WHITE & CASE

Global HR Hot Topic

July 2012

Non-Competes and Other Restrictive Covenants in the *Cross-Border Context*

Challenge:

Employment-context restrictive covenants (non-compete, confidentiality, trade secret and non-solicitation agreements) are vital tools for international businesses in this information age. But enforcing these across multiple jurisdictions implicates wildly different rules.

Having discussed in our previous *Global HR Hot Topic* of June 2012 "plain vanilla" single-jurisdiction restrictive covenants where an employee was hired, worked and then allegedly breaches in just one foreign jurisdiction (and where any covenanted choice-of-law clause refers back to that same jurisdiction), we turn here to the conflict-of-laws problem of *cross-border restrictive covenants*. These are restrictive covenants with a geographic scope that spans more than one country, and covenants with a border-crossing employee like an expatriate, mobile worker or employee with regional/global responsibilities, and covenants with a choice-of-law clause that implicates some legal regime other than the host country's. To determine which jurisdiction's law controls the enforceability of a cross-border restrictive covenant, confront two separate issues: *choice-of-law clause* and *relevant jurisdictions*.

- **Choice-of-law clause**. We have seen that every jurisdiction imposes its own mandatory rules, standards and procedures enforcing local restrictive covenant public policy. We have also seen that these mandatory rules differ widely across jurisdictions. And we have seen that because these rules apply by force of public policy, parties are usually powerless to contract around them. (*See Global HR Hot Topic* of June 2012.) Given all that, many legal systems necessarily *have to* reject contractual choice-of-law selections that invoke the laws of less-protective foreign regimes. In the words of an Argentine law firm newsletter explaining Argentine non-competes, "the enforceability in Argentina of provisions executed under the law of a foreign country…in principle will not be valid." After all, if parties could select the law of some looser foreign regime to control their restrictive covenants, then choice-of-law clauses would be a back door through which parties would flee host jurisdiction restrictive covenant "mandatory rules." Courts the world over are smart enough to close, and lock, this back door.

  For that matter, choice-of-*forum* and alternate dispute resolution clauses raise similar problems. Never rely reflexively on a forum-selection clause in the international employment context. Outside the US, these clauses are rarely enforceable to divest host-country court jurisdiction over employment-context disputes.

Pointer:

Craft cross-border restrictive covenants to conform to relevant law. In determining which jurisdiction's law is most relevant, never be lulled by a choice-of-law clause. Focus instead on the place where the employee will go off to breach.

Each monthly issue of *Global HR Hot Topic* focuses on a specific challenge to globalizing HR and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case's International Labor and Employment Law practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

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But we have been considering choice-of-law clauses that select *looser* legal regimes. Obviously a choice-of-law clause that selects a jurisdiction with a nexus to the parties' relationship can implicate *stricter* rules from a *tougher* selected jurisdiction. For example, because California's non-compete law is stricter than New York's, a New York court might defer to an agreed California choice-of-law clause in an otherwise-New York-grounded non-compete (if California has a nexus to the employment relationship). Similarly, because French non-compete law is in some respects stricter than English law, an English court might defer to a French choice-of-law clause on grounds such as post-term compensation when enforcing an otherwise-English-grounded non-compete (where there is a nexus with France).

The upshot is that choice-of-law clauses in cross-border restrictive covenants tend to backfire because they work against employers in both directions. They are ineffective in pulling looser rules into a stricter host jurisdiction, but they are effective in pushing stricter rules onto a looser jurisdiction.

Employers, therefore, might consider leaving choice-of-law clauses out of their cross-border restrictive covenants entirely. But counterintuitively, multinationals like to pepper choice-of-law clauses into their cross-border restrictive covenants. Why? Employers claim these clauses somehow offer "certainty." But treaties and cases around the world show that choice-of-law clauses in cross-border restrictive covenants often introduce more confusion and complications than "certainty." *See*, e.g. Europe Rome I Convention, EU Regulation 593/2008/EC (6/17/08) at arts. 8(1), 21; *Duarte v. Black and Decker*, [2007] EWHC 2720 (QB)(UK)(1/07); *Samengo-Turner v. Marsh & McLennan*, [2007] EWCA Civ. 723 (UK)(7/07); *cf. Ruiz v. Affinity Logistics*, 667 F.3d 1318 (U.S. 9th Cir. 2012). *Duarte and Samengo-Turner*, two landmark UK decisions, involved whether a US state choice-of-law clause in an employment-context restrictive covenant (one case involved a New York law clause and the other a Maryland law clause) requires a UK court to defer to US state law in interpreting a restrictive covenant enforced in the UK. The facts in each case involved some twists, but at the end of the day, both UK courts predictably ruled that UK, not US state, public policy and "mandatory rules" control how restrictive covenants get enforced on UK soil. The choice-of-law clauses in those cases introduced confusion, not "certainty."

Employers fear leaving choice-of-law clauses out of their cross-border restrictive covenants because the omission leaves them feeling naked. But (subject to some exceptions) this omission may actually be a sound strategy: Omitting this clause virtually guarantees a court construing the covenant will apply just *one* jurisdiction's set of restrictive covenant rules and strictures—not two. Rather than rely on a choice-of-law clause, then, consider silently tailoring the content of a restrictive covenant to conform to the "mandatory rules" and public policy of the most *relevant jurisdictions.*

- **Relevant jurisdictions**. The question therefore becomes: *Which jurisdiction is most relevant to a given cross-border restrictive covenant?* Is it the place where the employee was originally hired? Is it the place where the parties executed the covenant? Is it the employee's longest or last principal place of employment? Is it the jurisdiction the parties selected in a covenanted choice-of-law clause? No. For practical purposes, the answer may be none of these. The most relevant jurisdiction in enforcing a cross-border restrictive covenant—the jurisdiction whose mandatory rules and public policy will most likely control when a dispute ends up in a court with power to enforce an award in the employer's favor—is usually the place where the employee *goes off and allegedly breaches*. Generally, in drafting a cross-border restrictive covenant, the one jurisdiction's law to account for above all others is the place where the employee will later go off to breach. If there are several places within the covenant's geographic footprint that a particular employee might likely end up after employment, then, as possible, craft a covenant that conforms simultaneously to all those jurisdictions' mandatory rules and public policies.

  Imagine, for example, an oil company executive hired in Houston who signs, on Texas soil, a non-compete with a US-wide territory and a Texas choice-of-law clause. Imagine the company then transfers that executive to work for a while in Oklahoma and then later transfers her to Alaska. What if the executive quits, moves (with all her assets) to California, and starts competing in flagrant violation of her non-compete? California courts historically have tended not to recognize or enforce non-compete injunctions issued out-of-state that violate California public policy. So few would expect a California court to defer to the Texas choice-of-law clause and apply Texas non-compete standards that do not meet California's tougher "mandatory rules" and public policy. The most relevant jurisdiction here, therefore, ends up being the place where the employee breaches the covenant—California. If in drafting this particular covenant the employer had foreseen that the executive would end up competing in California, then its best strategy would have been to craft a covenant cognizant of California law.

  The analysis works the same way internationally. Imagine an American banker hired in New York who, while on New York soil, signs a non-compete with a global territory and a New York choice-of-law clause. Imagine the bank transfers him to London for a while and then on to Tokyo. Ultimately the banker quits, moves to Frankfurt, and competes by taking a job managing a global division of a German bank. If the original employer wants an injunction to stop the breach of the non-compete, whose law most likely applies? *Germany's*. Even if the employer could win judgments against this banker from New York, English, and Japanese courts, those judgments will not likely be enforceable in Germany (where the banker is now competing and keeping his assets) unless they happen also to conform to German "mandatory rules" and public policy. That is, with the banker and his assets now safely in Germany, for practical purposes, injunctions and even money awards from courts in New York,

England and Japan are all but worthless unless German courts will recognize and enforce them. And no one expects any court anywhere to enforce a foreign judgment that violates its local "mandatory rules" and public policy. For practical purposes, German law controls.

Of course, an employer drafting a real-world restrictive covenant with a cross-jurisdictional territory will have a tough time divining which jurisdiction will later end up as the place where this particular employee goes off and breaches. Indeed, it is this very unpredictability that pushes so many employers seeking "certainty" to insert choice-of-law (and choice-of-forum) clauses into their cross-border covenants. But as we have seen, these clauses can bring more confusion than certainty. So the difficulty of this challenge (predicting where a border-crossing employee will end up competing) is no excuse for an employer to sabotage its own cross-border restrictive covenant by inserting a provision likely to backfire.

Conclusion

Employment-context restrictive covenants are vital for international businesses in this information age. But enforcing these agreements across national boundaries implicates wildly different rules. With each jurisdiction balancing the competing interests in its own particular way, a multinational operating internationally confronts a panoply of restrictive covenant enforceability standards, mandatory rules and public policies. The most practical strategy is to craft restrictive covenants to conform to "applicable law." In determining which jurisdiction's law is most "applicable," or relevant, never be lulled by a choice-of-law clause. Focus instead on the place where the employee will go off to breach.