is needed (for example by reference to a particular class of employee or job category), it is advisable to do so as this

will improve the prospects of enforcing the covenant. Limiting the restraint to employees with whom the former employee had personal dealings for a reasonable and limited period of time immediately before the termination of his employment should help an employer show that he needs protection against the influence that the former employer wields with current members of staff.

Non-solicitation clauses should be restricted to those customers with whom the employee had business contact within a defined period immediately before the termination of his employment. As with non-dealing clauses, the likelihood of enforceability may be increased if the restraint is limited to customers with whom the employee had personal dealings for a reasonable and defined period of time immediately before to the termination of his employment. An employer should consider including a non-solicitation clause in addition to a non-dealing clause because the former may be upheld by a court if a non-dealing clause is not, and it should allow the employer to prevent its former employee from soliciting or trying to solicit customers irrespective of whether any business dealing has taken place.

Another issue to consider with any type of restrictive covenant is its geographical scope. Unless the restraint is intended to apply worldwide it must be limited by reference to area, such as a specific radius from the employer's place of business or a specific territory or region which corresponds with the activities of the employer or the duties of the former employee. Failure to limit the geographical application of the covenant will render it globally applicable and, unless global application can be justified, the covenant is unlikely to be enforceable. A larger area of restriction is likely to be justified if the covenant seeks to protect confidential information.

Does the employer have to compensate the employee for the restrictive covenant?

No. However, in Hong Kong it is increasingly common for employers to do so and, where this is done, the applicable rate is the employee's usual base rate of pay.

The reason for this practice is that under the Employment Ordinance, an employee has a statutory right to make a payment in lieu of his notice period. It is common for aggressive competitors who poach senior employees to assist the individual to pay out his notice period with his former employer. This tactic is less effective where the individual is legally bound by a non-compete arrangement with his former employer and where he receives his usual remuneration during the non-compete period, as he is less likely to breach his non-compete obligation.

Are restrictive covenants preferable to an extended notice period combined with garden leave?

Extended notice periods are unenforceable in court. It is possible to have an express garden leave clause under which an employee can be made to stay at home during his notice period and not start with the competitor until that

notice period has expired (subject to the employer continuing to pay). To be able to enforce garden leave, the employer needs to be able to show that there is a legitimate business interest in enforcing the garden leave. However, enforcing garden leave for much longer than six months is likely to be difficult. Furthermore, in Hong Kong, employers need to be mindful that an employee has a statutory right to make a payment in lieu of his notice period. It is not uncommon for aggressive competitors poaching an employee to pay out the individual's notice period with his employer on his behalf.

One possible advantage of using garden leave is that a court it may be prepared to grant an order enforcing it for a certain period even if it considers it unsustainable to keep the employee away from the competitor for his entire notice period. With a non-compete restrictive covenant, a court will take an 'all or nothing' approach to enforcement which means that, if it considers the restriction chosen by the employer to be too long, the employer loses all protection.

How can an employer enforce a restrictive covenant?
An employer can seek an interim injunction and/or damages.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes, provided the court judges the covenant to be enforceable and to have been breached by the ex-employee. Damages are calculated either on the basis of the employer's loss or on an account of the profits improperly made by the former employee.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Yes, liquidated damages are allowed. The agreed damages must not exceed a genuine pre-estimate of the employer's losses and must not be punitive.

Can the employer sue the new employer of an employee who is breaching his covenants?
Yes, provided the employer can show that the new employer was aware of the restrictions. The new employer then would be liable for the same damages or subject to the same injunction as the ex-employee.

Italy

Are post-termination restrictive covenants enforceable?
The only type of restrictive covenant expressly regulated by law is the type that prevents a worker from being involved, directly or indirectly, as a partner, director, employee or being self-employed in any activity in competition with the employer for a certain period of time after the termination of the employment, within the limits described in the answers below (non-compete covenants).

Other types of restrictive covenant, such as non-solicit covenants, are not expressly regulated by law. It is debatable whether they are subject to the same limits described below. Moreover, no specific case law exists on such covenants. Accordingly, no clear legal principles exist on their limits and enforceability.

Non-compete covenants are enforceable. They must be agreed in writing and must be limited in time and in scope (see below).

Are there different types of restrictive covenants?
As mentioned above, the only type of restrictive covenant expressly regulated by law is the non-compete covenant. Other types of restrictive covenant, such as non-solicit covenants, are not expressly regulated by law.

Should the parties intend to provide for different types of restrictive covenant within an employment contract, it is advisable to set them out in separate clauses so that, should a court deem one of the restrictive covenants to be unenforceable, this would not automatically affect the other restrictive covenants.

What are the procedural requirements of a restrictive covenant?
Non-compete covenants must be agreed in writing between the parties. No other procedural requirements apply. However, consideration for the specific covenant must be provided for in the clause and the covenant must be limited in time, scope and width (see below).

Is it possible to vary an employment contract to include a restrictive covenant?
Yes. The consent of the employee is a requirement to the variation, and the refusal of such consent would not constitute grounds for dismissal. The limits described in the answers above must be complied with.

What is the permissible term of a restrictive covenant?
The permissible term for non-compete covenants is three years following the effective date of termination for employees *(impiegati)* and middle-managers *(quadri)*, and five years following the effective date of termination for executives *(dirigenti)*.

What is the permissible scope of a restrictive covenant?
The law does not specify the maximum scope of the non-compete covenant.

According to case law, the geographical scope of the non-compete covenant can cover anything from a few Italian regions to the whole of the European Union. Where the geographical scope of a non-compete covenant is broader than the EU, there is a risk that the whole covenant may be held to be void, depending on the circumstances (eg the type of activity forbidden, the characteristics of the business sector, etc). This is because the aim of the non-compete covenant should be to limit the employee competing, rather than to prevent the worker from working. A solution might be to agree a list of companies in competition with the former employer for which the worker will not be allowed to work, rather than referring to geographical area.

Please note that the scope and the length of the restrictive covenant affect the amount of consideration for the non-compete covenant: the wider the scope and the longer the covenant, the greater the consideration that must be paid.

Does the employer have to compensate the employee for the restrictive covenant?

The employer must provide compensation to the employee for non-compete covenants. The compensation may be paid when the employment terminates, in monthly instalments during the restricted period, or when the term of the non-compete covenant expires. In some cases, the compensation is paid during the course of the employment and, if this is the case, social security contributions are mandatory for the compensation paid. The amount of compensation must be determined in advance, as must any payment made during the course of employment.

The amount of compensation to be paid is not prescribed, but case law suggests that it must take into account both the duration of the non-compete covenant and its scope. In general, the broader the scope, the higher the level of compensation required. For example, in a case relating to a 12-month non-compete covenant covering all possible competing activities in the whole of the EU, the Court of Milan deemed compensation equal to 50 per cent of the worker's gross annual salary to be fair.

Are restrictive covenants preferable to an extended notice period combined with garden leave?

Yes. The length of the notice period in cases of dismissal is set out by national collective agreements. It may be extended if both parties agree, but this is not very common. However, garden leave is unlikely to be enforceable, since as a general principle of Italian law, an employer may not assign to a worker inferior tasks to those previously carried out (and garden leave is effectively the removal of the job by the employer). By putting the employee on garden leave, the employer would therefore risk being liable for damages.

The employee working a longer notice period would be more expensive than one with a non-compete covenant as the employee's full salary would be payable, as well as social security contributions (which would not be

payable for restrictive covenant payments). In addition, an illness or injury suffered by the worker during the notice period triggers an extension of that notice period, but would not affect the length of a non-compete covenant.

How can an employer enforce a restrictive covenant?
A liquidated damages clause can be provided in case of breach of the restrictive covenant. Moreover, the employer could obtain an injunction requiring the employee to terminate his employment relationship with a competitor employer during the period of the relevant covenant. In addition, damages could theoretically also be claimed from the competitor employer.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
The parties can agree that if the worker breaches the non-compete covenant he is obliged to pay back the money received from the employer as compensation for the non-compete covenant.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Liquidated damages are permitted over and above the compensation to be paid back by the worker to the employer for breach of the non-compete covenant (see above); the covenant can require the worker to pay the employer a pre-agreed amount as a penalty for the breach. Usually, such penalty is up to twice the amount paid to the worker as compensation for the non-compete covenant.

Can the employer sue the new employer of an employee who is breaching his covenants?
The employer may seek an injunction requiring the worker to terminate his employment relationship with a competitor employer during the period of the relevant covenant.

Although there are no precedents, an employer could theoretically claim damages from the competitor employer if it can be proven that, on entering into the employment relationship, the competitor employer was aware of the worker's non-compete obligations. However, it is debatable whether it would be possible to obtain an injunction requiring the competitor employer to terminate the employment relationship with the worker because the competitor employer is not a party to the non-compete covenant.

Latvia

Are post-termination restrictive covenants enforceable?
In Latvia, restrictive covenants are enforceable in the same manner as any other contractual provision.

However, an employer may, upon termination of the employment, decide not to exercise its right and release the employee from the restrictive covenant. In the event that the employer releases the employee, the employee cannot force the employer to pay the agreed compensation.

Are there different types of restrictive covenants?
The only restrictive covenants applied in Latvia are non-compete clauses, which prevent an employee from working in a competing business.

What are the procedural requirements of a restrictive covenant?
A non-compete clause must be in writing and must contain sufficient information on the restriction, ie the scope, territory, duration and amount of the compensation to be paid by the employer.

Non-compete clauses are not considered part of an employment agreement. However, they may be in the form a provision of the employment agreement or be entered into in a separate agreement.

Is it possible to vary an employment contract to include a restrictive covenant?
Non-compete clauses are not considered to form part of the employment agreement, but may be entered into as a separate obligation during the course of employment.

What is the permissible term of a restrictive covenant?
A non-compete clause may not be applicable for a longer period than two years from the effective date of termination.

What is the permissible scope of a restrictive covenant?
A non-compete clause may only apply to the same field of activity as the employee worked in during his or her employment.

Does the employer have to compensate the employee for the restrictive covenant?
Yes, the employee must be compensated. However, there is no specific amount determined under Latvian law. The compensation paid must be fair. There are no guidelines as to what will be considered fair compensation. However, recent case law has held 40 per cent of monthly salary to be fair.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
It is better for the employer financially to opt for a non-compete clause rather than an extended notice period. During an extended notice period, the employer must pay the employee his entire salary and benefits,

including social security contributions – which are not payable if the employer relies on the non-compete clause instead.

An agreement in advance (ie when entering into the employment agreement) to have an extended notice period is not enforceable under Latvian law and must be agreed by the parties on termination.

Depending on the grounds of the termination, Latvian law provides that notice of termination by the employer may have immediate effect or notice must be given one month in advance. Employees must give one month's notice.

How can an employer enforce a restrictive covenant?
Enforcement of a non-compete clause is the same as enforcement of any other contractual provision. In case of a breach, the employer is entitled to claim damages and other contractual remedies stipulated in the contract.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
In case of breach of the non-compete clause, the courts have recognised that the employer is entitled to request the employee to return the compensation he has received from the employer and, if the employer can prove any other loss, the employer may also claim damages for such losses.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Yes. The employer and the employee may also agree on a contractual penalty in case of a breach. Recently, the court upheld a contractual penalty corresponding to twice the employee's annual salary, which was payable to the employer.

Can the employer sue the new employer of an employee who is breaching his covenants?
No, because the new employer is not party to the non-compete covenant that is a contractual obligation.

Lithuania

Are post-termination restrictive covenants enforceable?
Yes, these are generally enforceable if they aim to protect a legitimate business interest of the employer, do not limit the former employee's rights excessively and provided that certain criteria set for such covenants are met.

Are there different types of restrictive covenants?
Yes, there is no legal definition, but in practice two different types of restrictive covenants are used:

- non-compete clauses preventing an employee from working in a competing business; and
- non-solicitation clauses preventing an employee from approaching the former employer's customers and soliciting former colleagues to work with him.

What are the procedural requirements of a restrictive covenant?
A restrictive covenant must be executed in written form: either incorporated in an employment contract or as a separate signed document.

Is it possible to vary an employment contract to include a restrictive covenant?
Yes, by mutual agreement of the parties.

What is the permissible term of a restrictive covenant?
There is no legislation in relation to the permissible term of a restrictive covenant. However, following case law, we would advise clients that such clauses should not exceed two years.

What is the permissible scope of a restrictive covenant?
For a non-compete clause to be enforceable, it must set geographical and functional scope (ie the activities it applies to) as well as limiting the time period for which the restrictions apply, provide compensation and balance the parties' interests.

The employer's interests to protect its business from unfair competition should be weighed against the interests of the employee's right to work.

There are no set requirements for non-solicitation clauses, but in practice they are usually incorporated into a non-compete clause.

Does the employer have to compensate the employee for the restrictive covenant?
Yes, but there is no set minimum amount. In practice most employers pay at least 50 per cent of the (former) employee's monthly salary.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
Notice periods are set by law and cannot be extended. Garden leave may not exceed the notice period. The advantage of a restrictive covenant is its longer duration of protection for the employer.

How can an employer enforce a restrictive covenant?
If the employee does not comply with the obligations of the non-compete (non-solicitation) clause, the employer can seek an injunction. The employer can also claim damages from the employee for violation of the non-compete (non-solicitation) clause, however the employer must show actual loss.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes – damages are calculated either on the basis of the employer's loss or on an account of the profits improperly earned by the former employee.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Yes. There are no limits prescribed. However, the sum should be high enough to prevent the employee from infringement (or the new employer from paying the penalty) and low enough to prevent mitigation in court. The court may mitigate the liquidated damages having evaluated the size (adequate or excessive), the actual damages, the infringement and the relations between the employee and the former employer, etc.

Can the employer sue the new employer of an employee who is breaching his covenants?
In general a new employer is not liable for damages by the mere fact that it has hired an employee who was known to be restricted by a non-compete clause. Special circumstances can, however, create liability for the new employer, for example if the new employer knew the employee was bound by a non-compete clause and has hired the employee actively to approach the customers of the competitor by making use of the commercial secrets that the employee gained in his former position. Such actions could be found to be unfair competition. The burden of proof of these circumstances lies with the former employer.

Russia

Are post-termination restrictive covenants enforceable?
Generally, post-termination restrictive covenants are not enforceable in Russia.

Are there different types of restrictive covenants?
Theoretically, it is possible to divide restrictive covenants into two categories: restrictive covenants applicable during a period of employment, and post-employment restrictive covenants. Restrictive covenants applicable during a period of employment are easier to enforce as the employer is still able to affect the employee.

Restrictive covenants may be characterised as follows:

- non-compete provisions (including prohibition of activity by the employee within the same business sector and employment by a competing employer. Under Russian legislation, this provision is only enforceable for CEOs);
- non-solicit provisions (forbidding the solicitation of clients after dismissal. This provision is difficult to enforce under Russian legislation); and
- non-disclosure provisions (these provisions may be included for the period of employment, in which case the provision may be enforceable, however such a provision is not enforceable for the period after termination).

What are the procedural requirements of a restrictive covenant?
Russian legislation does not provide any procedural requirements for restrictive covenants.

Is it possible to vary an employment agreement to include a restrictive covenant?
After concluding an employment agreement, amendments require the consent of both parties to the agreement. If the parties have agreed to include a restrictive covenant, it is possible amend the employment agreement as long as the restriction is not a waiver of the employee's statutory rights.

What is the permissible term of a restrictive covenant?
There are no specific local restrictions for this.

What is the permissible scope of a restrictive covenant?
There are no specific local law requirements regarding the scope of restrictive covenants. As a matter of practice, the scope is limited to non-compete provisions in employment contracts with CEOs. Other covenants are not common.

Does the employer have to compensate the employee for the restrictive covenant?
There are no specific local requirements for this.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
Russian law strictly regulates the length of notice periods both for the employers and employees. An extended notice period cannot be enforced against an ordinary employee (who would only be required to give two weeks' notice). Garden leave provisions are not enforceable in Russia.

How can an employer enforce a restrictive covenant?
There are no specific local law provisions relating to the enforceability of restrictive covenants. Therefore, restrictive covenants may be included in employment agreements as civil law provisions and be enforced under normal contract law. As restrictive covenants restrict the application of normal civil law rules to the employment relationship, they are difficult to enforce under Russian law.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
As restrictive covenants are very difficult to enforce by way of breach-of-contract claims, in practice most employers prefer to ensure compliance by agreeing to make payments to the employee if they comply with the terms of the covenant.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there any limits on what can be agreed?
A pre-determined fine for breach, if provided by the contract, is illegal due to prohibition of additional disciplinary actions, applied based on the employment agreement. Any restriction of a person's constitutional rights (ie the right to choose the type and place of work) may make such an agreement null and void. Therefore we can conclude that the covenant is unlikely to be enforceable.

Can the employer sue the new employer of an employee who is breaching his covenants?
No.

Spain

Are post-termination restrictive covenants enforceable?
Yes.

Are there different types of restrictive covenants?
Yes, restrictive covenants are usually non-compete clauses and/or non-solicitation restrictions, for clients and/or employees.

What are the procedural requirements of a restrictive covenant?
Any such restriction must be set out in writing, include adequate compensation and comply with all legal requirements as described in this section.

Is it possible to vary an employment contract to include a restrictive covenant?
Yes, it is, provided that both parties, employer and employee, agree.

What is the permissible term of a restrictive covenant?
A maximum of two years from the effective date of termination of employment.

What is the permissible scope of a restrictive covenant?
The employer must show a commercial interest. This has been construed to mean that the scope should relate to the activities and area in which the relevant individual worked, ie in a multinational group, it would not be possible to set a worldwide scope, unless it could be shown that the relevant employee had been working on a worldwide basis. This is why it is advisable to refer to clients, activities or locations where the employee has had dealings in the previous 12 to 24 months.

Does the employer have to compensate the employee for the restrictive covenant?
Yes – a restrictive covenant is not enforceable unless the individual to whom it applies is adequately compensated. There is no set formula for what constitutes adequate compensation, however an assessment of adequacy will depend on factors such as the duration of the restricted period, the individual's remuneration and his chances of finding a job without violating the restrictive covenant.

Payment of compensation may be made while the employment relationship still exists, on termination, in monthly instalments during the term of the restrictive covenant or once the restrictive covenant has expired.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
Yes. Under Spanish law, garden leave clauses are not enforceable. Employees have a specific right to 'effective work', which makes garden leave inapplicable even if the employee previously agreed to it in writing (unless he agrees *while* on garden leave). This means that requiring an

employee not to perform his duties during the notice period would be unenforceable against his will.

From a costs perspective, a restrictive covenant could be more attractive than an extended notice period since compensation would be agreed between the parties and could be lower than the individual's regular salary.

How can an employer enforce a restrictive covenant?
It is usual to start by sending a warning to the employee, asking him to stop breaching the restriction. If the employee does not do so, the employer may start a damages action against the employee before the employment courts. However, it is not possible to obtain an injunction to prevent the employee from dealing with the competitor or from soliciting clients or employees.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes. The amount of the financial compensation can be agreed between both parties and set out in the restrictive covenant. Twice the amount received as compensation for the restrictive covenant might be found to be excessive, unless the company is able to show that the value of loss suffered justifies the amount.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Case law in relation to whether liquidated damages clauses are enforceable is unclear and the courts do not always enforce such clauses.

Can the employer sue the new employer of an employee who is breaching his covenants?
No, the employer can only sue its former employee. In order to sue the new employer the old employer could bring an unfair competition action, although breach of the covenant by only one employee is unlikely to be enough.

Sweden

Are post termination restrictive covenants enforceable?
Swedish law differentiates between non-compete clauses and other covenants. For example, non-solicitation clauses are in general enforceable (unless they are found unreasonable by court). The non-compete clauses are only enforceable if the employer has a legitimate need for protection and can only be used in relation to key employees that have access to protected information. Further, the employee must be entitled to compensation during the restricted period.

Please note that certain rules may also apply under collective bargaining agreements.

Are there different types of restrictive covenants?
Yes:

- non-compete clauses prevent an employee from working in a competing business; and.
- non-solicitation clauses prevent an employee from soliciting customers or former colleagues.

Further, confidentiality undertakings for protection of information that the employer (or any associated company or customer) reasonably wishes to keep confidential are common in employment agreements in Sweden.

What are the procedural requirements of a restrictive covenant?
A restrictive covenant forms part of the employment contract. Although employment contracts are not required to be in written form, a restrictive covenant is likely to be void for uncertainty if it is not in written form.

Is it possible to vary an employment contract to include a restrictive covenant?
Yes but only with employee consent.

Restrictive covenants can also be agreed in a termination agreement as part of a severance package offered to the employee.

What is the permissible term of a restrictive covenant?
The permissible term of a restrictive covenant is not statutorily prescribed and depends on the type of restriction. The enforceability of a restrictive covenant must be judged on its own merits in each individual case.

Non-compete and non-solicitation clauses should have a duration no longer than 24 months after the employment has been terminated. In practice, such clauses have a term of around six to 12 months.

Generally, non-compete and non-solicitation restrictions contain a provision that allows the employer to release the employee from the restriction subject to a notice period of for example one month.

What is the permissible scope of a restrictive covenant?
A non-compete clause may only be used by certain employers and in relation to certain employees (normally key employees). The clause should contain information about the business that should be protected and what the employee is restricted from doing, eg not act as a consultant, employee or director of a competing company.

With non-solicitation clauses, the employee is usually restricted from trying to entice customers and former colleagues away from the employer. In relation to customers, it should only cover those customers that the employee has been dealing with for a specified period of time before the employment relationship was terminated.

There is no geographical limitation to the applicability of the restrictions and they may cover the whole world, provided that it is reasonable in the specific situation.

Does the employer have to compensate the employee for the restrictive covenant?
As mentioned above, for non-compete clauses the covenant must provide for the employee to be paid compensation during the restricted period in order for the clause to be enforceable. Usually, the employee is entitled to the difference between his salary paid by the employer at the time of termination and the (lower) salary he is entitled to from his new employment. However, the maximum compensation required is 60 per cent of the employee's monthly salary at the time of resignation. The employee does not need to be paid compensation during any period when the employee receives severance pay (ie payments in addition to the regular payments made by the employer during the notice period) from the employer. Further, the employee does not need to be paid any compensation if the employer has terminated the employment agreement due to the employee's breach of the employment agreement, if the employment agreement is terminated with immediate effect or if the employee retires.

For non-solicitation clauses: no.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
An employer may not unilaterally decide to release an employee from his duties during the notice period, ie garden leave has to be agreed mutually with the employee.

From an economic perspective, an extended notice period would incur higher costs for the employer than a non-compete clause or a non-solicitation clause since the employee is entitled to full salary and benefits during the prolonged notice period – but may provide more protection if there are any doubts that the restrictive covenants are enforceable.

How can an employer enforce a restrictive covenant?
A liquidated damages clause can be provided in case of breach of the restrictive covenant. Liquidated damages usually amount to around six times the employee's average monthly gross salary, calculated on the basis of his monthly salary during the six months preceding the termination. If considered unreasonable, the liquidated damages clause may be modified by the court.

If the actual loss exceeds the contractual penalty, the employer may be entitled to damages. It may, however, be difficult for the employer to prove such damage and the causal link between the damage and the breach. Thus, it may be difficult for the employer to obtain damages in practice.

Interim injunctions may be granted and may halt a former employee's ongoing breach of a restrictive covenant – with the employer's interest in stopping the non-observance of the restrictive covenant being balanced against the employee's right to personal freedom.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes. The employer may be entitled to damages in excess of the liquidated damages amount provided that the employer can prove that the actual loss exceeds the contractual penalty.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Yes, liquidated damages are permitted and using them is standard practice. Please see above for further information.

Can the employer sue the new employer of an employee who is breaching his covenants?
The employer may be able to sue the new employer for compensation under the law of protection of company secrets, which primarily protects business and trade secrets.

The Netherlands

Are post-termination restrictive covenants enforceable?
Yes, however please note that a court may limit the non-compete clause either in time, geographical scope or by industry at the request of the employee. In practice, there is a risk that the enforceability of a non-compete clause would be limited by such a judgment.

A non-compete clause is rendered void if the employer is liable for damages as a result of the termination of the employment. This will be the case if the employer has terminated the employment agreement without observing the applicable notice period, in the event of an apparently unfair dismissal, a wrongful dismissal for urgent cause and/or if the employee has actually been forced to terminate the employment agreement himself due to wrongful actions of the employer.

Furthermore, if the circumstances under which both parties agreed on the non-compete clause have changed substantially since it was first entered into, the non-compete clause may no longer be valid. For example, this may be the case if the employee has been promoted to a new role without the non-compete clause being renewed.

Are there different types of restrictive covenants?
Under Dutch law, different types of restrictive covenants are possible. Confidentiality clauses are typically used. For senior management, non-compete clauses are often included that restrict the employee's choice of employment after termination of his employment agreement. Other possible restrictive covenants are non-solicitation clauses.

What are the procedural requirements of a restrictive covenant?
A non-compete clause should be set out in writing in the employment agreement, with an employee of at least 18 years of age. If the employee's position within the company materially changes (for example as a result of promotion), a non-compete clause should be renewed in writing. If the employer is liable for damages as a result of the termination of the employment, this renders a non-compete clause unenforceable.

For other restrictive covenants, no procedural requirements apply, other than general rules of contract law.

Is it possible to vary an employment contract to include a restrictive covenant?
Under Dutch law, it is possible to amend an employment contract to include a restrictive covenant, however the consent of the employee is required.

What is the permissible term of a restrictive covenant?
Confidentiality clauses are generally not limited in time. Although it is not legally required, non-solicitation clauses are usually limited in time. Generally, non-solicitation clauses are limited to solicitation of either employees or clients of the business with whom the employee had contact

within a limited period of time before the termination date of the employment agreement.

For non-compete clauses, no statutory restrictions apply as to the term and geographical and business scope. However, as a general rule, a duration of between one and two years is accepted. Courts have the discretion to limit the clause further, eg to a couple of months, a more restricted geographical area, or a certain industry, on the grounds that it is an unreasonable restriction that prevents the employee from accepting a job commensurate with his ability and experience; this right to work may be found to outweigh the employer's interests.

What is the permissible scope of a restrictive covenant?
Generally, confidentiality clauses are unlimited in time. Non-solicitation clauses are commonly limited in time. As for non-compete clauses, these are normally limited in time, geographical scope and by reference to the relevant industry.

Does the employer have to compensate the employee for the restrictive covenant?
Not usually. Compensation is neither mandatory nor prescribed. Employees often ask for compensation but it will generally be awarded in court only if the employee can prove that the restrictive covenant substantially restricts him from finding alternative employment.

Are restrictive covenants preferable to an extended notice period combined with garden leave?
Yes. From a costs perspective, a non-compete covenant could be more attractive than an extended notice period on full salary but may be less preferable from an enforceability perspective. As noted above, a non-compete clause is not always enforceable and could be limited in time and scope by a court.

How can an employer enforce a restrictive covenant?
An employer can enforce restrictive covenants by including a penalty clause in the employment agreement. In case of breach of a covenant, the employee will be liable for a contractually agreed penalty both for the violation itself as well as for each day that violation of the restrictive covenant continues. In the event that the employee does not comply with the restrictive covenant despite a penalty clause, the employer can seek an injunction to prevent any further violation.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
An employer can claim damages if the employee violates the terms of the restrictive covenant.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
As it is difficult in practice to assess the actual damages incurred by the employer, post-termination restrictive covenants usually provide for

liquidated damages taking the form of pre-agreed amounts per breach and for each day that the breach continues. In addition, the parties can agree that the employer is allowed to claim actual damages instead of the penalties agreed on. It is worth noting that payment by the employee of the liquidated damages does not release the employee from his obligations under the non-compete clause, which will continue to apply.

There is no maximum amount for liquidated damages prescribed by law. Courts can amend the amounts agreed on, taking into account the position of the employee and the interests of the employer that require protection.

Can the employer sue the new employer of an employee who is breaching his covenants?

A breach of a restrictive covenant is considered a matter between the employer and the employee. However, under some circumstances it is possible to sue the new employer, provided the former employer is able to demonstrate that the new employer has unlawfully benefited from the breach.

UK

Are post-termination restrictive covenants enforceable?
The starting point is that restrictive covenants are unenforceable as a restraint of trade and are contrary to public policy. Nevertheless, the UK courts will be prepared to enforce a restrictive covenant if it protects a legitimate business interest of the employer and goes no further than is reasonably necessary to give that interest adequate protection. Legitimate business interests tend to fall into two categories: trade secrets (including confidential information) and trade connections. When considering whether the covenant goes no further than is reasonably necessary to protect the interest, it is important to focus on what you are seeking to protect and what type or types of restraint might adequately afford that protection.

Are there different types of restrictive covenants?
Yes:

- non-compete restrictive covenants prevent an employee from working in a competing business;
- non-dealing and non-solicitation restrictive covenants prevent an employee from approaching and dealing with the former employer's customers, regardless of who makes the initial approach; and
- non-poaching restrictive covenants prevent an employee from soliciting former colleagues to work with him.

What are the procedural requirements of a restrictive covenant?
A restrictive covenant forms part of the employment contract. Although employment contracts need not be in written form, a restrictive covenant is likely to be void for uncertainty if it is not in written form. Further, in order to be enforceable and for the employer to be able to seek injunctive relief, a restrictive covenant must be supported by proper consideration. If the covenant appears in the employment contract when it is executed, there should not be any need for separate consideration as the offer of the employment should act as sufficient consideration. If, however, the covenant is entered into later, it is advisable to attribute (greater than peppercorn) consideration to it.

Is it possible to vary an employment contract to include a restrictive covenant?
An employment contract may be varied only in accordance with its own terms or with the agreement of both parties. Consequently, it may not be straightforward for an employer to insert a restrictive covenant into an employment contract once it has been executed. The employer has three options:

- seek the employee's express agreement either on an individual basis or, if appropriate, through collective bargaining;

- impose the restrictive covenant unilaterally and seek to rely on the employee being deemed to have given implied acceptance to it by continuing to work after the change has been made. This is not usually the preferred method of introducing a restrictive covenant. This is because it can be difficult to persuade the courts that an employee has given implied acceptance to a purported change to his terms of employment when that change is not actually felt by the employee until a significantly later date; a change to restrictive covenants would only be felt by the employee upon termination of employment; or
- terminate the employee's employment and offer re-employment on new terms that include the restrictive covenant. This is the nuclear option and would require the employer to give the employee notice (or make a payment in lieu). Depending on the number of employees dismissed, this method may trigger collective redundancy consultation obligations (as termination in this context qualifies as redundancy under collective redundancy legislation). It may also trigger a claim for unfair dismissal, although the loss suffered by the employee where he is offered immediate re-engagement on the same financial terms is likely to be minimal.

As referred to above, any variation should be accompanied by proper consideration.

What is the permissible term of a restrictive covenant?
This is not statutorily prescribed. Each restrictive covenant must be considered on its own merits. It is clear, however, the duration must be no longer than is reasonably necessary to protect the business interest in question. The issues to be addressed are:

- in relation to confidential information, its likely shelf-life;
- in relation to trade connections, how long it will take a replacement employee to establish relationships with enough of the employer's key clients to prevent significant loss of business to the former employer by the competing employee or the company employing him; and
- in relation to workforce stability, the length of time it is likely to take for the former employee's influence over the senior staff with whom he worked to be neutralised.

If the restrictive covenant is to protect confidential information, in principle it can last for the shelf-life of the information. A non-compete covenant, on the other hand, should not last for more than 12 months (as this is the maximum length the courts will generally enforce). A court will not rewrite a restriction that it considers too long; if too long a period is selected, the restriction falls away in its entirety.

In practice, it may be possible to enforce a longer non-solicitation covenant than the other types of restrictive covenant (because the restrictions on the

employee's actions and his ability to find work are less onerous under a non-solicitation clause).

What is the permissible scope of a restrictive covenant?

With non-compete clauses, the business to be protected should be defined as that with which the former employee was actively involved within a specified period of time (usually up to 12 months), immediately before termination of employment. Careful consideration must be given to the area to be protected by a non-compete covenant because it will be difficult to stop the employee working in an area where he did not work for the former employer.

Non-dealing clauses impose a greater degree of restriction on a former employee than non-solicitation clauses (see below) because they prevent the employee from dealing with the former employer's clients regardless of whether the employee or former client initiated the approach. The likelihood of enforceability may be increased if the restraint is limited to customers with whom the employee had personal dealings for a reasonable and defined period of time, immediately before the termination of his employment (again up to 12 months is common).

Non-poaching clauses aim to protect the stability of the employer's workforce by restricting a former employee from recruiting ex-colleagues. However, an employer is unlikely to have a legitimate interest in preventing any member of staff, however junior, from being poached. Consequently, the restraint is commonly limited to preventing solicitation of senior employees or those with a particular value to the employer, for example individuals who are employed or engaged by the employer in a 'directorial, managerial, executive or technical capacity'. If it is possible to refine the categories of employee for whom protection is needed (for example by reference to a particular class of employee or job category), it is advisable to do so as this will improve the prospects of the covenant being enforceable. Limiting the restraint to employees with whom the former employee had personal dealings for a reasonable and limited period of time immediately before the termination of his employment should also assist in showing that the restraint goes no further than is reasonably necessary.

Non-solicitation clauses should be restricted to those customers with whom the employee had business contact within a defined period immediately before the termination of his employment. As with non-dealing clauses, the likelihood of enforceability may be increased if the restraint is limited to customers with whom the employee had personal dealings for a reasonable and defined period of time immediately before the termination of his employment. An employer should always consider including a non-solicitation clause in addition to a non-dealing clause because it may be upheld by a court as the less restrictive of the two restraints if a non-dealing clause is not upheld, and it should allow the employer to prevent its former employee from soliciting or trying to solicit customers irrespective of whether any business dealing has taken place.

Another issue to consider with any type of restrictive covenant is its geographical scope. Unless the restraint is intended to apply worldwide it must be limited by reference to area, such as a specific radius from the employer's place of business or a specific territory or region that corresponds with the activities of the employer or the duties of the former employee. Failure to limit the geographical application of the covenant will render it globally applicable and, unless global application can be justified, the covenant is unlikely to be enforceable. A larger area of restriction is likely to be justified if the covenant seeks to protect confidential information.

Does the employer have to compensate the employee for the restrictive covenant?

No (though see comments above in relation to the consideration to be given for the covenant).

Are restrictive covenants preferable to an extended notice period combined with garden leave?

If an employee has a long notice period (up to 12 months; more than 12 months is unusual in the UK), it may be possible to put the employee on garden leave and require him to stay at home and not do any work during his notice period and not to start any new employment until that notice period has expired (subject to the employer continuing to pay the employee in the usual way). The contract of employment will need to include an express garden leave provision allowing the employer to do this. Even if the notice period is longer than six months, it is unlikely that a court would enforce a garden leave period of more than six months. Further, the period of the post-termination restrictive covenants (which will run from the date of termination, ie when the garden leave ends and the employment is terminated) should be reduced by any period of time spent on garden leave, and the provision in the contract of employment should make this clear. Not doing this could potentially make the restrictive covenants longer than is reasonably necessary and therefore affect their enforceability. To be able to enforce garden leave in court, an employer would need to show that there is a legitimate business interest in the garden leave being enforced.

One advantage of using garden leave is that a court may be prepared to grant an order enforcing it for a certain period, even if it considers it unsustainable to keep the employee away from the competitor for his entire notice period. With a non-compete restrictive covenant, a court will take an 'all or nothing' approach to enforcement, which means that, if it considers the length of restriction chosen by the employer to be too long, the employer loses all protection. Another advantage of using garden leave is that the employee continues to be bound by the duty of fidelity to his employer during the garden leave period. This means that he is not permitted to act other than in the interests of his employer; a much stronger restraint than any restrictive covenant.

How can an employer enforce a restrictive covenant?
It can seek an injunction and/or damages.

Is financial compensation available for breaches of restrictive covenants? If so, how is it calculated?
Yes – provided the court judges the covenant to be enforceable and to have been breached by the ex-employee. Damages are calculated either on the basis of the employer's loss or on an account of the profits improperly made by the former employee.

Are liquidated damages permitted (ie payment of a pre-agreed amount if a breach occurs)? If so, are there limits on what can be agreed?
Yes, liquidated damages are allowed. The agreed damages must not exceed a genuine pre-estimate of the employer's losses and must not be punitive. If they are, then the liquidated damages provision will be deemed a penalty and will be void.

Can the employer sue the new employer of an employee who is breaching his covenants?
Potentially, yes. This will depend on a number of considerations, including the knowledge of the new employer, its intentions and its involvement in the wrongdoing. The most common claims brought by a former employer against a new employer where there has been employee wrongdoing are claims of inducement of breach of contract, dishonest assistance in breach of fiduciary duty, causing loss by unlawful means and unlawful conspiracy. Potential remedies include injunctive relief, damages or an account of profits.

Contributors

Austria	Lisa Haemmerle
Belgium	Koen De Bisschop
China	Som Leung
Estonia	Kadri Michelson (Raidla, Lejins & Norcous)
Finland	Annika Pohjolainen (Roschier, Attorneys Ltd)
France	Louise Thiebaut, Laurence Harvey Wood
Germany	Ulla Rupp
Hong Kong	Som Leung
Italy	Luca Capone
Latvia	Aiga Klimovica (Raidla, Lejins & Norcous)
Lithuania	Julija Lisovskaja (Raidla, Lejins & Norcous)
Russia	Olga Chislova
Spain	Raquel Flórez
Sweden	Jennie Lööw (Roschier, Attorneys Ltd)
The Netherlands	Astrid Van Ommeren Rob Van Eldik
UK and general co-ordinators	Louise Taylor, Paula Volkmer, Alison Chung

Contacts

AUSTRIA

Stefan Köck
T +43 1 515 15 112
E stefan.koeck@freshfields.com

BELGIUM

Julie Pankert
T +32 2 504 7594
E julie.pankert@freshfields.com

CHINA

Som Leung
T +852 2846 3339
E som.leung@freshfields.com

ESTONIA

Raidla, Leijns & Norcous

Sven Papp
T +43 1 515 15 112
E sven.papp@freshfields.com

FINLAND

Roschier, Attorneys Ltd

Nina Isokorpi
T +358 20 506 6219
E nina.isokorpi@roschier.com

FRANCE

Gilles Bélier
T +33 1 44 56 55 09
E gilles.belier@freshfields.com

Emmanuel Bénard
T +33 1 44 56 54 05
E emmanuel.benard@freshfields.com

Gwen Senlanne
T +33 1 44 56 55 13
E gwen.senlanne@freshfields.com

GERMANY – COLOGNE

Elmar Schnitker
T +49 221 20 50 72 03
E elmar.schnitker@freshfields.com

René Doring
T +49 221 20 50 71 62
E rene.doering@freshfields.com

GERMANY – DÜSSELDORF
Thomas Müller-Bonanni
T +49 211 49 79 366
E thomas.mueller-bonanni@freshfields.com

Heinz Josef Willemsen
T +49 211 49 79 187
E heinzjosef.willemsen@freshfields.com

GERMANY – FRANKFURT
Jochen Leßmann
T +49 69 27 30 87 69
E jochen.lessmann@freshfields.com

Ulrike Schweibert
T +49 40 36 90 63 30
E ulrike.schweibert@freshfields.com

GERMANY – HAMBURG
Boris Dzida
T +43 1 515 15 112
E boris.dzida@freshfields.com

Klaus-Stefan Hohenstatt
T +49 40 36 90 61 18
E ks.hohenstatt@freshfields.com

HONG KONG
Som Leung
T +43 1 515 15 112
E som.leung@freshfields.com

ITALY
Luca Capone
T +39 02 625 30401
E luca.capone@freshfields.com

LATVIA
Raidla, Lejins & Norcous
Aiga Klimovica
T +371 6 724 0689
E aiga.klimovica@rln.lv

LITHUANIA
Raidla, Lejins & Norcous
Žilvinas Kvietkus
T +370 5 2500800
E zilvinas.kvietkus@rln.lt

RUSSIA
Olga Chislova
T +7 495 785 3032
E olga.chislova@freshfields.com

SPAIN
Raquel Flórez
T +34 91 700 3722
E raquel.florez@freshfields.com

SWEDEN

Roschier, Attorneys Ltd

Magnus Wallander
T +46 8 553 191 25
E magnus.wallander@roschier.com

THE NETHERLANDS

Brechje Nollen
T +31 20 485 7626
E brechje.nollen@freshfields.com

UK

Kathleen Healy
T +44 20 7832 7689
E kathleen.healy@freshfields.com

Nicholas Squire
T +44 20 7832 7419
E nicholas.squire@freshfields.com

Caroline Stroud
T +44 20 7832 7602
E caroline.stroud@freshfields.com

Freshfields Bruckhaus Deringer

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We are experienced in cross-border advice and have an excellent record in delivering tailored multi-jurisdictional advice, having very strong working relationships with local lawyers in countries in which we do not have offices.

We advise on:

- all aspects of employment and industrial relations law, including: the individual and collective employment aspects of mergers and acquisitions (public and private, listed and unlisted), joint ventures, demergers and all manner of corporate reorganisations (including redundancies); executive remuneration and related regulatory and disclosure obligations; service contracts and related documents; confidentiality and restrictive covenants; works councils; individual and group severance arrangements; and contracting-out of services;
- all the legal aspects of establishing and operating pension schemes; restructuring pension arrangements, and merging and winding up schemes; and pension scheme disputes, including court proceedings; and
- designing, drafting and implementing share plans; corporate governance issues and senior executive remuneration and incentive arrangements (including the share plan and benefit aspects of senior executive terminations); age discrimination issues affecting share plans; and related tax, company and securities laws.

RoschierRaidla

There is an entrepreneurial spirit at the firm, and its successful recruitment policy has resulted in a 'good mix of hungry lawyers', report market observers. Clients appreciate the lawyers' 'strong technical expertise, pragmatism and excellent understanding of business objectives', and praise the 'responsive service at a competitive price' that they offer. *Chambers Europe,* 2009

The RoschierRaidla network is an integrated cross-border operation of leading law firms in Finland, Sweden, Estonia, Latvia and Lithuania, specialising in demanding international business law assignments and large-scale transactions.

In Finland and Sweden, RoschierRaidla is represented by Roschier, Attorneys Ltd, one of the leading legal service providers in Northern Europe. The Baltic arm of RoschierRaidla, Raidla Lejins & Norcous, comprises three leading law firms in Estonia, Latvia and Lithuania. The network offers one-stop access to premier cross-border and local expertise in five capitals of the Nordic-Baltic region. Today, RoschierRaidla employs some 270 lawyers and over 420 professionals in total.

The employment and labour law team advises employers on all aspects of domestic and international employment law: from the recruitment process and the term of the employment through to the end of the employment relationship. We also represent employers in union negotiations and dispute resolution processes. Transactional support and strategic guidance on business reorganisation and outsourcing is an important part of our practice, since employment and labour law issues often play a significant role in M&A transactions. Further, we provide advice on pensions and benefits, including incentive schemes for company management and employees.

ABU DHABI
The Makeen Building
Office 202
PO Box 129817
Abu Dhabi
T +971 2 6521 700
F +971 2 6521 777

AMSTERDAM
Strawinskylaan 10
1077 XZ Amsterdam
T +31 20 485 7000
F +31 20 485 7001

Mailing address
PO Box 75299
1070 AG Amsterdam

BAHRAIN
Bahrain World Trade Centre
East Tower, 37th floor
PO Box 20184
Manama
Bahrain
T +973 1 713 4333
F +973 1 713 4300

BARCELONA
Mestre Nicolau 19
08021 Barcelona
T +34 93 363 7400
F +34 93 419 7799

BEIJING
3705 China World Office Two
1 Jianguomenwai Avenue
Beijing 100004
T +86 10 6505 3448
F +86 10 6505 7783

BERLIN
Potsdamer Platz 1
10785 Berlin
T +49 30 20 28 36 00
F +49 30 20 28 37 66

BRUSSELS
Bastion Tower
Place du Champ de Mars/
Marsveldplein 5
B-1050 Brussels
T +32 2 504 7000
F +32 2 504 7200

COLOGNE
Im Zollhafen 24
50678 Cologne
T +49 221 20 50 70
F +49 221 20 50 79 0

DUBAI
The Exchange Building
5th floor
Dubai International
Financial Centre
Sheikh Zayed Road
PO Box 506 569
Dubai
T +971 4 5099 100
F +971 4 5099 111

DÜSSELDORF
Feldmühleplatz 1
40545 Düsseldorf
T +49 211 49 79 0
F +49 211 49 79 10 3

FRANKFURT AM MAIN
Bockenheimer Anlage 44
60322 Frankfurt am Main
T +49 69 27 30 80
F +49 69 23 26 64

HAMBURG
Freshfields Haus
Hohe Bleichen 7
20354 Hamburg
T +49 40 36 90 60
F +49 40 36 90 61 55

Mailing address
Postfach 30 52 70
20316 Hamburg

HANOI
#05-01
International Centre
17 Ngo Quyen Street
Hanoi
T +84 4 38247 422
F +84 4 38268 300

HO CHI MINH CITY
#1108 Saigon Tower
29 Le Duan Boulevard
District 1
Ho Chi Minh City
T +84 8 38226 680
F +84 8 38226 690

HONG KONG
11th floor
Two Exchange Square
Hong Kong
T +852 2846 3400
F +852 2810 6192

LONDON
65 Fleet Street
London EC4Y 1HS
T +44 20 7936 4000
F +44 20 7832 7001

MADRID
Fortuny 6
28010 Madrid
T +34 91 700 3700
F +34 91 308 4636

MILAN
Via dei Giardini 7
20121 Milan
T +39 02 625 301
F +39 02 625 30800

MOSCOW
Kadashevskaya nab 14/2
119017 Moscow
T +7 495 785 3000
F +7 495 785 3001

MUNICH
Prannerstrasse 10
80333 Munich
T +49 89 20 70 20
F +49 89 20 70 21 00

NEW YORK
520 Madison Avenue
34th floor
New York, NY 10022
T +1 212 277 4000
F +1 212 277 4001

PARIS
2 rue Paul Cézanne
75008 Paris
T +33 1 44 56 44 56
F +33 1 44 56 44 00

ROME
Piazza di Monte Citorio 115
00186 Rome
T +39 06 695 331
F +39 06 695 33800

SHANGHAI
34th floor
Jinmao Tower
88 Century Boulevard
Shanghai 200121
T +86 21 5049 1118
F +86 21 3878 0099

TOKYO
Akasaka Biz Tower 36F
5-3-1 Akasaka
Minato-ku
Tokyo 107-6336
T +81 3 3584 8500
F +81 3 3584 8501

VIENNA
Seilergasse 16
1010 Vienna
T +43 1 515 15 0
F +43 1 512 63 94

WASHINGTON
701 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20004-2692
T +1 202 777 4500
F +1 202 777 4555

27920