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**2019 MANAGING THE GLOBAL WORKFORCE WEBINAR SERIES**

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# **ENFORCING NONCOMPETE AGREEMENTS GLOBALLY**

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# **MIDDLE EAST**

Abu Dhabi Global Market (ADGM)

Bahrain

Dubai International Financial Centre (DIFC)

Kingdom of Saudi Arabia

Kuwait

Oman

United Arab Emirates

# Middle East: General Principles

- The general premise in the Middle East is that noncompete clauses are extremely difficult to enforce. Relevant provisions across the key jurisdictions:
  1. UAE - Federal Law Number 8 of 1980/Ministerial Resolution Number 297 of 2016
  2. DIFC - DIFC Law Number 6 of 2004
  3. ADGM - The Employment Regulations 2015/UK Common Law and Equity
  4. Kuwait - Law Number 10 of 2007 (Competition Law)
  5. Bahrain - Law Number 36 of 2012
  6. Oman - Royal Decree Number 55/90/Sultan's Decree Number 35/2003
  7. Kingdom of Saudi Arabia - Royal Decree Number M/21 of 1969 - Royal Decree Number M/51 of 2005

# Middle East: UAE Example

- Article 127 of the UAE Labour Law specifically addresses noncompete clauses: in order to enforce them, the ex-employer must file a claim asserting that the breach of the post-termination restrictions led to a quantifiable loss.
- The relevant article states:
  - *"If work assigned to the employee allows to acquaint with the employer's clients or have access to the secrets of his work, the employer may oblige the employee that after termination of the contract he may not compete with him or take part in any business interest competitive to the employer's. Such agreement shall be valid only if the employee has reached the age of 21 years at the time of its being executed and if the agreement is limited with respect to the place, time and nature of work to the extent as is necessary to safeguard the lawful interest of business."*

# Middle East: UAE Administrative Remedy

- Article 127 of the UAE Labour Law specifically addresses noncompete clauses: Ministerial Decision (297) of 2016:
- The relevant article states:  
*The Ministry may refrain from issuing a work permit or withdraw the permits issued thereby to the workers who, pursuant to a final court judgment, have been found to have violated one of the noncompete clauses stipulated in Article (127) of the Law regulating labour relations referred to hereinabove.*

# Middle East: UAE Example - DIFC

- DIFC – one of two financial-free zones in the UAE, separate employment, and regulatory authorities.
- **Article 144. Continuing duties after termination of agency**
- After the termination of the agency, the agent:
  - (a) *has no duty not to compete with the principal;*
  - (b) *has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his detriment, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in breach of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of the customers retained in his memory, if not acquired in breach of his duty as agent; . . . .*
  - (d) *has a duty to the principal not to take advantage of a subsisting confidential relationship created during the agency relationship.*
- The DIFC regulations do not explicitly allow for noncompete clauses in their contracts.
- Upon the termination of an individual's contract, the employee will be unable to reveal or practice the trade secrets of the principle or use the connections he or she obtained while working there if it would lead to the detriment of that principle.

# Middle East: UAE Example - DIFC

- **Article 148. Principal's choice of remedies**
- (1) If an agent has received a benefit as a result of breach of his duty of loyalty, the principal is entitled to recover from him what he has so received, its value, or its proceeds, and also the amount of damage thereby caused; except that, if the breach consists of the wrongful disposal of the principal's property, the principal cannot recover its value and also what the agent received in exchange therefor.
- (2) A principal who has recovered damages from a third person because of an agent's breach of his duty of loyalty is entitled to obtain from the agent any profit that the agent improperly received as a result of the transaction.

# Other Jurisdictions in the Middle East

- ADGM: Second financial free zone in UAE.
- Kuwait: damages available for a breach of a contractual provision restricting noncompete, dealt with under Competition Law (10 of 2007).
- Bahrain: Labour Law (article 73) no more than one year, similar work (however, not enforceable if employer terminates contract of employment through no fault of employee).
- Oman: Commercial Code and Labour Law: no mention of noncompete but applied to noncompete cases in Oman. Protection of trade secrets only to ensure balanced competition.
- Kingdom of Saudi Arabia: Sharia Law regulates business activities. Labour Law has no mention of noncompete. Trade secret protection obtained through work.

# Middle East: Solution

- Injunctive relief not available – except for ADGM and DIFC
- Rely on damages as a remedy
- Liquidated damages clause
- Longer contractual notice periods
- Garden leave clauses for employees who are exposed to a lot of confidential and commercially sensitive information

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**UNITED KINGDOM**

# UK: General Principles

- Any contractual term restricting an employee's activities after termination is void for being in restraint of trade and contrary to public policy, unless the employer can show that:
  - It has a legitimate proprietary interest that it is appropriate to protect
    - Trade connections (with customers, clients, or suppliers) and, more generally, goodwill
    - Trade secrets and other confidential information
    - Stability of the workforce
  - The protection sought is no more than is reasonable having regard to the interests of the parties and the public interest
    - Considered at point contract entered into
    - Special treatment for employment covenants
    - Prevention of competition must not be an end in itself
    - Restriction must be no wider than is necessary

# UK: General Principles

- A noncompetition (or noncompete) restriction, which prevents an employee from joining a rival employer for a defined period after termination, has traditionally been harder to enforce than a nonsolicitation restriction and is viewed as “the most powerful weapon in an employer’s armory”
- Courts have recognized that other forms of protection, such as confidentiality restrictions and nonsolicitation restrictive covenants, cannot always be effective in safeguarding a former employer's legitimate interests
- No need for continued payment to the employee

# UK: General Principles

- Duration – how long it will be before competitive activities by the individual represent less than a material threat to the employer's legitimate interest?
- Covenant not binding if employer is in breach
- Court does not have the power to rewrite a covenant to make it enforceable
- Remedies
  - Injunction
    - Serious issue to be tried
    - Damages not an adequate remedy
    - The balance of convenience
  - Damages
  - Undertakings
- Claims against the new employer for inducing breach of contract

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**HONG KONG**

# Hong Kong: General Principles

- The legal position in Hong Kong is similar to the UK
- Noncompete clauses are fairly common for senior employees or those with connections to clients or access to confidential information
- The courts in Hong Kong will only enforce a noncompete clause if it is necessary to protect the legitimate business interest of the employer which may include:
  - Trade secrets, confidential and proprietary information
  - Employer's trade connections (with customers or suppliers)
  - The stability of the workforce
- Once a legitimate interest has been established, the court will assess whether the restraint is reasonably necessary to protect the employer's legitimate interest by reference to duration, geographical boundaries, and scope of restrained activities

# Hong Kong: General Principles

## Duration

- In determining whether the duration of a restrictive covenant is reasonable, the court may consider:
  - the length of time it takes to replace the departing employee
  - the length of time the employee was kept away from the business
  - whether the employee has given an undertaking to the court in respect of confidential information
- There is no automatic set-off between the period covered by a noncompete clause and the period of garden leave served by the employee, but this may be taken into account in determining the reasonableness of the restraint
- A three- to six-month restriction is more likely to be enforceable

# Hong Kong: General Principles

## Geographical scope

- Worldwide restriction is likely to be considered unreasonable
- A general restriction from taking employment within the whole of Hong Kong will only be enforceable if it is justifiable in protecting the employer's legitimate business interest

## Scope – types of work/business activities

- The employee should only be restrained from carrying out the work/business activities that the employee was responsible for or was materially involved in as an employee

# Hong Kong: General Principles

- Whether the Hong Kong courts will enforce a noncompete clause will heavily depend on the specific circumstances and facts of each case.
- Generally, a noncompete clause is more difficult to enforce than a nonsolicitation clause.
- “*Blue pencil*”: If a restrictive covenant cannot be shown to be reasonable, it will not be enforced unless the unreasonable aspect can be severed without changing the character of the clause.
- The courts will not rewrite the restrictive covenant by substituting what in its view would be a reasonable restriction as to time, geographical location, or types of work.
- It is not necessary to provide any remuneration to the ex-employee during the noncompete period. Nevertheless, this will be one of the factors considered by the courts in determining whether the restrictions are reasonable.

# Hong Kong: General Principles

## Remedies

- Injunction
  - Serious issue to be tried
  - Urgency
  - Damages not an adequate remedy
  - Balance of convenience in favor of granting the injunction sought
- Damages and/or account of profits
- Undertakings

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**FRANCE**

# France: General Principles

- Noncompete clauses must meet the following requirements:
  - Legitimate business interests
  - Limitation of geographical scope
  - Maximum duration
  - Mandatory financial indemnity paid during the noncompete period
- The noncompete clause must comply with the terms of the applicable collective bargaining agreement
- Start date of noncompete varies depending on whether notice is performed or not
- Possibility to unilaterally waive the clause should be provided in the contract, otherwise consent is needed

# France: Implementing Noncompete Clauses

- Invalid noncompete clause:
  - can nonetheless bind previous employer
  - judges have the power to reduce its scope or consider the clause null and void
- Enforcing noncompete and consequences of noncompliance with the noncompete clause:
  - Former employee's liability
  - New employer's liability
- Other restrictive covenants are permissible and can, under certain circumstances, be assimilated into a noncompete clause:
  - Nonsolicitation of employees
  - Nonsolicitation of customers

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# **NONCOMPETE AGREEMENT EXAMPLES**

# Example #1

The Employee and the Company agree as follows:

1. The Employee agrees that “not to compete” or “noncompete” means that the Employee will not engage in any manner anywhere in the world in a business or activity similar in nature or appearance or have any similarity to that of the Company.
2. The Employee agrees not to compete, either directly or indirectly, with the company for a period of four years from the date of this agreement.

# Example #1: Considerations

## Middle East

- Too long
- Not specific as to the place
- Nature of work
- Period of time
- Compensation would have to equal four years' salary

## United Kingdom

- Likely to be unenforceable
  - Four years is too long
  - The noncompete needs to be limited to activities of the Employer with which the Employee was materially involved
  - Worldwide restriction is potentially fine but only if the Employer operates on a worldwide basis

# Example #1: Considerations

## Hong Kong

- Unlikely to be enforceable
  - Worldwide restriction is likely to be considered unreasonable
  - The restraint should be limited to activities that the Employee was responsible for or was materially involved in as an employee
  - A noncompete period of four years is too long

## France

- Too long
- Must be limited to activities of the employer with which the employee was materially involved
- Geographical scope too broad—must be limited to areas where the Employee was doing business
- No financial indemnity

## Example #2

The Employee shall not, at any time during the period hereof, and for two years from the date of termination of this Agreement, directly or indirectly, within the country in which he was employed by the Employer, engage in, or become involved in, any competitive or similar business as that of the Employer.

The Employer's similar business is defined as "any business that competes with the business of the Company or any Group Company."

# Example #2: Considerations

## Middle East

- If in the UAE, courts would restrict the time to a period of six months
- Nature of work too broad

## United Kingdom

- More chance of being enforced than Example 1 but:
  - Duration of two years is too long
  - The noncompete needs to be limited to activities of the Employer with which the Employee was materially involved

# Example #2: Considerations

## Hong Kong

- Unlikely to be enforceable
  - A noncompete period of two years is likely to be too long
  - The restraint should be limited to activities that the Employee was responsible for or was materially involved in as an employee

## France

- Must be limited to activities of the Employer with which the Employee was materially involved
- Geographical scope too imprecise—the Employee should know, at the time he signs the contract, which areas are of concern
- No financial indemnity

## Example #3

Following the termination of contract with the Employer for any reason, the Independent Contractor agrees not to engage directly or indirectly in any business substantially similar to or in competition with the business of the Employer, its Successors, or assigns for a period of one year.

For purposes of this agreement, engaging in “any business substantially similar to, or in competition with the business of the Employer” shall mean:

- i. Engaging in a business as an owner, partner, or agent;
- ii. Taking employment with a third party engaged in such business either as an employee, contractor, or consultant; or
- iii. Soliciting customers for the benefit of a third party engaged in such business.

# Example #3: Considerations

## Middle East

- Independent contractors are not a recognized category of employee
- However, other contractual clauses would restrict the direct competition

## United Kingdom

- Noncompetes can be enforced against Independent Contractors
- One-year duration is long but is capable of being enforceable if the “Employer” can show that the contractor had access to confidential information that will still be “live” a year later
- The noncompete needs to be limited to activities of the Employer with which the Employee was materially involved
- Clause (iii) is a nonsolicitation clause that has a better chance of being enforced although it needs to be limited to customers with whom the contractor had material contact

# Example #3: Considerations

## Hong Kong

- Noncompete clause can be enforced against Independent Contractors
- The restraint should be limited to activities which the Independent Contractor was responsible or materially involved
- A noncompete period of one year may be enforceable depending on the facts of the case
- Clause (iii) is a nonsolicitation clause and it is more likely to be enforceable than the noncompete clause. Nevertheless, the restraint should be limited to customers that the Independent contractor has dealt with or has knowledge by virtue of the services he/she provided for the company

## France

- Noncompete clause can be enforced against independent contractors
- Unlike with employees, no need to have a financial indemnity
- Must be limited geographically

## Example #4

As a condition of employment, the Employee agrees that in the event that his/her employment terminates for any reason, for a two-year period, the employee will not, directly or indirectly, either for himself/herself or through any kind of ownership as a director, agent, employee, or consultant, for any other person, firm, or corporation, call on, solicit, take away, or cause the loss of clients of the Company on whom the Employee called or with whom he/she became acquainted during his/her employment immediately preceding the termination of employment.

It is expressly agreed and understood that the remedy at law for breach of covenant is inadequate and that injunctive relief shall be available to prevent the breach thereof.

# Example #4: Considerations

## Middle East

- Too broad
- Not specific
- Too long
- Criminal act to take information from the Employer, so alleviated remedies for breaches need to be considered

## United Kingdom

- Two-year period is too long
- However, if it were for a period of one year or less, the rest of the clause would be enforceable as it is a nonsolicit that is limited to customers with whom the Employee was acquainted

# Example #4: Considerations

## Hong Kong

- Unlikely to be enforceable
  - A nonsolicitation period of two years is likely to be too long
  - A nonsolicitation period of six months is more likely to be enforceable

## France

- Nonsolicitation of clients assimilated to noncompete clause
- Geographical scope is not defined
- No financial indemnity

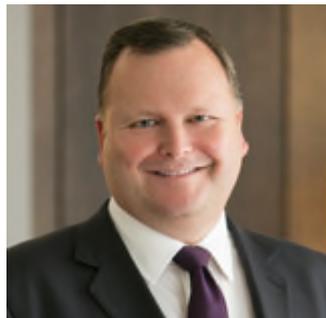
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