RESTRICTIVE COVENANTS FOR MULTI-NATIONAL EMPLOYERS:

STRATEGIES FOR EFFECTIVE DRAFTING AND IMPLEMENTATION

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Employment-Based Covenants

Global Drafting Requires Balancing Competing Interests

- Global Consistency: desire to preserve as much consistency throughout global enterprise operations as possible

- Local Effectiveness: need to adjust your approach and tailor agreements so that they adequately reflect local law and custom.
Frequently Used Types of Covenants In Key Countries Throughout the World

- Confidentiality/Non-Disclosure
- Notice Clause/Garden Leave
- Non-Solicitation of Clients/Non-Dealing with Clients
- Non-Solicitation of Employees
- Non-Compete
Why Implement Restrictive Covenants Across a Multi-National Enterprise?

- **Talent Retention**: focus on retaining talent globally by creating barrier to loss of key employees

- **Protect Confidential Info**: guard against the removal or misuse of trade secrets and confidential information

- **Client Relationship & Goodwill**: prevent former employee from exploiting relationships with company customers, and provide time for company to shore up relationships
Global Restrictive Covenants: Issues Common to all Jurisdictions

- **Identify employer interests**: what is the restrictive covenant intended to protect?

- **Narrowly tailor temporal and geographic scope**: tailored to legitimate employer business interests.

- **Consideration**: what consideration, if any, must be given at signing?

- **Compensation**: do you need to pay compensation during the restricted period?
Restrictive Covenants: Global Challenges

No Globally Applicable Covenant Law

Local laws vary, but three primary approaches emerge:

- **Reasonableness Standard** – like most U.S. states
- **Reasonableness with Pay** – e.g., China & many EU nations
- **Prohibited** – like California, also Mexico, India
Restrictive Covenants: Global Challenges

- No “one size fits all” agreements: just as U.S. law varies from state to state, it is not possible to draft one document for all countries

- Choice of law/forum clauses: generally will not work

- Language: requirements & options vary
  - Dual Column English & Local Language – most common
  - English Only – sometimes ok, e.g., Singapore
# Rolling Out Global Restrictive Covenants: Common Business Unit Concerns

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<th>Common Business Concerns</th>
<th>Response</th>
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<td>• Impact on employee recruitment/hiring.</td>
<td>• Are your competitors implementing similar agreements?</td>
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<td>• Employees unwilling to sign, or may attempt to negotiate terms.</td>
<td>• Likely acceptance <em>if</em> restrictions reasonably tailored/fair.</td>
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<td>• Expense of enforcement and uncertainty of injunctive relief.</td>
<td>• Deterrent value of the agreement; many issues can be resolved at the demand letter stage.</td>
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<tr>
<td>• Cost of implementation.</td>
<td>• New consideration not always required/significant. Where it is, may still be worthwhile due to positive impact on revenue if customers and employees are not lost to competitors.</td>
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The Americas
Canada

Two-Tiered System of Laws

• National Rule: discourages non-competition agreements

• Provincial Law: as in U.S., restrictive covenant law varies by province, so must account for location in drafting
  – E.g., Quebec: especially difficult to enforce a covenant
Canada

National & Provincial Law Interaction - Example

- **National Law**: 1935 Supreme Court decision says continued employment is adequate consideration for covenant given to existing employee

- **Provinces**: more recent provincial cases say new consideration is required
  - Limiting Supreme Court decision to only where employer expressly threatens termination absent signature
Brazil

Balancing Two Constitutional Principles

• “Free Competition”: employer’s right to protect itself and impose employment terms to protect confidential info

• “Right to Work”: can be limited by covenant, but balancing the principles requires durational and scope limits, and compensation

• Consideration: courts generally require payment of specific compensation for restrictive covenant
Argentina

• **Constitutional right to work:** subject to infringement only on showing of reasonableness, governed by case law, not legislation

• **Reasonableness:** scope, duration, industry
  – Reasonableness judged as of the time of signing

• **Compensation:** 50-100% of prior monthly compensation to be paid monthly during the restricted period

• **Non-Solicit of Clients:** similar reasonableness standard and some compensation still required
Mexico

- **Non-competition agreements**: unenforceable as a violation of the principle of “freedom of work”
- **Non-solicitation agreements**: also unenforceable
- **Confidentiality & nondisclosure agreements**: generally enforceable
- **Trade Secrets**: trade secret law also protects information
- **Trends**: compensation for covenant + suit for claw back
Post-Employment Restrictive Covenants: Europe

- **Diverse legal systems**: no EU-wide law on covenants

- **Reasonableness**: generally assess reasonableness of legitimate business interest, time & scope

- **Compensation**: many countries require compensation during restricted period

- **Place of Suit**: EU rules govern locus of suits against employees
Germany

- Generally only enforceable if in writing
- Employee must receive an original signed copy of the clause
- Must not exceed two years in duration
- Must not “unfairly jeopardize” the employee’s future career
- Must provide employee compensation of \textit{at least} 50\% of his/her last salary (including bonus, commission, etc.)
England & Wales

- No statutory basis for restrictive covenants; case-law based
- Tend to apply to senior employees
- Any contract must be accompanied by consideration
- Non-solicitation (of clients) clauses enforceable, often combined with “non-dealing” clauses
- Garden leave is common
England & Wales

• Employee non-solicitation clauses
  – enforceable
  – must be narrowly drafted

• Overbroad covenants

• Courts can “blue pencil”
  – cannot re-write or modify
Spain

• 1995 Workers’ Statute Section 21 governs
• Courts generally enforce non-competes only with:
  – senior managers
  – very qualified employees with access to sensitive information
  – sales personnel with direct access to clients
• Requires “adequate” compensation either:
  • during the restricted period; or
  • separately enumerated compensation paid during employment
• Injunctive relief not available
Denmark

- New legislation effective Jan. 1, 2016
- Term can be no longer than 12 months for non-compete or non-solicit – if agreement contains both, cannot exceed 6 months
- Compensation is required – 40% or 60% of salary, depending on duration and scope of covenant
- Covenant is unenforceable if employee is terminated without reasonable cause
- Employee non-recruit provisions not enforceable
Asia
China

- Confidentiality, non-competition and non-solicitation agreements are generally enforceable
  - 2008 Employment Contract Law
  - Must harmonize with collective bargaining agreement terms

- Non-competes
  - Only for senior management, senior technicians and those with trade secrets access
  - No more than 2 years
  - Reasonable geography
  - Compensation paid during restricted term
    - Varies by province
India

- Post-termination non-competes generally unenforceable
  - Indian Contract Act
  - Constitution
- In-term non-competes are enforceable
- Post-termination non-solicits… *maybe enforceable*
- Non-disclosure clauses
- Options: Contracts for term of years
India

- Protection of confidential info and client lists
  - No statute but courts may protect info
- Will not honor choice of other law or forum
- Sale of business covenants, enforceable if reasonable
Africa
South Africa

• No governing legislation

• Court will analyze reasonableness of restrictive covenant

• Courts will consider:
  – Proprietary interests of employer
  – Balance of hardship
  – Public policy concerns
South Africa

• Restrictive covenant agreements permitted to protect:
  – confidential information and matter (trade secrets); and
  – relationships with customers, potential customers, suppliers and others.

• No compensation required

• Injunctive relief available
FINAL QUESTIONS?

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THANK YOU

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