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Post-Contractual Obligations in Different Jurisdictions and According to Non-State Law

LLM Paper
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Acknowledgments & Preface

First of all, I would like to express my sincerest gratitude to prof. dr. Johan Erauw, for allowing me to research this most interesting topic, for giving me the independence one expects to receive when writing a master's thesis, and to review the result of my research. For the latter, I also thank Erinda Mehmeti. My eternal gratitude also goes to my parents, for giving me the opportunity to pursue the study of my choosing in the country of my choosing.

For my final year's thesis, I wanted to explore a topic that I had not been so familiar with. Having studied International and European Law as my bachelor's discipline, I wished to challenge myself by analyzing a private law topic. I have made my decision to write my LLM paper on the topic of post-contractual obligations, when browsing through a book of Marcel Fontaine and Filip De Ly on 'Drafting International Commercial Contracts' as preparation for the International Commercial Transactions course, which I was following at the time. I have immediately contacted prof. dr. Johan Erauw with a request to promote my thesis on this particular topic. Being assured by prof. dr. Erauw that the topic was not yet widely explored in the legal literature, I was convinced that this topic was challenging enough to be worth examining for the final year of my law studies. Even though I was faced with scarcity of sources, I believe I have found a way to scrutinize the topic from various perspectives, namely by examining certain national jurisdictions, as well as international law instruments. At the end, I was very glad with my choice of topic, because the fact that it is not very popular in the legal doctrine gave me a lot of freedom in structuring and developing my thesis. Nevertheless, I am convinced that in light of the practical problems that are caused by post-contractual obligations, especially in international settings, this topic should be explored in the global legal literature in much more detail.

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1. Introduction

'The default rule is that a party's rights and obligations under a given contract only last as long as the contract.'[1] A contractual agreement has a starting point upon its conclusion and ends either as a consequence of its natural and foreseen end, or prematurely upon specific occurrence.[2] However, these, at first sight clear-cut, boundaries of a contract are not so straightforward in practice. Especially when one thinks about international contracts, demarcation lines are not so easy to establish.[3] It might not be entirely clear where to draw the line between the pre-contractual phase and the actual conclusion of a contract. Even in the early stage, predating the "official" agreement, certain obligations between the parties will exist, that will demonstrate an existence of some sort of an agreement. As a matter of fact, parties might indeed conclude and sign certain understandings, which afterwards will result in binding obligations or, in some cases, even be interpreted as the actual contract or a part of the contract. Nevertheless, in my thesis I will not examine the pre-contractual stage of a contract, but I will look at what happens after a contract is terminated.

Similarly, as it is not always easy to define the precise beginning of a contractual agreement, it is often not entirely correct to conclude that, after the termination of a contract, all contractual relationships between the parties come to an end. On the contrary, there are certain obligations that survive, or even arise, after the contract has ended. These post-contractual obligations will extend into the future, after principal obligations of an agreement have been performed or cease to exist.[4] For this reason, sometimes they are called post-contractual situations[5] to signify the difference with the obligations, which have been terminated or have been declared non-existent for other reason. However, some authors

[1] Ken Adams, 'Survival' (Adams On Contract Drafting, 9 July 2006) <http://www.adamsdrafting.com/survival/> accessed 26 March 2015

[2] Marcel Fontaine, Filip De Ly, Drafting International Contracts: An Analysis of Contract Clauses (Transnational Publishers 2006) p.597

[3] ibid

[4] ibid 598

[5] Geoffrey Samuel, Law of Obligations & Legal Remedies (Cavendish Publishing Limited 2001 p.295

believe, that the term *post-contractual* is not sufficiently correct altogether, since it is not that the obligations on their own survive, but the contract itself that continues to exist to some extent.[6] However, in this research, the correctness of the term itself will not be questioned and the term *post-contractual obligations* will be used.

In my thesis, I will shortly examine different post-contractual obligations, what the consequences of their existence are and what common problems they pose. A comparative study then will follow, which will examine two of the most common, and perhaps the most problematic post-contractual obligations, more precisely post-contractual non-compete and confidentiality obligations. I will proceed by looking deeper at how they are perceived in different jurisdictions. I will start my comparison with civil law countries, namely France, Germany and Lithuania. Afterwards, I will continue the comparison by analyzing concepts of post-contractual non-compete and confidentiality obligations in common law jurisdictions, including United Kingdom and United States. In my analysis I will concentrate on requirements posed for imposition of post-contractual confidentiality and non-compete, limitations prescribed by statutory or case law and overall general practice of enforceability of clauses prescribing the two post-contractual obligations. After that an examination of several international instruments will follow. I will examine a number of instruments that recognize the existence and possible enforceability of post-contractual obligations per se, and then look more closely to specific provisions and rules concerning post-contractual non-compete and confidentiality obligations. Furthermore, a comparative analysis of all discussed jurisdictions will be presented, followed by a short comparison of the non-state law instruments. Finally, I will conclude my thesis and reach the main goal of this thesis - discover which of the two analyzed post-contractual obligations is more entrenched, why that is so, whether that is done on international or domestic level and what consequences that implies.

[6] Fontaine, De Ly (n 2) 598

2. Post-contractual obligations: general overview

A list of obligations that might remain after the contract itself has been terminated is wide and possibly non-exhaustive. However, it is possible to group those obligations under two distinct categories.[7]

First of all, there are obligations that arise out of past events and will usually require a one-time performance.[8] In other words, obligations that wind up the past.[9] The existence of such obligations will be particularly noticeable in long term contractual relationships, as opposed to contracts that require a one-time performance from both parties, and after which there are no more ties between the two. In a long term contractual relationship there will be *leftovers* to deal with. For example, a distributor might have products of a manufacturer left in its stock. What happens to those products after the expiration of a distribution agreement? The agreement will usually contain a clause dealing with such matters, by including a clause obliging the manufacturer to repurchase its products or allowing the distributor to sell the remaining units. In any case, the post-contractual obligation will be of a short-term character and will concern the past. [10]

Another example of winding up the past is returning specific documents, which were delivered by one party to the other party as a consequence of a contract. Such documents can include certain advertising materials provided together with contracted goods.[11] One has to think of an expired distribution agreement for a highly demanded good, to see that it will be within the interests of the manufacturer to require all signs of his product to be removed from distributor's establishment, since potential clients will be misled and this might in turn constitute a threat to the overall reputation of the manufacturer's business. In

[7] ibid 599
[8] ibid 597
[9] ibid 599
[10] ibid 604
[11] ibid 601

addition, certain advertising materials might be expensive themselves. Consequently a manufacturer will definitely want to include a clause dealing with such marketing materials in a distribution agreement.

These examples illustrate post-contractual obligations that have to do with the past, they finalize relationships between the parties in order to bring about a situation in which parties have no bounds with each other.[12]

In addition to this first group of post-contractual obligations, there are obligations that will provide for certain future legally binding arrangements of a more continuous nature. It might be the case that they will take form of obligations that already existed with the beginning of the contract, but it is also possible that they will be completely new obligations, coming into effect with the termination of principal obligations.[13]

One of the most significant examples is the non-compete clause. Many commercial contracts, as well as employment contracts have a clause on a post-contractual non-compete obligation.[14] It is not uncommon that a seller of a certain business will be bound not to compete with his buyer. As far as the sale of goods is concerned, in a situation, where goods are manufactured by a seller on buyer's request and according to buyer's specifications, it is understandable, that after the sale of goods, the buyer will be determined to make sure the seller does not engage in a business with buyer's competitors.[15] It is, of course, unreasonable to think that a buyer will be able to prevent a seller to conduct business with buyer's competitors indefinitely, but a certain period of time, depending on the market and goods themselves, probably the quantity purchased, will most likely be provided, extending obligations of a seller into the future. As regards competition, several other descendant clauses imposing post-contractual obligations are of high importance, such as a non-solicitation clause, which will impose a duty not to approach current or potential customers of a

[12] ibid 604
[13] ibid
[14] ibid 605
[15] ibid

previous employer; or a non-dealing clause will prevent one from establishing a business relationship with such customers even if they approach a person, bound by the non-dealing clause, themselves. Also, a non-poaching clause will forbid contacting and trying to recruit other staff of a previous employer.[16] These obligations quite often come in a combination, since they all intend to prevent an individual from using contacts and information obtained from an ex-employer.[17]

Another important example of post-contractual obligations is the confidentiality obligation. Confidentiality clauses are particularly relevant in labor and employment contracts, as well as contracts related to technology and research, specifically where information of high value is shared and transferred between the parties.[18] The goal of confidentiality clauses is to prevent third parties from obtaining valuable and secret information. Such confidential information include information on products and their characteristics, information on technology used to produce certain products or on technology per se, market research, price lists, customer lists and other valuable information, that allow a successful exploitation of business.[19] During the period of a contract it will normally be in the interest of an enterprise to preserve the secrecy of all this information. For this reason, employees will be bound by confidentiality clauses in their contracts or even separate contracts. However, after termination of an employment contract, it would be unwise for an employer to free his previous employee from any confidentiality obligation, due to obvious risks of being exposed to competitors. For this reason, confidentiality obligations will normally be extended in time and that will be provided in the employment agreement. The scope and the period of such obligations will inevitably depend on the position

[16] 'Post Termination, Restrictive Covenants' (Slater & Gordon Lawyers, April 2012) <https://www.slatergordon.co.uk/media/340283/post-termination.pdf> accessed 3 March 2015

[17] Post-contractual non-compete, non-solicitation, non-dealing, non-poaching clauses, as well as post-contractual confidentiality clauses, discussed further, in legal literature are often named as post-termination or post-employment restrictive covenants. However, in this thesis the specific term will not be applied, and such clauses will be simply referred to as post-contractual clauses.

[18] Fontaine, De Ly (n 2) 606

[19] Martijn W.Hesselink, Jacobien W.Rutgers, Odavie Bueno Diez, Manola Scotton, Muriel Veldman, Principle of European Law: Commercial Agency, Franchise and Distribution Contracts (Sellier 2006) p.114

held by the employee in question. Post-contractual confidentiality obligations, as well as non-compete or other relevant obligations, will be particularly restrictive for senior employees. Due to their duties they will most likely be in possession of valuable confidential information, have a closer relationship with important customers and influence other staff members.[20]

A third example in this group of post-contractual obligations that extend into the future is a guarantee. The effect of such obligation will depend on the good or service that the guarantee is provided for.[21] Some other examples that can further be mentioned in this category of post-contractual obligations include obligations in technology transfer agreements to communicate improvements that parties develop during the exploitation of technology whether before or after the principal obligations have been terminated, as well as a right of first refusal for a future contract.[22]

Post-contractual obligations that have been mentioned are just some of many possible ones. In addition to the great variety of different types of obligations, there is an outstanding number of variations on each specific type; so one could probably spend years trying to compile them all. Notwithstanding a great diversification of obligations, there are problems that are more or less common to them all.[23]

One of the major issues regarding the issue of post-contractual obligations is whether such obligations exist implicitly or an express clause is absolutely necessary.[24] Theoretically, there are no requirements as to the form of the contract to bind the parties, but in practice, probably every lawyer will advise parties to put in writing as many relevant issues as possible, in order to make things clearer and easier in the future. Therefore, a wise drafter will inevitably put clauses on post-contractual obligations in a contract to make sure that in the

[20] ibid
[21] Fontaine, De Ly (n 2) 608
[22] ibid 610
[23] ibid 611
[24] ibid 612

future there are no doubts or disagreements regarding their existence.[25] However, what if that is not done. What if there is no clause in the contract? Is it right to conclude that an obligation might still exist? Here it is necessary to remember general principles of contract interpretation and remember that certain aspects that are not covered by a contract itself will be taken from the law governing the contract, or even the law of the forum might play a role. Therefore, it may very well be the case that in the absence of a specific provision in the agreement itself, national laws will impose certain post-contractual obligations. For instance, most jurisdictions provide for laws governing guarantees against defective goods.[26] It might also be possible that an obligation will be established in the case law, if the national legislator does not expressly deal with the point.[27] Consequently, a lack of an express provision in an agreement will not necessarily mean that a certain obligation will not exist. Nevertheless, if an obligation will be determined and governed by national law there is a risk that some effects and solutions might not be exactly what parties would have wished. For this reason, as for any other aspects of a contract, drafters should carefully consider post-contractual aspects in light of the law applicable to the contract.[28]

The existence of a relationship of post-contractual clauses with national law brings us to another point, namely, whether those clauses will always be considered lawful. Normally, a post-contractual clause will be considered unlawful when it derogates from binding legislation or violates general principles of law.[29] To determine if a clause is unlawful one will have to look at the law governing the contractual relationship in question. Here we notice, that not putting a post-contractual clause in a contract might be a solution for an inexperienced or, perhaps, lazier drafter. By not dealing with a topic he could avoid the risks that, due to a certain national law, a clause would be declared unlawful. In addition, a decision not to include a clause on a post-contractual

[25] Adams (n 1)
[26] Fontaine, De Ly (n 2) 612
[27] ibid
[28] ibid
[29] ibid 615

obligation might, perhaps, also be a tactic solution. For example, if national law provides for a more generous outcome than a standardized contract of a certain establishment, and in light of some specific circumstances, it is desirable to make an exception for one contract, omitting a clause instead of changing it could be a technique used not to attract attention. Nevertheless, that should inevitably be done within the limits of legality, since other contractual duties might come into effect such as a duty to inform. However, this is a topic for a different discussion.

Another important consideration to make is regarding a change of circumstances. A change of circumstances might be detrimental for the destiny of a contract. Are there situations that could also affect the existence of post-contractual obligations? It would appear that post-contractual obligations, as opposed to primary obligations of a contract, are 'particularly vulnerable to such changes.'[30] This is due to the fact that they last longer. There should be some degree of necessity in order to justify their existence. As a result, a change of circumstances might raise doubts regarding the necessity to indeed justify the prolongation. For instance, take a post-contractual non-compete obligation for 3 years, owed by one business establishment to another. One of the two businesses go belly up after half of the three-year period. Does the obligation still exist, even though one of the parties legally ceased to exist? It is tempting to conclude it is a fundamental change of circumstances that could dismiss a party from its non-compete obligations. However, a bankrupt party does not legally disappear the second it stops its activities on the market.

> As a natural person, the party to whom the obligation is owed survives with its rights and, in time, transmits them to its successors. As a legal person, the business survives for the period of its winding up and its rights may be passed on to another firm.[31]

But does it really justify the continuation of a post-contractual obligation? The original contract was concluded as between businesses, engaged in certain

[30] ibid 619
[31] ibid

economic activity. Should not a post-contractual non-compete obligation be considered in light of that economic activity? And would it not be logical to conclude that the obligation ceased to exist together with the enterprise? The outcome will most likely depend on national courts dealing with the issue and national law solutions for hardship.[32] This problem signifies once again the importance of qualitative drafting, since it would not arise in the first place if the contract contained a specification that the post-contractual obligation will cease to exist in case the enterprise goes bankrupt.

An interesting issue to note is whether certain general clauses survive the termination together with clauses imposing post-contractual obligations. It is quite common that a number of general clauses will also endure termination, such as dispute settlement or applicable law clauses. Unlike clauses containing post-contractual obligations, such general clauses will not be imposed a time limit.[33]

> It is not necessary to say that boilerplate survives termination—if a party is able to bring a claim after the agreement terminates, then the rules governing how a claim is to be handled perforce apply to that claim and do not fall by the wayside.[34]

Therefore, only in exceptional occurrences survival of such general clauses will be expressly stipulated in a contractual agreement.[35] Normally, these boilerplate provisions will include jurisdiction of a competent court or an arbitral tribunal to settle disputes, applicable law, as well as notices.[36] With respect to post-contractual obligations it is convenient such parallel clauses survive. Consider a

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[32] ibid

[33] General clauses that survive termination and clauses imposing post-contractual obligations are not to be confused. It is irrelevant whether a particular post-contractual obligation has already existed during the period of a primary contract or only came into effect after the contract has been terminated. The fact that it has already existed during the period of a contractual relationship does not make it a general obligation. It must be emphasized that in this thesis only the category of post-contractual obligations is discussed, general clauses regarding issues of arbitration, jurisdiction, applicable law and etc., that survive the termination of a contract are outside the scope of this thesis.

[34] Adams (n 1)

[35] Fontaine, De Ly (n 2) 617

[36] Adams (n 1)

situation when a dispute arises regarding the performance of a post-contractual obligation. The obligation and the dispute are automatically placed in a certain setting. Parties will know to which court or tribunal to turn and which law will fill necessary gaps. Without such provisions a post-contractual obligation would be as one soldier on a field – it would not really offer a full set of guarantees.

Furthermore, there are more aspects worth mentioning which may raise problems regarding post-contractual obligations. For example, remedies available for breach of a post-contractual obligation. Here again one would face serious complications of poor drafting, if a clause dealing with this was not added. There of course remain certain remedies provided in national law. On the other hand, those remedies might be very poor, since the contract itself will be already performed. For this reason, remedies such as specific performance or withholding one's performance will not be practically available anymore and the number of actually useful remedies will be most likely low. As a result drafters should consider if it is possible to penalize a violation of a post-contractual obligation by contractual means.[37] This will be particularly important when the contract is international and most likely involves application of laws of several jurisdictions.[38] Another issue is the duration.[39] If the period is not determined in the contract, it will also be determined by the applicable law. However, this in most cases equals to rolling a dice, because the faith of contracting parties will depend on whether the applicable law contains provisions or principles providing for a desirable duration or not. Although an omission of an explicit clause on duration might also be a case of tactic drafting.[40]

All these discussions lead to several important understandings. First of all, the importance of a careful and thoughtful drafting of provisions of an agreement is extremely important not only regarding main obligations, but also regarding post-contractual obligations. One must not be distracted by the importance of

[37] Fontaine, De Ly (n 2) 616
[38] Similarly, the same holds for countries with two or more jurisdictional units, such as United States. (For a detailed discussion on United States see Chapter 4.2)
[39] ibid 618
[40] See pg.6 paragraph on lawfulness of a clause

the general part of a contract, but should also foresee future problems, going beyond the duration of the contract, that the contract may bring along. Secondly, post-contractual obligations, just as principal obligations of a contract, will largely depend on national laws. The degree of this dependency will mainly depend on the contract itself and the way it was drafted. For this reason, in order to analyze post-contractual obligations as they are in practice more into depth, it is inevitable to look at laws of various national jurisdictions and international conventions influencing those laws. Consequently, I will continue by looking more closely at principles and laws that govern post-contractual obligations in jurisdictions, which I have chosen to focus on in my research.

3. Civil law countries

3.1. Germany

3.1.1. Non-compete

Post-contractual non-compete clauses in Germany are subjected to a number of restrictions contained in statutes and case law. These restrictions concern both the content and form of non-compete clauses, which survive the ending of the original principal obligations.[41] Post-contractual non-compete clauses will be further discussed in detail within the framework of German employment law. Post-contractual non-compete obligations in commercial contracts will be shortly analyzed at the end of this chapter.

The German Commercial Code[42] contains provisions on non-compete clauses dealing with obligations during the term of the employment and after it. What is very interesting and important to note, is that a compensation payment[43] is required for a valid non-compete clause that survives after termination.[44] The sum of this compensation must be provided in the agreement. If it is lower than a statutory required minimum, a party on whom a post-contractual non-compete is allegedly imposed may refuse to comply with it.[45] In such case a party to whom such obligation is owed will not be able to enforce it. The general rule is that the compensation should be equal to at least a half of former gross salary. In addition to that, an ex-employee retains his right for compensation even if he is not in a position to compete, due to studies, illness or any other reason.[46] Consequently, it is not a symbolic fee, which would be seen as a matter of formality. However, at the end both parties benefit from this requirement for compensation. First, a

[41] Doris-Maria Schuster, Christian Mathias, 'Post-Contractual Non-Compete Restrictions in Germany' (WWL, June 2013) <http://whoswholegal.com/news/features/article/30586/post-contractual-non-compete-restrictions-germany> accessed 2 April 2015
[42] Handelsgesetzbuch 1897, hereinafter referred to as 'HGB' or 'German Commercial Code'
[43] 'Karenzentschädigung'
[44] Jens Kirchner, Pascal R.Kremp, Michael Magotsch, Key Aspects of German Employment and Labour Law (Springer 2010) p.125
[45] ibid 126
[46] ibid 127

businessman or employer will always think twice before drafting a non-competition clause, imposing a post-contractual obligation, in order not to incur unnecessary costs. This is a very convenient addition to the laws on post-contractual obligations from the perspective of an employee, since non-compete agreements might become burdensome and preclude beneficial deals or contracts. Therefore, such constraint will prevent unneeded restrictions of competition coming into effect through clauses on post-contractual obligations. In addition, it can also be seen as an enforcement mechanism advantageous to an employer, since businesses or individuals bound by such non-compete obligation are actually getting something out of it and the temptation to violate the obligation is reduced.

Another constraint on German employers as regards post-contractual non-compete obligations is the German Civil Code. All employment contracts, concluded as from January 2002, which are drafted solely by the employer, will be subjected to provisions of the Code. Consequently, clauses on post-contractual obligations, deviating from the Code to the disadvantage of employees might be rendered null and void.[47] For this reason, drafters will have to be extra careful when imposing a post-contractual non-compete.

Furthermore, the German law does not leave any doubt on the question whether a post-contractual non-compete obligation has to be expressly stated in a contract. The Commercial Code gives a strict answer by requiring such obligation to be contained in a clause, which is signed by both parties, either in the original employment or separate agreement.[48]

Moreover, a non-competition clause on post-contractual obligations must be justified by the need to protect legitimate interests of an employer. German courts have interpreted this requirement and developed it further. [49] Firstly, a non-compete clause must be drafted for a relevant sectorial and geographic

[47] ibid 125
[48] ibid 126
[49] ibid 127

area.[50] An individual can be restricted within a sector and location of an ex-employer only, not taking into the account potential sectors or locations. For this reason a jurisdiction wide clause would be considered invalid and courts would adjust it as appropriate.[51] Unless, of course, the employer in question is active in the same sector throughout the whole country. However, such clause will probably indicate a high amount of compensation fee, so it would be expected that an employer is careful not to impose it without a good reason. So normally, a post-contractual non-compete clause will have to be individualized in order to be legally valid, as well as effective as regards the protection of interests of both parties. Secondly, post-contractual obligations will only be justified if they are agreed on for up to two years. If nevertheless, both parties agree a longer clause can be drafted. However, in that case a party bound by that clause will have a choice of ceasing to abide an obligation after 2 years or voluntarily continuing to comply and receive compensation.[52]

German parties to whom a non-compete post-contractual duty is owed are not in such a miserable position as regards remedies for non-compliance. The existence of compensation payment results in an effective remedy in case of a breach. If an obligation is breached an employer to whom it was owed can put an end to payments of compensation. Such employer can also demand for reimbursement if a breach came to his attention only after some time, during which payments were made. [53] What is more, an injunction can be demanded which will demand a party in breach to end a competing activity. Finally, there is of course a possibility to claim damages, however case law proved that such claim will usually turn to be unsuccessful, since under German law it is very difficult to establish damage that resulted from a breach of post-contractual non-competition clause.[54] In order to avoid this situation drafters should include a liquidated damages clause.

[50] ibid
[51] ibid
[52] ibid
[53] ibid 128
[54] ibid

A non-compete clause can be waived by an employer at any time. Although a waiver will not erase the clause right away, quite on the contrary, it will continue to be valid for 1 more year.[55] For this reason, if a contract contains a non-compete clause, that will normally survive termination and result in post-contractual non-competition obligation, and in case the employer does not wish to maintain it, such employer should waive a clause prior to the termination of that contract. Consequently, this implies that non-compete obligations in German laws are quite a headache for employers and businessmen, since not only they have to be considered sufficiently before imposing them, but also their termination should be decided well in advance.

The Commercial Code also contains two scenarios when an employee has a choice whether or not to comply with a post-contractual non-compete obligation. First, when an employee was dismissed due to business reasons. Second, when an employee resorted to summary resignation due to a breach of a contract by the employer.[56] In such cases an employee can either adhere to a clause and lawfully demand compensation, or give a written notice within one month after the dismissal that he will not be bound by the non-compete obligation.[57]

What is somehow striking is the fact that, according to the German Federal Court of Justice[58], post-contractual non-competition clauses, contained in the Commercial Code will not necessarily apply to executives such as managing directors and board members.[59] The Court decided that non-competition clauses on post-contractual obligations for such individuals will need to respect the principle of public policy and should not result in an unreasonable burden as regards the freedom to choose and pursue a career.[60] This is because German employment and labor law differentiates between regular employees and executives, unlike for example common law jurisdictions.[61] Accordingly, rules on

[55] ibid 129
[56] ibid
[57] ibid
[58] 'Bundesgerichtshof', hereinafter referred to as 'German Court of Justice' or 'Court'
[59] Kircher, Kremp, Magotsch (n 44)
[60] ibid 126
[61] ibid 171

post-contractual non-compete obligations also differ. Provisions on post-contractual non-compete obligations, contained in the Commercial code will only be applicable where it is decided so in case law of the courts.

As regards executives, rules on non-compete clauses imposing post-contractual obligations are quite similar, but much less strict than for regular employees. For example, the core rule on compensation is not so clear, since whether compensation will or will not be paid depends on the circumstances of every case.[62] It would appear that rules on non-compete clauses should be as strict, because executives possess much more knowledge, know-how and other valuable, secret information than probably any other employee of the same enterprise. As a result, the obligation should be as strict, perhaps even stricter. Case law does not seem to provide a reasonable explanation on the matter. It is only clarified that an executive contract can only contain a non-compete clause if it is intended to protect confidential information or client connections of that particular business. In addition, a post-contractual non-compete must not prevent a competitor from employing an executive.[63] Reasons for differentiation as regards post-contractual non-compete probably lie somehow in the fact that executives such as managing directors of limited liability companies and management board members are not categorized as employees. Unlike employees, they are contracted under "service agreements".[64] Consequently, German courts probably saw a major difference between the two positions. Nevertheless, the precise rationale remains quite unclear, since a different nature of contractual agreements does not seem like an essential argument to explain why certain provisions of the Commercial Code are applicable to executives and others are not. It may very well be the case that German courts were fitting this solution within a broader context of labor and employment laws. However, the conclusion is that not only post-contractual obligations will be less entrenched in executive contracts, but also provide a lower degree of legal certainty, since rules are not entirely precise.

[62] ibid 130
[63] ibid
[64] ibid 171

In the field of commercial contracts, §90(a) of the German Commercial Code establishes a possibility to impose a post-contractual non-compete obligation for an agent in a commercial agency agreement. Based on this section, such post-contractual non-compete must be explicitly agreed on by both parties and cannot exceed a period of two years after the termination of the agency contract. Furthermore, pursuant to the 1989 Amendment, the prohibition to compete may only be imposed regarding a certain territory, that has been within the scope of the agent's activities performed for the principal, or within a group of customers with whom the agent has been involved. A prohibition may also be limited to certain types of transactions.[65]

On the matter of compensation, rules in §90(a) are not entirely specific. It is stated that compensation is required for the period of the post-contractual non-compete. However a minimum or maximum amount of the compensation is not defined. Section (a) of the provision only requires for the compensation to be reasonable. In order to determine what amount of compensation is reasonable, it will be necessary to consider looses of an agent, as well as gains of a principal. What is more, a non-compete clause that does not provide for compensation can still be valid, however, such compensation may be demanded as a matter of law.[66]

3.1.2. Confidentiality

First of all, German legal scholars distinguish two terms that are of high relevance in the field of confidentiality obligations. Trade secrets are considered to be technical circumstances and processes, such as computer programs, while commercial circumstances and processes, including customer lists, business and

[65] Marco Ardizzoni, German Tax and Business law (Sweet & Maxwell 2005), p.7022
[66] ibid

marketing strategies, are categorized as business secrets.[67] However, as regards laws on confidentiality clauses in contractual agreements, the two categories do not demonstrate any statutory differences and are only distinguished as a matter of precision.[68] Therefore, in legal literature the two concepts will most likely be used interchangeably in matters concerning confidentiality.

In the field of employment relationships German statutory law contains certain provisions regarding confidentiality obligations after the term of employment has come to an end. Secrets of an ex-employer will be protected by means of criminal law against industrial espionage on the basis of Section 17(2) of the Act Against Unfair Competition[69] and Section 203 of the German Criminal Code.[70] However, it would have to be proven that an employee intentionally used certain confidential information. This will usually be challenging to prove in practice.[71] Also the duration of such implied obligation seems to be unclear. In any case such obligation probably would not be recognized to last for long, since after a significant lapse of time it would become impossible to obtain any proof that it was breached.

In addition to that, according to case law of the Federal Labor Court, an obligation not to disclose confidential business information of a previous employer exists, even without any written agreement, based on secondary obligations arising from the initial employment agreement or on general fiduciary obligations. The basis for such decisions the court found to lie again in the Unfair Competition Act, more precisely its §1, and also §823, §826 of the German Civil Code. [72] Furthermore, the same Court has also explained that

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[67] Sabine Bechtel, Nadia Rossmy (Synapse, March 2014) <http://www.taylorwessing.com/synapse/ti_safeguarding_employees_germany.html> accessed 7 April 2015

[68] ibid

[69] Gesetz gegen den unlauteren Wettbewerb 1896, hereinafter referred to as 'Act Against Unfair Competition' or 'Unfair Competition Act'

[70] Strafgesetzbuch 1871, hereinafter referred to as 'German Criminal Code'

[71] Bechtel, Rossmy (n 67)

[72] Carsten Domke, 'Trade Secrets in Employment Relationships in Germany' (American Bar Association CLE Conference, Denver, 12 September 2008)

employees may use any knowledge acquired during their period of employment as long as this information is retained in their memory, as opposed to information accessed as a result of their previous employment and stored or saved in some form, and as long as they are not bound by an explicit post-contractual confidentiality or non-compete obligation in a written agreement.[73]

In this light, any thoughtful employer would indeed add a clause containing a post-contractual confidentiality obligation in an employment agreement, before he is faced with practical difficulties of proof. [74] Not doing so where it is necessary would amount to some extent to a wait-and-see attitude. In other words, the employer hopes that after the term of employment, the employee will respect some implied duties, and only starts to look for protection in case information is actually leaked. In such situation it is possible that an ex-employer will be left without any protection at all.

A couple of years ago, the regional employment tribunal, judging on a case that revolved around a clause imposing a confidentiality obligation during and after the term of employment, decided that the fundamental freedom of expression prevails over confidentiality, if the employer is unable to justify the presence of such clauses by legitimate business interests.[75] The case concerned an ex-employee of a publishing house, who, in breach with her post-contractual confidentiality obligations, repeatedly posted statements on Facebook, containing certain information regarding business of her previous employer. The tribunal had to consider the permissibility of broad post-contractual confidentiality obligations under German law. As a result it ended up considering possible justifications for such obligations, and balancing competing interests of individuals or businesses concerned.[76] In this way, the tribunal decided that if an

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<http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/125.authcheckdam.pdf> accessed 8 April 2015

[73] ibid

[74] Bechtel, Rossmy (n 67)

[75] Michael Beuger, 'Employment Law: Confidentiality vs. Freedom of Expression' (Wilde Beuger Solmecke, 19 August 2013) <https://www.wbs-law.de/eng/employment-law-eng/employment-law-confidentiality-vs-freedom-of-expression-44669/> accessed 15 March 2015

[76] ibid

employer cannot demonstrate a sufficiently legitimate business interest to protect certain information from third parties, freedom of expression prevails over such obligations.[77] In such case, a clause of such kind will not be enforceable.

This case does not reveal a lot on the matter of justifications that could be used by businesses to justify broad post-contractual confidentiality obligations. However, it does signal the reluctance of German courts to acknowledge such clauses as valid, because they may often breach a fundamental right of freedom of expression, which is a constitutionally guaranteed right.[78] Consequently, employers' freedom to limit the rights of their employees is to a great extent limited as regards confidentiality obligations after the term of an employment agreement by the freedom of expression.

Furthermore, the reluctance of German courts to acknowledge wide confidentiality clauses, especially in employment contracts, is closely related to the principle of fair competition that is strongly rooted in the German legal system.[79] The possibility to impose non-compete post-contractual obligations in German employment law was discussed in the previous section and it was particularly noticeable that there are a number of restrictions imposed on employers willing to draft clauses containing such obligations. Considered in this light, confidentiality obligations remaining after the termination of a contract, in a way restricts the competitive position of an individual bound by the obligation, since he is not allowed to use certain knowledge he has obtained during the term of a previous contract.[80] As a result, post-contractual confidentiality obligations will not be easy to impose either.

As regards commercial contracts such as franchise, distribution and agency agreements, a post-contractual confidentiality obligation in German law is contained in §90 HGB. Even though the rule of §90 HGB was primarily applicable

[77] ibid
[78] ibid
[79] Bechtel, Rossmy (n 67)
[80] ibid

to agency agreements, its scope was extended. As a result, §90 now by analogy applies to franchise and distribution agreements.[81] According to this paragraph an agent is prohibited to disclose valuable business information of his principal to third parties.

It is important to note, however, that confidentiality obligations under §90 HGB will be 'less strict than one during the contractual period',[82] which is contained in §80 I HGB.[83]

German law also deals with an issue that may arise during a period of confidentiality obligation, either contractual or post-contractual: the issue of confidential information becoming available in the public domain. In the commentary on the HGB, it is explained that any information that is available to the public cannot be considered confidential in any case.[84]

[81] ibid
[82] Martijn W.Hesselink, Jacobien W.Rutgers, Odavie Bueno Diez, Manola Scotton, Muriel Veldman, Principle of European Law: Commercial Agency, Franchise and Distribution Contracts (Sellier 2006) p.116
[83] ibid
[84] Münchener Kommentar zum Handelsgesetzbuch, §90 nos.9-10

3.2. France

3.2.1. Non-compete

French statutory law barely deals with the issue of non-compete obligations. Nevertheless, for already quite some time the laws in France as regards post-contractual non-compete obligations have been becoming stricter and stricter, due to one important reason - the importance of competition has been realized not only by legal scholars, but most importantly by the French judiciary. That French laws on restrictions of competition are scrutinized in a more rigorous manner is particularly noticeable within the sphere of employment law. A general trend seems to indicate a movement towards the opinion that employees should in general be allowed to compete with their former employers. Courts have also understood that adequacy and validity of non-compete obligations must be evaluated more carefully, especially in light of grave unemployment problems in France.[85] Significant changes in the decisions dealing with the subject matter have been noticed since 1992, however, the most notable development was introduced in 2002.[86] Due to recent developments, post-contractual non-compete obligations in France in this chapter will mainly be analyzed, as they are understood in employment contract law.

Non-compete clauses in working agreements are nowadays scrutinized by the judiciary under strict requirements, because of their capacity to hinder competition and access to the job market to a significant extent. Five cumulative requirements were introduced by the French judiciary since 2002.[87]

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[85] Roger Blanpain, Susan Bisom-Rapp, William R. Corbertt, Hilary K.Josephs, Michael J.Zimmer, The Global Workplace: International and Comparative Employment Law (Cambridge University Press 2007), p.446

[86] Pascal Lagesse, Mariann Norrbom, Restrictive Covenants in Employment Contracts and Other Mechanisms for Protection of Corporate Confidential Information (Kulwer Law International 2006), p.92

[87] Jeremie Boublil, 'Non-compete clauses in France: the strict conditions of validity of non-compete clauses inserted in employment contracts can also apply to non-compete clauses agreed in shareholders' agreements' (Lexology, 19 May 2011)

A non-compete obligation, whether imposed during a contractual relationship of employment or after it has ended, must first of all be justified by a legitimate business interest.[88] Under recent French case law there will be two kinds of business interests that demonstrate the need of protection, namely specific know-how of a company and its client lists.[89] This requirement may seriously restrain the scope of availability of non-compete obligations as regards employees holding different positions. For example, it will be much more difficult and usually impossible to justify a post-contractual non-compete obligation in a working agreement with a member of technical staff of a company, because employees in such positions do not pose threat to legitimate interests of the employer.[90]

Secondly, a non-competition obligation must be imposed for a certain limited territory.[91] State-wide clauses will only be reasonable in very exceptional cases. Normally, French courts will be reluctant to enforce a clause, which does not contain any territorial limits.

Thirdly, it also has to be limited in its term of duration.[92] The duration of a post-contractual non-competition obligation will depend on individual circumstances of a case, but normally will be drafted for a period somewhere between 3 months and up to 2 years following the termination of an agreement.[93]

Fourthly, the nature and specifications of the position held by the employee in question must be taken into account.[94] Following this requirement it will be relevant whether the employee's work requires only basic skills or a highly advanced level of expertise in a particular field, and how a restriction imposed after the course of their employment would hinder access to new employment opportunities. For this reason, it may be difficult to impose a long termed and

[88] Blanpain, Rapp, Corbertt, Josephs, Zimmer (n 85)
[89] Lagesse, Norrbom (n 86)
[90] Boublil (n 87)
[91] ibid
[92] Blanpain, Rapp, Corbertt, Josephs, Zimmer (n 85)
[93] Boublil (n 87)
[94] ibid

geographically wide restriction on an employee with specific expertise, because that would significantly hinder his access to the job market, since his suitability for new employment positions is limited as it is.[95]

Finally, in order to be valid a non-compete obligation must be sufficiently compensated.[96] The minimum or maximum amount of the compensation is however not determined.[97] Therefore, it has to be assessed on a case-by-case basis. Nevertheless, 30% of the ex-employee's previous gross salary seems to be generally accepted as a sufficient minimum.[98] Although, according to case law statistics the compensation will usually be somewhere between 40% to 60%.[99] It will be paid either in the beginning of the post-contractual obligation at once or monthly in installments depending on the agreement.[100] That will not have any impact as regards enforceability and validity of a clause, as long as it is paid as it was agreed by both parties. However, compensation cannot be paid at the end of the period of a post-contractual non-compete, nor before the primary agreement has come to an end. This seems logical and fair from the positions of both sides. If a party owning an obligation was paid at the end of an agreement, it would have less incentive to actually fulfill the obligation, if it had to wait until the very end and see if it will actually be compensated at the end or have to go to courts to demand it. As regards a party to whom the obligation is owed, it would be unfair to demand the compensation to be paid during the course of the main agreement, since it would double its burden. Thinking from a more general

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[95] Lagesse, Norrbom (n 86) 93

[96] Blanpain, Rapp, Corbertt, Josephs, Zimmer (n 85)

[97] Matas Mačiulaitis, 'Ar susitarimas dėl nekonkuravimo teisėtas?' (Verum, 2 February 2015) <http://www.verum.lt/publikacijos/darbo-teise/ar-susitarimas-del-nekonkuravimo-teisetas/> accessed 11 April 2015

[98] UK Trade & Investment France in Partnership with Fitzgerald and Law, 'France: Employment Law' (www.ukti.gov.uk 2013) <http://www.fitzandlaw.com/pdf/UKTI-France-Employment.pdf >accessed 12 April 2015

[99] Ming Henderson, "French Court Rules That A Confidentiality Clause Does Not Require Any Compensation To Be Lawful' (Trading Secrets, 20 November 2014) < http://www.tradesecretslaw.com/2014/11/articles/trade-secrets/a-confidentiality-clause-does-not-require-any-financial-compensation-to-be-lawful/> accessed 12 April 2015

[100] Laurence Dumure Lambert, 'A global guide to restrictive covenants: France' (Mayer Brown 2013) <http://www.mayerbrown.com/files/uploads/Documents%5CGuide%20to%20Restrictive%20Covenants/MB_rest-cov_emea.pdf> accessed 20 March 2015

perspective, post-contractual obligations would in some way lose their meaning if compensation for them was brought within the term of the primary agreement.

Nevertheless it is interesting to note that, apart from a couple minor exceptions introduced by the recent case law of the French Court of Cassation,[101] there is no requirement of compensation for the validity of post-contractual non-compete obligations in commercial contracts. Such absence was justified by the French Court of Cassation mainly by the freedom of contract.[102] Within the field of commercial agency agreements, the requirements of validity of clauses imposing non-compete obligations stem directly from Directive 86/653 EEC.[103] The directive does not contain any requirement of compensation and the French did not add it on their own motion, even though the list of validity conditions in the requirement is not exhaustive. Notwithstanding certain attempts to extend the requirement of compensation, introduced in the field of employment contracts, to commercial agency agreements, the Court of Cassation expressly rejected all of them by stating it was not the intention of the French legislator as it is expressed in the Commercial Code. In a similar manner all efforts to justify a requirement of compensation were rejected by the Court of Cassation as regards franchise or sale of business contracts.[104] On the other hand, the rejection of compensation as a requirement of validity by the Court of Cassation does not mean it is forbidden or not desirable. For example, compensation could be seen as an incentive for the debtor of an obligation to actually respect it.

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[101] For example, in sale of shares contracts, compensation is required for a non-compete post-contractual obligation to be valid, if a seller of shares is actually an employed shareholder in a company at the time of a sale and the non-compete obligation is owed to that particular company. First ruling regarding this rule was given by the Labor Chamber of the French Court of Cassation 15 March 2011 and then further clarified 8 October 2013. However, since then in further case law on the issue no significant clarifications have been made. Nevertheless, some legal scholars believe that the rulings five requirements on non-competition clauses in employment contracts will be extended to include commercial agreements, and rulings of 2011 and 2013 are the first steps towards such development.

[102] Yann Richard, David Al Mari, 'Should Non-compete Clauses Be Compensated?' (Association of Corporate Counsel 24 April 2014) <http://www.acc.com/legalresources/quickcounsel/snccc.cfm?makepdf=1> accessed 2 April 2015

[103] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents

[104] Richard, Mari (n 102)

In addition, the principle of proportionality will be crucial when evaluating a non-compete clause – all the requirements will have to be considered in light of this principle.[105] It will also be important that a threat of competition is not a mere consideration. There must be an actual threat that commercial and economic risk will be incurred.[106]

Furthermore, a non-compete clause must be agreed upon in writing.[107] That can be done either by putting a non-compete clause imposing a post-contractual obligation in the primary agreement, or inserted in the primary agreement during the course of the contract, by a mutual agreement of both parties.[108] As a result, it will not be possible that there is an implied post-contractual obligation of non-competition.

In case some of the requirements are not met sufficiently or completely, the French Courts will have the opportunity to modify a non-compete clause. However, if that is not possible due to certain circumstances rendering a clause unfair and unnecessary on the whole, the clause will be declared null and void altogether.[109]

French law contains another interesting development as regards non-compete clauses imposing obligations that survive the termination of an employment contract. In France, non-compete clauses may be in addition governed by collective bargaining agreements, which may provide for more conditions for the validity of clauses or provide for particular categories of employees who may be subjected to non-compete obligations.[110] On the other hand, if a non-compete obligation provided for in an individual agreement is more favorable than one contained in a collective bargaining agreement, according to the most favorable

[105] ibid
[106] Lembert (n 100)
[107] ibid
[108] ibid
[109] ibid
[110] Lagesse, Norrbom (n 86) 93

treatment principle, the first one will prevail and be valid. However, in a reversed situation, a more restrictive clause in an individual working agreement would be replaced by the more favorable general clause in the collective bargaining agreement.[111] Nevertheless, if a collective bargaining agreement is to apply, it is necessary that the employee in question has consented in writing to its content.[112]

What is more, French law strictly prohibits an employer to waive a post-contractual non-compete obligation after it has started to run.[113] In its decision of 21 January 2015[114] the French Court of Cassation established that such non-compete obligation could be waived on the day of the employee's actual departure at the latest. All agreements to the contrary will not be valid. For this reason, if an employee is exempted from working during the notice period, before the actual termination takes place, an employer will have to express his waiver before the period of notice even ends, on the day of the actual departure whenever it is.

3.2.2. Confidentiality

Any post-contractual confidentiality obligation in France must be appropriately limited in its duration, geographical scope and material scope. In addition as regards employment law, it must not prevent an ex-employee to earn his living in a position consistent with his previous professional skills and training.[115]

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[111] ibid 94

[112] L&E Global: employer's counsel world wide, 'Top Ten Considerations for Non-compete Clauses in Europe' (L&E Global 10 June 2013) <http://www.jus.uio.no/ifp/forskning/omrader/arbeidsrett/arrangementer/arbeidsrettssemin arene/paper-arbrettsseminar.pdf> accessed 13 April 2015

[113] Judicael Fouquet, 'Non-compete obligation: the contractual time limit for waiver may not apply in certain circumstances' (Global Workplace Insider, 26 February 2015) <http://www.globalworkplaceinsider.com/2015/02/non-compete-obligation-the-contractual-time-limit-for-waiver-may-not-apply-in-certain-circumstances/> accessed 13 April 2015

[114] Cour de Cassation, Civil, Chambre Sociale, 21 Janvier 2015, 13-24.471

[115] Wendi S.Lazar, 'Employment Agreements and Cross Border Employment – Confidentiality, Trade Secret, and Other Restrictive Covenants In a Global Economy' (ABA ERR/International Labor and Employment Law Subcommittee Annual Meeting, Denver, 2008), p.8

However, very broad confidentiality obligations are imposed quite often, that do not even have limits as regards the period after the termination of a contract and apply for as long as information in question remains confidential.[116]

Unlike post-contractual non-compete obligations in France, confidentiality obligations do not require financial compensation at all times. There is no such requirement as regards validity and enforceability of a clause imposing post-contractual confidentiality restriction. This was assured quite recently by the French Court of Cassation in its SNC Adex v. MD[117] judgment dating 15 October 2014, which concerned an employment agreement. The Court reasoned that unlike a non-compete duty, a confidentiality obligation normally does not prevent a job-seeker to find a new employment position. For this reason, there is no need for compensation. The decision in SNC raised certain discussions among French legal scholars. Some believe that the conclusion was quite unexpected, because of the circumstances of the case.[118] In the proceedings, the claimant assumed that a confidentiality clause surviving the termination of his employment agreement, hindered his access to the job market, because for many years he had worked in the same niche sector and acquired rare skills and knowledge during the course of employment. The confidentiality clause in question was not only drafted for an indefinite amount of time, but also it was not restricted to any particular territory. However, all these arguments as regards the need of compensation were rejected by the Court, which concluded that the claimant was still able to find a job, without disclosing confidential information, and in no circumstances compensation for post-contractual confidentiality obligation could be required by law.

[116] Lambert (n 100)
[117] SNC Adex v. MD Cour de Cassation, Civile, Chambre Socialie, 15 Octobre 2014, 13-11.524
[118] Ming Henderson, 'French Court Rules That Confidentiality Clause Does Not Require Any Financial Compensation to Be Lawful' (Trading Secrets, 20 November 2014) <http://www.tradesecretslaw.com/2014/11/articles/trade-secrets/a-confidentiality-clause-does-not-require-any-financial-compensation-to-be-lawful/> accessed 28 March 2015

Within the scope of employment relationships there is no express confidentiality obligation both contractually and post-contractually in the French Labor Code.[119] Article 1134 of the French Civil Code entrenches an implied obligation of confidentiality during the course of employment, which does not require an explicit clause in a working agreement. However, does this implied obligation survive the termination of an employment agreement and result in a post-contractual confidentiality obligation? French Courts gave a positive answer to this question on many occasions. [120] Therefore, it is generally recognized that after the term of employment the implied obligation would survive, especially as regards senior executives.[121] What is more, according to the case law of French Courts, in absence of a contractual post-employment obligation, an ex-employee will be allowed to freely use professional knowledge and skills, which he has acquired during the course of previous employment.[122] This rule dates back to 1994, when Paris Court of Appeals decided that it is legitimate for an employee to harvest the fruit of the experience he has gained during his previous employments. According to the Court of Appeals, this is a normal aspect of enhanced value.[123]

Furthermore, what is also interesting is that confidentiality obligations in France are not only protected by private law, but their violation might result in criminal sanctions. In case an express clause was not drafted, using former employers' confidential information in order to compete will constitute tort on the basis of Articles 1382 and 1383 of the French Civil Code.[124] In addition, according to Article L.621-1 of the Intellectual Property Code, revealing or attempting to reveal secrets of an employer or previous employer is a criminal offense, which

[119] 'France: Employment Law' (UK Trade & Investment France in Partnership with Fitzgerald and Law 2013) <http://www.fitzandlaw.com/pdf/UKTI-France-Employment.pdf >accessed 12 April 2015

[120] Samuel Estreicher, Global Labor and Employment Law for the Practicing Lawyer: Proceedings of the New York University 61st Annual Conference on Labor (Kluwer Law International 2010), p. 212

[121] Lazar (n 115)

[122] Estreicher (n 120) 213

[123] Patrick Thiebart, 'Restrictive Covenants in France' (American Bar Association 2001) <http://apps.americanbar.org/labor/lel-aba-annual/papers/2001/thiebert.pdf> accessed 28 March 2015

[124] ibid

may be punished by imprisonment.[125] On the other hand, it is important to understand that not every piece of information that is considered as confidential by an employer will fall within the scope of the Code. Nevertheless, ex-employees will be inclined to respect their post-contractual confidentiality obligations even more, since in case of a violation, not only contractual remedies may be enforced against them, but also criminal sanctions may be imposed. Furthermore, the usual remedies such as injunctions or damages will be available for the ex-employer, in case there was an explicit clause concerning confidentiality, in front of labor or civil courts, depending on the situation.[126]

[125] ibid

[126] Lambert (n 100)

3.3. Lithuania

The concept of post-contractual obligations in Lithuanian law is entrenched in Article 6.221(3), Book VI of the Civil Code[127].

3.3.1. Non-compete

Even though the Code contains a number of articles dealing with agreements restraining competition, apart from one exception, none of them handle the fate of non-compete clauses after a contract has ended.

The exception is contained in Book II, Article 2.164 and relates to agency contracts. In the first paragraph it is stated that a post-contractual non-compete obligation will be valid if it is contained in the original agreement, signed by both parties, and does not exceed a period of two years after the termination of the agency contract. Furthermore, a non-compete obligation can only be imposed regarding the territory and market; or territory and a client group within the scope of the original agency agreement.[128] It is also stated in paragraph 3 that a principal can at any time before the lapse of a non-compete period decide to terminate the non-compete.

What is important, is that an obligation to pay compensation is contained in paragraphs 5 and 6 of the article. Compensation must be paid for the whole duration of the post-contractual obligation, whether periodically or at the end of the non-compete period. The option for the compensation to be paid at the end of the non-compete period is very surprising. Some countries, for example France, have expressly forbidden such a possibility due to an obvious inconvenience it causes to a individual bound by an obligation. It can even be considered that a commercial agent in Lithuania can be double burdened, since not only he cannot exercise his profession freely, but also has to bear the

[127] Lietuvos Civilinis Kodeksas 2000, hereinafter referred to as 'Lithuanian Civil Code' or 'Civil Code'
[128] Article 2.164(2) Lithuanian Civil Code

financial consequences himself during the whole duration of a post-contractual non-compete (which might even be two years!). The Code further provides a provisional guideline for the calculation of the compensation. It is suggested that it can be calculated on the basis of an annual pay, which the agent was receiving during the term of the contract.[129] However, the right to compensation will be lost, if the contract was terminated as a result of a breach by the agent. [130]

Paragraph 6 indicates 3 situations in which the principal will lose his right to a non-compete and the agent will automatically not be bound by it. Firstly, when the principal has terminated the contract and breached his obligations regarding the period of notice to be given upon termination, or if a clause regarding such period of notice is not contained in the agreement, or if the principal has not informed an agent immediately. Secondly, when the principal was in breach of his main obligations and an agent has informed about a termination immediately. Thirdly, the contract was terminated by a court decision because of a breach by the principal.

Last two paragraphs of the article describe when a clause instituting a post-contractual non-compete obligation will be considered null and void. First of all, a court can announce that on request of an agent, if as a result of a non-compete obligation an agent is put in an outrageously disadvantageous position. A clause will also be considered null and void if it is not in accordance with the article.

It is quite unclear why the Code imposes detailed and strict enough rules on non-compete post-contractual obligations only for agency agreements. The reason perhaps is that the concept of non-compete obligations after a contract has ended is the most entrenched in that area of private law and as a consequence was simply codified. It may also be possible that perhaps the legislator saw a need to entrench it of its own motion and for this reason included it in the Code. However, an answer is neither provided by legal scholars, nor by national courts. Consequently, one can only guess. Nevertheless, the rule on compensation is in

[129] Article 2.164(4) Lithuanian Civil Code
[130] Article 2.164(5) Lithuanian Civil Code

some sense an achievement, since not all jurisdictions indeed impose such compulsory reimbursement of a post-contractual non-compete obligation owed by an agent. Especially in light of the fact that most European Countries followed the approach of Directive 86/653 EEC, which among other things harmonized the requirements of validity for clauses imposing post-contractual non-compete obligations on commercial agents and a requirement of compensation is not among the validity requirements contained in the Directive. Therefore, countries such France or the Netherlands did not impose compulsory compensation on their own motion, even if it was not expressly forbidden by the Directive. On the other hand, Lithuania joined the European Union far later, only in 2004, so it is quite understandable that the Lithuanian legislator and judiciary did not follow the approach, adopted by French and Dutch.

Recently the High Court of Lithuania has significantly extended the scope of applicability of Article 2.164. According to the Court this article will also be applicable to employment relationships. Employment laws in Lithuania do not contain any provision on non-compete obligations nor during the term of employment nor after it has ended.[131] Consequently, this interpretation of the High Court is a progressive step, especially in light of the requirement of compensation, that will now also benefit ex-employees and thus prevent excessive and unnecessary non-compete obligations after the termination of the contract has taken place.

In addition to its very general discussions on the subject, the High Court has also analyzed pre-conditions that a post-contractual non-compete clause must fulfill. It was stated that any non-compete agreement must fulfill the requirements entrenched in Article 1.6 of the Civil Code, of being just, reasonable and equitable.[132] To ensure that, just like the Constitutional Court, the High court stressed the importance of striking a balance between the interests of the employer and ex-employee, meaning that the interests of the employer must be

[131] Gabija Janceviciute, 'Ką turi žinoti apie konfidencialumo ir nekonkuravimo sutartis' (Mano teisės, 24 April 2014) < http://manoteises.lt/straipsnis/ka-turi-zinoti-apie-konfidencialumo-ir-nekonkuravimo-sutartis/> accessed 10 March 2015
[132] Case 3K-3-378/2013

protected by restricting the rights of an ex-employee to the smallest extent possible. It is up to an employer to decide in what way he wishes to maintain that balance. Namely, whether he wishes to avoid competition with his ex-employee by agreeing on a post-contractual non-compete and paying compensation for that or to enter the risk that an ex-employee may become a competitor on his own or join a competing side and perhaps incur costs or lose profits in such way.

What is more, the High Court also considered that a non-compete agreement would in any case be drafted for the benefit of the employer. This has several implications. Firstly, compensation will be necessary to bring the relationship back to balance.[133] The amount of compensation must be adequate, not symbolic and not only the previous salary of an employee will have to be taken into account, but also the scope of a non-compete obligation. For example, in a quite recent case the High Court found that that a monthly compensation of 9% of the previous monthly salary was too low in light of the scope of the non-compete restriction. [134] According to the non-compete in the case, the applicant was not allowed to run a competing business, to work or even advise a competitor of his ex-employee. The non-compete clause also stated that the applicant could not engage in any marketing and advertising business, even though the original activity was concerning sales of souvenirs and business presents. As a result the compensation was not just and adequate neither based on its amount expressed in percentage(9%), nor based on its actual value (96EUR).[135] Therefore, when evaluating adequacy of a sum of compensation, the Court will always consider it in light of proportionality.[136] In addition, the fact that the agreement is made for the benefit of an employer is important for another reason – it is up to an employer to decide if he wants to stop a non-compete and allow his ex-employee to enter into competition with him.[137] This is precisely in accordance with the rule contained in Article 2.164 paragraph 3 of the Lithuanian Civil Code.

[133] Case 3K-3-121/2008
[134] Case 3K-3-377/2013
[135] ibid
[136] Matas Mačiulaitis, 'Ar susitarimas dėl nekonkuravimo teisėtas?' (Verum, 2 February 2015) <http://www.verum.lt/publikacijos/darbo-teise/ar-susitarimas-del-nekonkuravimo-teisetas/> accessed 11 April 2015
[137] ibid

What is more, the High Court has also analyzed whether any employee can be bound by a post-contractual non-compete. The Court answered negatively in the case 3K-3-377/2013. It was decided that it is inherent in the nature of an obligation that it is usually applicable as regards employees who have been holding higher positions, such as executives. However, that is neither a general rule, nor a condition for a non-compete to be valid. Clauses of post-contractual non-compete must be drafted on an individual basis, taking all relevant circumstances into account. Factors that must be considered are the nature of the employee's duties and responsibilities, the nature and the amount of information that the employee is dealing with, the amount of responsibilities in proportion to other employees, importance of knowledge on the business the employee has obtained, actual threat of competition after an employment relationship has ended and any other relevant circumstance of a case.

Next to the High Court, also the Constitutional Court of Lithuania has touched upon the matter of post-contractual non-compete obligations. The Court demonstrated a very restrictive attitude towards such obligations. It highlighted in a number of occasions that Article 48 paragraph 1 of Lithuanian Constitution, among other things, enshrines the right of an individual to freely choose his business or course of employment. This right is constitutional and can therefore only be restricted for a limited period of time and within a certain limited territory. In addition the Court stated that within the field of employment law, any post-contractual non-compete agreement must be drafted in such manner that the interests of employer and employee remain balanced, especially after the employment relationship has come to an end.[138]

3.3.2. Confidentiality

First of all, the Civil Code contains a provision on what type of information should be considered as confidential under Lithuanian statutory law. According

[138] ibid

to Article 1.116 paragraph 1, confidential information is understood as information that has potential commercial value due to the fact that it is not known to third parties, and cannot be obtained by third parties due to efforts of the owner of this information or a person to whom it is assigned. It is further stated that laws may specify which information cannot be considered as confidential in any case.

In addition, in its case law, the High Court of Lithuania, as regards post-contractual matters of confidentiality, also analyzes what information can be considered confidential. Most importantly, information in question must not be known to the general public or easily accessible to third parties.[139] That does not mean, however, that it must be absolutely secret, but an owner of information must put efforts to keep information confidential, either by physical, technical, legal or organizational means.[140] It should also be noted that efforts must be reasonable, not exclusive.[141] Furthermore, the Court said that the information must have real or potential commercial value. It is not enough that information is just secret, since in such case it would be merely a secret, not a commercial secret.[142] A commercial secret must put its owner in a more advantageous position towards its competitors. However, as court practice has proven, it might be quite complicated to determine if certain information does indeed present features of commercial value.[143]

As regards confidentiality obligations, the Civil Code does not contain a general provision on post-contractual confidentiality obligation. Nevertheless, such obligation is mentioned in articles regarding different types of contract. For example, Article 6.669 imposes a confidentiality obligation, as regards construction contracts. The article states that if during the course of the contract one party obtained a commercial secret or any other information, which is described as confidential in the construction agreement, the party in question

[139] Case LAT 3K-3-326/2012
[140] Janceviciute (n 131)
[141] Case LAT 3K-3-326/2012
[142] ibid
[143] Janceviciute (n 131)

must not disclose this information to third parties, without consent of the other party during the time of the contract and after it has lapsed.

A similar obligation is contained in Chapter 34 on transfer of technology contracts. Article 6.709 of that chapter states that parties must ensure that confidential information of whatever kind described in the agreement, must not be disclosed during or after the time of the agreement, unless disclosure is consented to by both parties.

Post-contractual confidentiality obligations of this kind in the Civil Code are also imposed on franchisees[144], distributors[145] and insurers[146].

One important similarity between these articles of the Civil Code is that in order for a post-contractual obligation to arise by means of statutory law, it is necessary that it was agreed by means of contract law that a piece of information in question is indeed a commercial secret or another type of confidential information. Therefore, an implied post-contractual confidentiality obligation only exists, if the original contract has clearly defined the scope of confidentiality.

Even though the Civil Code is silent on a general post-contractual confidentiality obligation, such obligation is contained in the Law on Competition of 1999.[147] Article 15 paragraph 4 of this Law states that when an individual obtained confidential information as a consequence of an employment relationship or any other contractual relationship, he must not disclose this information to third parties for at least one year after the end of the contractual relationship. The provision is clear-cut, it imposes an implied post-contractual confidentiality obligation for a period of one year after the term of the contract. The duration of

[144] Article 6.771(5) Lithuanian Civil Code
[145] Article 6.802(13) Lithuanian Civil Code
[146] Article 6.995 Lithuanian Civil Code
[147] Lietuvos Respublikos konkurencijos įstatymas 1999, VIII-1099, hereinafter referred to as 'Law on Competition'

the confidentiality obligation can be extended by an explicit agreement, but in no case can it be avoided all together.

4. Common law countries

4.1. United Kingdom

4.1.1. Non-compete

In the past, the general attitude towards post-contractual non-compete obligations in the United Kingdom was very reserved, especially when such obligations were combined with other post-contractual obligations such as confidentiality or non-solicitation. However, in recent years, Courts have demonstrated a much more receptive approach. Nowadays English Courts, especially in the field of employment law, are not only willing to accept non-compete clauses, but also are more positive towards clauses of considerably longer duration in contracts with senior employees.[148] Consequently, non-compete post-contractual obligations in English law will also be discussed within the field of employment law due to a number of cases and recent legal literature on the matter.

A general statute dealing with the issue of non-compete obligations in labor and employment contracts does not exist in English law. The matter is in the hands of English judiciary that has developed a collection of principles and rules. First of all, according to the case law of the United Kingdom, an employer can not prevent his ex-employee from starting to work for its competitor or starting a competitive business on his own merely because of an increased competition or a threat of competition as such.[149] Even if an express clause has been drafted, English courts will inspect if there is a serious threat of unfair competition.[150] The burden of proof will be on the employer to prove that a post-contractual non-compete obligation is necessary in a particular situation.[151]

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[148] 'Post Termination: Restrictive Covenants' (Slater & Gordon Lawyers, April 2012) <https://www.slatergordon.co.uk/media/340283/post-termination.pdf> accessed 3 March 2015

[149] Richard W.Painter, Keith Puttick, Ann Holmes, Employment Rights (3rd edn, Pluto Press 2004) p.162

[150] ibid 163

[151] ibid

In the matters of enforceability of the clause several more factors will play a significant role. The clause will be accessed in terms of reasonableness as regards its duration, geographical scope, material scope, public interests and maintenance of free competition.[152] Even though recent practice has proved that English courts are willing to impose broader post-contractual restrictions on competition, clauses will nevertheless have to remain within reasonable limits.

Concerning the duration, it is unlikely that a clause of over twelve months will be valid and enforceable without a very serious justification.[153] In case twelve or more months are demanded by an ex-employer, exceptional circumstances will have to be established, followed by clear and consistent documentary evidence justifying the rationale of such lengthy duration.[154] This was reminded by the High Court of England a couple of years ago in Patsystems Holdings Limited v. Neilly.[155] In this case an ex-employer attempted to impose a post-contractual non-compete obligation forbidding his ex-employee Mr.Neilly from joining a competing business for one year. According to the Court a non-compete obligation of such duration is 'the most powerful weapon in an employer's armory'.[156] And in this particular case it was considered as unreasonable and unnecessary for the protection of legitimate interests of Patsystems. From the time the employment contract had been signed the post-contractual non-compete clauses were void, because Mr.Neilly had been holding a position of only a junior salesman, his access to confidential information was limited and he barely had any contacts with company clients. A change of his position to senior employee and variation of the original working agreement did not bring any changes as regards the validity of non-compete clauses.[157] Consequently, not only it was emphasized that a twelve months post-contractual non-compete will

[152] ibid
[153] ibid
[154] Lloyd W. Aubry, Jr, 'Employment Law: Commentary' (2007) 19(11) Morrison Foester <http://media.mofo.com/docs/pdf/ELC1107.pdf> accessed 30 March 2015, p.3
[155] Patsystems Holding Limited v Neilly [2012] EWHC 2609 (QB)
[156] ibid para.44
[157] Peter De Maria, 'High Court Rejects Attempt to Enforce a 12 Moths Non-competition Covenant' (Doyle Clayton, 18 July 2012) <http://www.doyleclayton.co.uk/blog/posts/high-court-rejects-attempt-to-enforce-12-months-non-competition-covenant> accessed 1 April 2015

have to demonstrate elements of reasonableness, but also that a later change in circumstances will neither have impact on the reasonableness, nor enforceability of a clause.

As regards the geographical scope, the clause cannot be too excessive. Historically, non-compete restrictions would be drafted based on the location of employer premises. However, it is well established in current practice of English courts that non-compete obligations can only cover territories over which an ex-employee has had influence or which have been relevant to the activities of his previous employment. [158] Consequently, a post-contractual non-compete will only be applicable to only those geographical markets and industries, which were in some way related to the employee in question.

Furthermore, in enforcing non-compete obligations it must be demonstrated that there is no public interest in holding the obligation unenforceable. Opinions of English legal scholars do not seem to form a unitary approach on this matter. Quite on the contrary, there is a severe dispute on the relevance of the public interest for the validity of post-contractual non-compete clauses. This is due to the fact that courts find it difficult to balance the individual freedom of contract and the public interest in free trade. Consequently, as we have seen, English Common Law courts choose the test of reasonableness instead.[159] As it was decided in the Euro Brokers case,[160] normally courts in the United Kingdom in their determinations will firstly consider if a clause containing a post-contractual restriction is reasonable. Secondly, the test of necessity will have to be fulfilled. In other words, a clause will have to be necessary in order to protect a genuine interest of an ex-employer.[161] So far the following business interests normally qualify as legitimate and genuine: customer, client or supplier contacts, trade secrets and stability of the workplace.[162]

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[158] ibid
[159] Colin Sara, 'Non-competition Clauses in Labor Contracts' (XIVth Meeting of European Labor Court Judges, Paris, 4 September 2006), p.3
[160] Euro Brokers Holdings Ltd v. Monecor (London) Ltd [2003] All ER (D) 118
[161] Painter, Puttick, Holmes (n 149) 162
[162] Aubry (n 154) 2

It is necessary to note, that English legal system is among those legal systems, which did not introduce compensation for non-compete post-contractual obligations. Although some employers choose to do that on their own initiative, that will not have any impact on the reasonableness of the clause.[163]

If a clause is found to be overly broad and unreasonable, a court will either conclude that a clause is not valid and unenforceable all together, or, where it is possible, will strike down only a part of a restrictive clause or/and modify it.[164] Nevertheless, English courts will not make any substantive revisions. This means that certain unenforceable words and phrases may be deleted, provided that the remaining provision still makes sense.[165] As a result, courts will not substitute one provision with another. For example, they will not substitute twenty months duration to four months, in order for a clause to be valid, nor they will restrict the scope of the restriction to a certain geographical location, because such amendments would change the substantive part of a clause. Furthermore, any modification may not distort the original bargain of the parties to the extent that it materially differs from the contract that has been agreed upon by the signatures.[166]

Overall, the possibility to impose non-compete restrictions on ex-employees, with an exception of ones holding senior positions, is limited to a great extent. The reason for this is the general rule rooted in English law that individuals are free to choose where to work after one employment relationship is over. The fact that they might start working for a competitor or start their own competitive

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[163] Daniel Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (Morrison Foester 27March 2008) <http://www.mofo.com/resources/publications/2008/03/employment-and-privacy-issues-in-non_competition__> accessed 1 April 2015

[164] Painter, Puttick, Holmes (n 149) 163

[165] Mark. S Pulliam, Lionel Vuidard, Natalia Drozdovskaya, Norma Studt, Carherine Drinnan, 'Working World: Global Non-compete Summary' (Latham & Watkins LLP)(Lexology, 13 April 2010) <http://www.lexology.com/library/detail.aspx?g=6dd69807-d197-4d64-82f8-628fcce3b979> accessed 2 April 2015

[166] ibid

business is only relevant in case of unfair competition.[167] That is very advantageous for employees and recruiting employers. In the mean time it is very disappointing for former employers. However, considering various arguments against post-contractual non-competition, a very restrictive approach might be seen as an advantage. Such approach brings about certain benefits. First of all, employers wishing to recruit new employees may do it more freely. As a consequence, the competitiveness of the employment market is improved and the employees are better off. Furthermore, many scholars believe that non-competition clauses reduce possibilities of innovation.[168] In this light, less stringent non-compete restrictions, may result in a greater level of innovation in the economy of the state. The greater level of innovation – the more possibilities are available to a consumer. Therefore, everybody can win. Perhaps English common law has found a convenient solution, beneficial to most of the market players, by imposing severe general conditions for imposition of post-contractual non-compete obligations, but relaxing those same conditions as regards higher-ranking employees.

4.1.2. Confidentiality

In English Common law confidentiality obligations are entrenched in equity.[169] Based on equity, an individual who has received confidential information, must not take unfair advantage of it.[170] Post-contractual confidentiality obligations as they are understood in United Kingdom will be further discussed within the sphere of employment law, because it id the most discussed and analyzed field of law as regards this matter.

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[167] ibid

[168] Grant R.Garber, 'Noncompete Clauses: Employee Mobility, Innovation Ecosystems, and Multinational R&D Offshoring' (2013) 28(1079) Berkeley Technology Law Journal <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2000&context=btlj> accessed 2 April 2015, p.1081

[169] Martijn W.Hesselink, Jacobien W.Rutgers, Odavie Bueno Diez, Manola Scotton, Muriel Veldman, Principle of European Law: Commercial Agency, Franchise and Distribution Contracts (Sellier 2006), p.116

[170] Seager v. Copydex Ltd [1967] 1 WLR 923

It is generally recognized in English Common law that confidential information an employee has obtained during his employment must not be disclosed during the employment relationship itself, as well as once it has ended.[171] The key principles of post-contractual obligations, concerning protection of confidential information were discussed in Faccenda Chicken case [172]. Faccenda Chicken company recruited Mr.Fowler as a sales manager. During the term of his employment Mr.Fowler obtained some useful business information. After he left the job in the Faccenda Chicken, he set up a competing business. He employed several former colleagues, also contracted with some of Faccenda Chicken's customers. There was no express clause in his work agreement as regards confidentiality or non-compete post-contractual obligations, so he believed he was free from any post-contractual restrictions. His previous employer went to the court and claimed that Mr.Fowler was bound by an implied duty of confidentiality, which he subsequently breached by using their customers and prices lists. However, the court rejected arguments of the claimant and stated that the information in question was not of such a character that could impose an implied duty of confidentiality. Furthermore, the court noted that once the employment relationship has ended, constraints on confidentiality are much looser. Then the English court made a distinction between two types of confidential information. The distinction is still applicable in jurisprudence of present times. The first type of information is highly confidential and must be categorized as a trade secret. As regards this type of information, an employee will be bound to respect its confidentiality even after the term of his employment and without an explicit clause in the primary working agreement. The second is information is somewhat less confidential and in most cases could be used after the employment relationship has ended. If an employer nevertheless wishes to protect such information after the term of employment, an explicit clause to that extent must be agreed upon. In most of the situations it will be difficult to distinguish which type of information is present, but the judgment of Faccenda Chicken stressed out the importance of explicit post-contractual confidentiality

[171] Deborah J.Lockton, Employment Law (7th edn, Palgrave Macmillan 2010), p.93
[172] Faccenda Chicken Ltd. v. Fowler et al [1986] 1 All ER 617 (CA), hereinafter also referred to as 'Faccenda Chicken case'

clauses, since in relation to ex-employees the implied duty of confidentiality will fail to protect the interests of employer in most of the cases.[173]

Notwithstanding the apparent necessity of explicit clauses of post-contractual confidentiality obligations, some employers choose or simply do not think it through and do not include them in the employment agreements. In such occasions, it will be up to English courts to decide on case-by-case basis, whether an implied post-contractual confidentiality is indeed present. In their determinations courts will consider several factors. First of all, they will look at the nature of employment.[174] Certain jobs will inevitably involve use of highly confidential information and an obligation to protect it after the term of employment will be inherent in the character of the job.[175] Secondly, the very nature of information will have to be examined.[176] Thirdly, it will be important whether information in question can be separated from other information, which can be freely used by all employees.[177] Fourthly, it will be inspected if an employer emphasized the necessity of keeping the information confidential.[178] This is particularly relevant in cases where the character of a job does not demonstrate the need of post-contractual confidentiality. The importance of these criteria was noted in the Faccenda Chicken case.

Furthermore, it is also crucial to understand what information can generally be considered as confidential. In Marshall Ltd v. Guinle[179] the court established three points to be scrutinized in determining whether information at issue is in fact confidential.[180] Firstly, the owner of information himself must assume that disclosing that information would harm him or his business, as well as benefit his competitors.[181] In addition to that, the owner must reasonably think that

[173] Lockton (n 171) 94
[174] ibid 93
[175] Painter, Puttick, Holmes (n 149) 164
[176] Lockton (n 171) 93
[177] ibid 94
[178] ibid
[179] Thomas Marshall (Exports) Ltd v Guinle [1978] 3 All ER 193, hereinafter referred to as 'Marshall case'
[180] Lockton (n 171) 94
[181] ibid

information in question is not known to the general public.[182] Finally, the confidentiality of information must be determined in light of peculiarities of a relevant industry or market.[183] In addition, it is also apparent that it will be irrelevant if information is not complex and could in fact be discovered by third parties themselves.[184] It is clear from these factors that the judgment will to a large extent depend on a particular circumstances of each individual case. For this reason, it is difficult to draw a general conclusion as to what information will be confidential. However, it is safe to assume that trade secrets in their most common meaning will fulfill the said prerequisites. In any case, English courts will have quite enough freedom in determining whether information is confidential or not.

However, in many cases courts will be faced with one major problem. It is difficult to separate confidential information from skills, which have been acquired during the course of employment. Such skills, as opposed to confidential information, an ex-employee is free to use in his new position. To understand the difficulty English courts are faced with, one has to think about the process that was necessary to learn and use during the course of employment. Should this be considered a skill that an individual acquired and cannot be forced to forget or not use, especially if it took a great effort to acquire it in the first place? Or should this be treated as confidential information that was disclosed to an employee so he could benefit that one particular employer?[185] This issue was analyzed in Printers & Finishers Ltd. V. Holloway.[186] In this case an ex-manager of a company during the course of his employment obtained knowledge of the company's flock-printing process, acquired a skill of using a printing plant, and retained some documents containing information about business activities of the company. No agreement was signed between him and his previous employer as regards post-contractual obligations. For this reason, his previous employer went to the court in order to obtain an injunction against

[182] ibid
[183] ibid
[184] ibid
[185] ibid
[186] Printers & Finishers Ltd. v Holloway [164] 3 All ER 731

the use of all three elements. However, according to the court the ex-employee could freely use the skill and knowledge he has acquired during the course of employment and an injunction was only ordered as regards the use of the documents and information contained in them. Therefore, it was acknowledged that no obligation of post-contractual confidentiality existed as regards the skill and knowledge, only as regards documents and information contained in them.

Similarly to non-compete clauses, in assessing whether a post-contractual confidentiality clause is enforceable, English courts will consider whether the clauses are reasonably limited in time and geographical area. As well as if any legitimate business interest can be demonstrated by an employer.[187] However, even though criteria for enforceability is in essence the same as in the case of non-compete obligation, one must not assume, that courts will apply same substantial standards. Due to the fact that a greater degree of reluctance will be demonstrated towards non-compete obligations, it is safe to assume that criteria will be more relax as regards clauses for confidentiality.

Another great correspondence as between the two types of clauses in the United Kingdom is the way courts deal with them in case they are overly broad. Just as it is the case with clauses on post-contractual non-compete obligations, English courts will also be able to modify unreasonably broad confidentiality clauses through the doctrine of blue-penciling. In other words, this will be done by severing offending parts, but not re-writing clauses themselves.[188]

[187] 'Post Termination: Restrictive Covenants' (Slater & Gordon Lawyers, April 2012) <https://www.slatergordon.co.uk/media/340283/post-termination.pdf> accessed 3 March 2015

[188] ibid

4.2. United States

4.2.1. Non-compete

In the United States a variety of attitudes exist regarding non-competition obligations.[189] Even within the area of employment law, on which further analysis will focus, there is no federal legislation on non-compete obligations. Consequently, there are fifty-one different sets of rules, which can be found in constitutional provisions or specific statutes of some states[190], but mainly in judicial decisions of state courts.[191] However, in the field of employment law, the majority of states follow one very similar model, which will be discussed further along with the distending approach of the State of California, and the intermediary position taken by the State of Virginia.

Main requirements for validity and enforceability of a clause imposing a post-contractual non-compete in employment relationships and other commercial contracts are reasonable duration, geographical territory and protection of legitimate economic interests, which include confidential information and customer relationships.[192]

In addition, the rule of the majority of states is that a non-competition clause that is too broad will be left to the discretion of the courts to nevertheless enforce it by modifying the scope.[193] The Courts will generally try to put an obligation into effect and bring it to compliance with national laws, as long as parties acted in good faith. Such modification practice exercised by state courts is what nowadays legal scholars call a blue pencil doctrine.[194] Some states will have

[189] Lloyd W. Aubry, Jr, 'Employment Law: Commentary' (2007) 19(11) Morrison Foester <http://media.mofo.com/docs/pdf/ELC1107.pdf> accessed 30 March 2015, p.1
[190] Constitutional provisions or statutes concerning non-compete obligations are to be found in 25 states and the District of Columbia.
[191] Eric A. Savage, 'Non-Compete Clauses: An International Guide: USA' (Ius Laboris, 2010) <http://www.iuslaboris.com/files/documents/Public%20Files/Publications/2010_Publications/non-compete-clauses-an-international-guide.pdf> accessed 29 March, p.337
[192] Aubry (n 189)
[193] ibid
[194] Savage (n 191) 343

variations of this doctrine. For example, in Colorado courts will only decide to "blue pencil" if post-contractual non-compete is limited in time and in space, without these two crucial elements being present, a clause will be declared null and void.[195] In addition, in any case, state courts will always be concerned with reasonableness of a clause in question. An unreasonable clause will not be considered as enforceable and the extent of reasonableness will also dictate if it can be modified to a reasonable clause.[196]

In the meantime the State of California demonstrates a very radical approach on non-compete obligations. Generally, such obligations are not enforceable.[197] This is entrenched in its Business and Professions Code, which states that:

> Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.[198]

This not only applies for non-competition obligations during the term of the primary contract, but also after its termination.[199] In the early case law of Californian courts, or more precisely in the case Diodes Inc v. Franzen[200] of 1968 on non-compete obligations within the field of employment law, the Court explained that the interests of an employee and his ability to move from one place of employment to another are crucial not only to him, but also to the competitive business interests of all employers in general. However, there is a narrow range of exceptions to the general prohibition of post-contractual non-compete obligations. Some exceptions have been developed by courts of California outside the scope of employment law. Nowadays post-contractual non-competes are allowed in the sale of business or partnership, dissociation of a partner from a partnership and dissolution of a partnership itself.[201]

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[195] ibid 344
[196] ibid 345
[197] Aubry (n 189)
[198] Business and Professions Code of the State of California 1973, Section 16600
[199] Aubry (n 189) 2
[200] Diodes Inc v. Franzen, 260 Cal. App. 2d 244, 255 (1968)
[201] Aubry (n 189) 2

Faced with such impossibility to impose post-contractual non-compete rules, lawyers often try to draft agreements governed by more favorable laws of another state. However, Californian courts have proved to be reluctant to impose such non-compete clauses in such agreements, especially against residents of the State of California.[202]

Judges of the State of Virginia are also not very receptive towards non-compete obligations and have disfavored inclusion of non-compete clauses in contracts of employment for a long time, but despite that post-contractual non-compete obligations are not generally prohibited in this state as they are in California.[203] On the other hand, in order to have such an obligation imposed, the employer will have to prove that a clause, next to its material scope, duration and territory, is also necessary to protect legitimate business interests including trade secrets or confidential information, knowledge of methods of operation and customer contracts.[204] In addition, a clause drafted by an ex-employer will have to be neither oppressive in curtailing an ex-employee's efforts to find a new place of employment and earn his living, nor unduly harsh. Finally, it will have to be a reasonable clause from the point of public policy.[205]

In addition, unlike in the model followed by the majority of states, the Courts in Virginia will not engage in modification of unenforceable and invalid post-contractual non-competition clauses. Clauses will be assessed as they have been drafted originally. This applies not only to clauses on post-contractual non-compete obligations in employment agreements, but also to other types of contracts. Therefore, an important implication for lawyers who draft a commercial contract under laws of Virginia, containing a post-contractual non-compete obligation is that extra care will be required, because either a clause will be enforceable as it is or not at all.[206]

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[202] Savage (n 191) 340
[203] Aubry (n 189) 2
[204] Paramount Termite Control Co v Rector 238 (1989), para.175
[205] ibid paras.171-174
[206] Aubry (n 189) 2

It is interesting to note that, from all American states, the most extreme attitude on post-contractual non-compete obligations (as well as contractual) is demonstrated in North Dakota. In this state any agreement imposing non-compete obligations is considered illegal, and therefore in any case will be null and void.[207]

Finally, in all American states, where a post-contractual non-compete is permissible, whether generally or on certain occasions, it will have to be agreed on explicitly and in writing by both signature parties.[208] Non-compete obligations in the United States are never presumed as a matter of law or as a general principle.[209]

As regards remedies available for an employer against an ex-employee, these will generally include an injunction, barring an ex-employee from working for a new company, and damages, resulting from actions of an ex-employee and usually concerning lost sales and punitive damages, in case of deliberate and outrageous conduct. Furthermore, the new employer may be liable for employing a worker, bound by a post-contractual non-compete.[210]

Lawyers in the USA face a very difficult task of drafting a post-contractual non-compete clause, due to profusion of laws. The clauses drafted will have to be state specific in order to impose enforceable post-contractual non-compete obligations. Even though most of the state courts are willing to modify clauses, agreed on in good faith, it will not happen in every situation, due to an obvious element of subjectivity in the analysis of American courts.[211]

4.2.2. Confidentiality

[207] Savage (n 191)
[208] ibid 341
[209] ibid 347
[210] Savage (n 191) 346
[211] Savage (n 191) 344

Post-contractual confidentiality obligations as they are understood throughout jurisdictions of United States will be discussed generally, by specifying certain aspects found in different states, as well as giving more details on post-contractual confidentiality within the field of employment law. However, the general part is also applicable to all types of commercial agreements. Nevertheless, it must be noted that certain exceptions to general rules could be found in some states.

In the United States post-contractual confidentiality may arise as a result of common law, notwithstanding the fact that no such provisions have been included in a contract.[212] Such post-contractual obligations may arise in the presence of highly confidential information and trade secrets of an ex-employer.

The majority of American States in their state laws prohibit misappropriation of trade secrets. This prohibition will extend to a certain period after the termination of a primary agreement, giving rise to post-contractual confidentiality obligations as regards certain information, qualifying as a trade secret. On the other hand, not every piece of information that a businessman or an employer considers to be a trade secret of his establishment will qualify as such under state laws. [213] Consequently, in such case, in the absence of an explicit clause imposing a post-contractual obligation not to disclose that particular piece of information, an ex-employee will be free from any confidentiality obligation in that regard. For this reason, businessmen are encouraged to explicitly contract on such post-contractual matters.

In most of the States a definition of a trade secret provided in a model law, more precisely the Uniform Trade Secrets Act, is adopted.[214] The Act defines a trade secret as follows:

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[212] Lamorte Burns & Co., Inc v Walters 770A.2d 1158, 1166 (N.J.2001)

[213] Arnold Pedowitz, Michael P. Royal, 'Enforcing Restrictive Covenants in the United States' (American Bar Association Annual Meeting Section of Labor and Employment Law, August 2011), p.4

[214] Kyle B.Sill, 'Drafting Effective Non-compete Clauses and Other Restrictive Covenants: Considerations Across the United States' (2013) 14:365 Florida Coastal Law Review <https://www.fcsl.edu/sites/fcsl.edu/files/FLC301_0.pdf> accessed 1 March 2015, p.389

> Information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[215]

Although forty-four American states have adopted some form of this definition on trade secrets,[216] what actually falls under the category of trade secrets, will to a large extent depend on State courts.[217] Practice shows that courts in different states do not adopt an entirely uniform interpretation, even though very similar definitions are implemented. This further complicates the position of American lawyers drafting contracts, containing post-contractual restrictions, due to the fact that courts of another state may not recognize a clause drafted under the laws of a different state.

Furthermore, even though parties are free to agree in a contract that some information will be considered as a trade secret, perhaps even with the intention that, after termination of the contract, confidentiality obligations will arise, it does not mean that these agreements are dispositive. The Courts of the United States may nevertheless decide that the information in question is not a trade secret and therefore, will not be protected after the termination of the contract.[218] The most important factor, in determinations of American Courts

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[215] Uniform Trade Secrets Act 1985 para.6-41-1(4)
[216] James C. Bruno, David C. Hissong, 'Enforcement of Non-Disclosure Agreements: Does MCLA 445.1901 and Related Case Law Apply in Other States? (2002) Michigan Bar Journal <https://www.michbar.org/journal/pdf/pdf4article375.pdf> accessed 1 May 2015, p. 58
[217] Sill (n 214) 390
[218] Wendi S. Lazar, 'Employment Agreements and Cross Border Employment – Confidentiality, Trade Secret, and Other Restrictive Covenants In a Global Economy (American Bar Association

regarding the existence of a trade secret, will be the actual secrecy of the trade information. In other words, whether the information is known outside the business in question.[219] However, absolute secrecy is not necessarily a prerequisite for a piece of information to be classified as a trade secret. The precautions taken to keep information confidential will be essential. More precisely, it will have to be proven that serious reasonable efforts have been made in order to protect certain information from the third parties.[220] The more easily obtainable information is, the more difficult it will be to conclude that one is dealing with a trade secret, which requires post-contractual protection. In addition, other factors will also be relevant in order to establish that a post-contractual obligation is enforceable due to a trade secret being present. The Courts will take into account the economic value of the information in question; efforts required to acquire or duplicate it by others; as well as the amount of time, money and effort that have been necessary to develop the information.[221]

In any case, in the case law of State courts one will find some common examples of trade secrets that will usually be protected under United States law. Those include manufacturing methods and processes, financial data, budgets or their forecasts, business or financial plans, customer or client lists, as well as supplier lists.[222] On the other hand, the actual presence of a trade secret will depend on all relevant circumstances of a case. For example, in the case APG Inc v. MCI Telecomms[223] the United States Court of Appeal concluded that details on customers needs of a drugstore could not constitute a trade secret, while in the Four Seasons case[224] it was conversely found that detailed customer profiles of the hotel in question qualified as a trade secret. Furthermore, while customer

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ERR/International Labor and Employment Subcommittee Annual Meeting, Denver, September 2008), p.3

[219] ibid

[220] Pascale Lagesse, Mariann Norrbom, Restrictive Covenants in Employment Contracts and other Mechanisms for Protection of Corporate Confidential Information (Kluwer Law International, 2006), p.229

[221] Lazar (n 218)

[222] 'Why is Confidentiality Important?' (Jules Halpern Associates LLC) <http://www.halpernadvisors.com/why-is-confidentiality-important/> accessed 1 May 2015

[223] APG Inc v. MCI Telecomms Corp, 436F. 3d 294, 304 (1st Cir. 2006)

[224] Four Seasons Hotels & Resorts BV v. Consorcio Barr, SA, 267 F. Supp. 2d 1268 (S.D. Fla. 2003)

lists will normally constitute trade secrets, in the case of Sethscot Collection,[225] the District Court of Florida decided that prospective customer lists were excluded from that category, since in this particular case they were obtained without a sufficient effort, by merely compiling information that was available to the general public.

Similarly, a party wishing to enforce a clause providing for a post-contractual confidentiality obligation, concerning confidential information, which falls short of the protection afforded to trade secrets, will first have to establish that a particular piece of information at issue is indeed confidential.[226] Information, which is publicly available or readily accessible via other means, for example through trade associations, will not be considered as confidential. Consequently, this information will not be possible to protect it by a post-contractual obligation.[227] Therefore, not only an explicit clause on post-contractual confidentiality obligations will have to be drafted in order to protect information that does not qualify as a trade secret, but also relevant grounds for its enforceability will be necessary.[228]

As regards the enforceability of any type of post-contractual confidentiality clause, whether concerning confidential information or trade secrets, the State courts will also be concerned with time limitations. In the majority of states, the duration of post-contractual confidentiality obligations will be limited to somewhere between one and two years.[229] It is possible that in certain cases the period might exceed two years. In the State of Florida, for example, if a post-contractual obligation concerns a trade secret, a reasonable duration will be five years or less and will be strictly unreasonable if exceeding ten years.[230] In Georgia, an indefinite restriction on disclosure of trade secrets is allowed. On the other hand, the same does not apply to post-contractual obligations concerning

[225] Sethscot Collection, Inc. v. Drbul, 669 So. 2d 1076 (Fla. Dist. Ct. App. 1996)
[226] Lazar (n 218)
[227] ibid 4
[228] Lazar (n 218) 4
[229] Pedowitz, Royal (n 213) 6
[230] Bruno, Hissong (n 216) 59

other confidential information.[231] However, it is quite unclear how far the possibility of an indefinite post-contractual obligation regarding trade secrets actually extends. What would happen if the trade secret in question at some point enters the public domain or if a business to which the post-contractual confidentiality obligation was owed ceases to exist? Would such an obligation still exist? For such answers, courts of Georgia will probably consider all relevant circumstances of each particular case, because the laws of the State are silent on these matters. In the meantime, Pennsylvanian courts have already established that post-contractual confidentiality obligations of an unlimited duration will be enforceable, as long as it is provided that in case information becomes public, a post-contractual obligation expires.[232] However, as regards employment contracts, even in the most employer-friendly states, long durations usually will only be possible in cases where an employer is involved in a very specialized business or a former employee has held a high-level position.[233] Outside the field of employment law, longer post-contractual non-disclosure obligations are possible in sale of business contracts, again only in certain states.[234]

Furthermore, in most cases, the requirement of a reasonably narrow geographical scope is not applicable to clauses on post-contractual confidentiality.[235] In addition, the scope of activities of a former employee will be relevant in all States. This requirement on the surface seems to be clear enough. A former employee must not disclose or use in any way trade secrets or confidential information learned during the course of employment.[236] Nevertheless, a problem with this requirement is that Courts will be faced with difficulties of determining what information is indeed confidential or can even be classified as a trade secret.[237]

[231] ibid
[232] ibid
[233] Pedowitz, Royal (n 213) 6
[234] Sill (n 214) 385
[235] Pedowitz, Royal (n 213) 8
[236] ibid 9
[237] See discussion above

Finally, judicial modification of clauses containing post-contractual confidentiality obligations will be allowed in some American States. California State courts are allowed to modify an offending term to make a clause enforceable. In the meantime, Georgian courts will not modify or "blue-pencil" any clauses on post-contractual confidentiality, except in sale of business contracts.[238] Wisconsin demonstrates a radical approach to modification of restrictive confidentiality clauses. According to the laws of this state, if a clause violates the statute, the entire provision is unenforceable.[239] Consequently, there will be no adaptations or modifications made by the State courts; the clauses will be read as drafted.

[238] Allen v Hub Cap Heaven Inc, 225 Ga App 533, 484 SE2d 259 (Ga. Ct. App. 1997)
[239] Bruno, Hissong (n 216) 59

5. Non-state law

5.1. PEL CAFDC

The Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC) of 2006 is an academic proposal compiled and drafted by the Study Group on the European Civil Code.

5.1.1. Confidentiality

PEL CAFDC Article 1:204 on confidentiality reads as follows:

(1) A party who receives confidential information from the other, must keep such information confidential and must not disclose the information to third parties either during or after the end of the contract period.
(2) A party who receives confidential information from the other must not use such information for other purposes than the objectives of the contract.
(3) Any information which a party already had in its possession or which has been disclosed to the general public, and any information which must necessarily be disclosed to customers as a result of the operation of the business is not to be regarded as confidential information for this purpose.

This article contained in PEL CAFDC speaks about confidentiality obligation in a general and vague manner. In light of the fact that no other article in the Principles elaborates on the point further, it is somewhat disappointing. What should be noted is that ii specifically refers to a post-contractual confidentiality obligation at the end of paragraph 1. Reading this paragraph, one can realize that post-contractual confidentiality obligations, could arise in the absence of any explicit drafting. Nevertheless, this is nothing revolutionary, having in mind that most jurisdictions do recognize implied post-contractual confidentiality obligations as it is.

In addition, the last paragraph dealing with information that has entered the public domain, seems to answer a question on whether a party is bound by a post-contractual confidentiality obligation, if at some point the information becomes public. It is stated that public information is not confidential for the purposes of the article. Consequently, the answer to the question will probably be that a party would not be bound by the obligation any longer.

Finally, it must be noted that this rule is a default one. Therefore, as it is indicated in a following article, according to PEL CAFDC, parties could agree otherwise.[240]

[240] Martijn W.Hesselink, Jacobien W.Rutgers, Odavie Bueno Diaz, Manola Scotton, Muriel Veldman, Principle of European Law: Commercial Agency, Franchise and Distribution Contracts (Sellier 2006) p.115

5.2. ICC Model Confidentiality Agreement 2006

The model confidentiality agreement developed by International Chamber of Commerce, known as the ICC Confidentiality Clause of 2006,[241] deals with the issue of obligations, which survive the termination of a contract in Article 11. The Article gives two optional clauses that may be contained in a confidentiality agreement. The Option A suggests as follows:

> Upon termination, the Receiving party shall stop making use of the Confidential Information. The obligations of the Parties under this Agreement shall survive indefinitely or to the extent permitted by the applicable mandatory law.[242]

This option A, first of all, indicates that confidentiality obligations do not end together with primary obligations of the contract. Furthermore, it is even suggested that confidentiality obligations may even survive for an indefinite period of time. Nevertheless, the Model Clause acknowledges that this aspect is most likely dictated by national laws.

The Option B of Article 11 contains a different solution as regards survival of obligations and offers that:

> Upon termination, the Receiving Party shall stop making use of the Confidential Information. The obligations of the Parties under this Agreement shall survive its termination for ____ years.[243]

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[241] ICC Model Confidentiality Agreement: ICC Model Confidentiality Clause by International Chamber of Commerce 2006, hereinafter referred to as 'the Model Agreement', 'the Model', 'the Model Clause'.
[242] ICC Model Confidentiality Agreement: ICC Model Confidentiality Clause by International Chamber of Commerce 2006, Article 11 Option A, p.11
[243] ibid Article 11 Option B, p.11

According to this suggestion, post-contractual obligations may be limited in time by an agreement of both parties. However, if relevant national law provides for limits of duration, they will have to be respected.

The Model itself explains that Option B should be chosen, if parties prefer to limit the duration of post-contractual obligations. However, if no preference is expressed, Option A should be the default choice.[244]

What is more, the Model Confidentiality Agreement inevitably gives a definition of confidential information, which post-contractual confidentiality obligations will concern. This is done in Article 2.[245] Furthermore, it specifies confidentiality obligations of the parties or what will be excluded from those obligations and etc. [246] However, these will depend on individual contractual decisions and in general do not have any further implications for the discussion on post-contractual obligations.

Even though this Model Agreement is a contract of its own right, it nevertheless stresses an important aspect of the whole analysis of this thesis. In the Agreement the International Chamber of Commerce has made a clear decision that confidentiality obligations survive the original term of an agreement. In addition, they might even survive for an indeterminate period of time.

[244] ibid footnote 8, p.11
[245] ibid Article 2, p.9-10
[246] ibid Article 3, p.10

5.3. UNIDROIT Principles of International Commercial Contracts 2010

UNIDROIT principles recognize the existence of post-contractual obligations per se in Article 7.3.5 paragraph 3, which states:

> Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.[247]

However, this article does not deal with the existence of post-contractual obligations exclusively. Other general clauses, including dispute settlement or arbitration clauses, also fall within the scope of the provision.[248] Therefore, the Principles provide not only a survival of certain post-contractual obligations, but also of certain general provisions of a contract. Consequently, it is a clear example of a solution for the previous discussion on parallel survival of general clauses, alongside some post-contractual obligations. The effect of this article is that general clauses such as a dispute settlement clause could be useful in situations, where post-contractual obligations are not being fulfilled.[249]

Furthermore, the comment of the Article gives an example of a clause, apart from dispute settlement, that could survive termination. The example given is one of confidentiality obligation. It is explained that a clause prohibiting to disclose confidential information to third parties, as long as information in question has not fallen into the public domain, may survive the termination of the contract. In this case, a party in question would remain bound by the confidentiality obligation until information becomes known to the general public. [250]

The UNIDROIT Principles also touch upon the topic of post-contractual

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[247] UNIDROIT Principles of International Commercial Contracts 2010, Article 7.3.5(3), p.256
[248] Marcel Fontaine and Filip De Ly, Drafting International Contracts: An Analysis of Contract Clauses (Transnational Publishers 2006), p.617
[249] ibid 617-618
[250] UNIDROIT Principles of International Commercial Contracts 2010, Article 7.3.5, Comment 3, Illustration 2, p.257

obligations in the section on principles of interpretation of a contract, in the comment of Article 4.8[251], where an example of a post-contractual non-compete obligation is given. The example analyses a franchise agreement, which includes a post-contractual non-compete clause. However, it is said that the clause is drafted in a general manner and is silent on the geographical scope. According to the comment it will be inherent in the nature and purpose of a franchise agreement that a clause then will be restricted to the territory where a franchisee has exploited his franchise. It is also explained that such clause will have to be interpreted in light of the nature and the purpose of the contract itself. The significance of this example cannot be overestimated. However, it is a clear reflection that drafters did see the importance of the issue of post-contractual obligations and problems they might pose.

In addition, the Principles contain few other provisions that are relevant for this analysis of post-contractual obligations, namely Articles 5.1.1 and 5.1.2. The former establishes that:

> The contractual obligations of the parties may be express or implied.[252]

While the latter determines:

> Implied obligations stem from
> (a) the nature and purpose of the contract;
> (b) practices established between the parties and usages;
> (c) good faith and fair dealing;
> (d) reasonableness.[253]

These two articles can therefore, be interpreted as establishing the possibility of post-contractual obligations that are not expressly agreed in a contract, but are merely implied. It becomes even more evident when considering factors contained in Article 5.1.2. When considering a possibility of an implied post-contractual confidentiality obligation, it is not difficult to imagine that it could

[251] ibid Article 4.8, Comment 3, Illustration 2, p.147
[252] ibid Article 5.1.1, p.148
[253] ibid Article 5.1.2, p.148

steam from the nature and purpose of the contract (paragraph a). Especially, when one thinks of such commercial agreements as franchise, distribution, agency, as well as research and development agreements, or outside the sphere of commercial agreements – employment agreements. It is not uncommon that in such contracts a considerable amount of confidential information is distributed and shared among the contracting parties, which they will protect from publicity during their contractual relationship. As a result, based on the nature of the contract, it is reasonable to assume that exclusive confidential information will not simply fall within in the hands of third parties. Furthermore, confidentiality obligation could be considered as an aspect of good faith under paragraph c. A party, knowing that information is highly confidential and disclosure of which will result in the other party incurring a considerable amount of damage, based on good faith would be bound not to reveal that information to third parties. A similar comment is given in the Principles themselves, as regards duty of confidentiality during the stage of negotiations. According to the comment in the Principles, even in the absence of an express declaration that information in question is confidential, the receiving party may be bound by a duty of confidentiality.[254] Finally, perhaps two parties have been contracting with each other for quite some time already. As a consequence, it may be established in their practice that some information shared considered confidential and is not disclosed to the general public. Would it be right if one party would suddenly disclose some information that is confidential in the eyes of the other party? Under this paragraph (b) perhaps it is most difficult to imagine that an implied post-contractual confidentiality obligation may arise, but if one considers some other post-contractual obligations, for example, faith of the remaining stock or materials it is not so complicated to see that a post-contractual obligation to return unsold items or advertising materials could be dictated implicitly. Therefore, even though the Principles themselves do not contain any comments about post-contractual obligations as regards these two articles, the acceptance of implied post-contractual obligations can nevertheless be read between the lines, especially in light of the general acceptance of post-contractual obligations in Article 7.3.5.

[254] ibid Article 2.1.16, Comment 2, pp.62-63

6. Comparative analysis

6.1. Non-compete

Post-contractual non-compete obligations are facing serious barriers and restrictions in most of the discussed countries. In France, a movement towards restriction of the use of post-contractual non-competes is mainly related to the realization of the importance of competition, especially in light of grave unemployment problems in the country. Consequently, within the field of employment relationships, possibilities to impose non-compete obligations that survive the termination of a contract are strictly scrutinized by the French judiciary.[255]

Similarly, in the common law jurisdiction of the United Kingdom, judges are scrutinizing the rules of imposition of post-contractual non-competition restrictions rigorously. It is even possible to conclude that English laws might even be the strictest on the matter, among jurisdictions generally recognizing post-contractual non-compete obligations. This is witnessed not only by the practice of English courts that it is extremely difficult to impose a non-compete obligation that survives the termination of a contract, but also by the fact that based on the doctrine of restraint of trade, highly favored by the national Courts, non-compete obligations will be difficult to impose even during the term of contract.[256] Again, this is especially noticeable in the field of employment law.

In Germany, the attitude towards non-compete obligations that survive after the term of a contract are also treated with a great level of restraint. On the other hand, differently from France and the United Kingdom, this strict attitude is already entrenched in German statutory law.[257] In Lithuania, primary rules as

[255] Roger Blanpain, Susan Bisom-Rapp, William R. Corbertt, Hilary K.Josephs, Michael J.Zimmer, The Global Workplace: International and Comparative Employment Law (Cambridge University Press 2007), p.446

[256] Colin Sara, 'Non-competition Clauses in Labor Contracts' (XIVth Meeting of European Labor Court Judges, Paris, 4 September 2006), p.2

[257] Jens Kirchner, Pascal R.Kremp, Michael Magotsch, Key Aspects of German Employment and Labour Law (Springer 2010) p.125

regards non-compete obligations after the termination of a contract have already been included in the Civil Code, however only for commercial agency agreements.[258] Afterwards, national courts have not only extended the scope of these rules to include employment relationships, but also set strict interpretation of the requirements contained in those rules.[259]

In the United States, existence and enforceability of non-compete rules differ from state to state.[260] However, the majority of the states follow one model as regards post-contractual non-compete rules within the sphere of employment contracts and according to this model, it will be possible to impose a post-contractual non-compete, but this possibility is limited; whereas in some states, for example the State of California, post-contractual non-compete obligations are not recognized as enforceable. Lastly, in the State of Virginia, such obligations are not encouraged, but are nevertheless allowed, even though they will be more difficult to enforce than in the states following the majority model.[261]

Requirements for the validity of post-contractual non-compete obligations are similar in all discussed jurisdictions. Clauses containing such obligations will generally have to be restricted in their geographical territorial applicability, as well as duration. Furthermore, legitimate interests will have to exist in justifying the necessity of such rules.

In the German jurisdiction, in addition to these three requirements, a requirement of financial compensation is provided. In the field of employment and labor law, the amount of compensation is established in the statutory law

[258] Gabija Janceviciute, 'Ką turi žinoti apie konfidencialumo ir nekonkuravimo sutartis' (Mano teisės, 24 April 2014) < http://manoteises.lt/straipsnis/ka-turi-zinoti-apie-konfidencialumo-ir-nekonkuravimo-sutartis/> accessed 10 March 2015

[259] Matas Mačiulaitis, 'Ar susitarimas dėl nekonkuravimo teisėtas?' (Verum, 2 February 2015) <http://www.verum.lt/publikacijos/darbo-teise/ar-susitarimas-del-nekonkuravimo-teisetas/> accessed 11 April 2015

[260] Lloyd W. Aubry, Jr, 'Employment Law: Commentary' (2007) 19(11) Morrison Foester <http://media.mofo.com/docs/pdf/ELC1107.pdf> accessed 30 March 2015, p.1

[261] ibid 2

and the statutory minimum is set as 50% of the former gross salary.[262] However, there are no requirements as to the amount of the compensation in other types of contracts.[263]

The three general requirements exist in the laws of France. However, the French have added two more cumulative conditions for post-contractual non-compete restrictions specifically in employment contracts, namely the nature and specifications of the position held by the employee, and financial compensation, although neither minimum, nor maximum amount of compensation is provided and will have to be evaluated on case by case basis.[264] It is also important to note that the requirement of compensation in most cases will not be necessary in commercial contracts.[265]

In the meantime, English courts have also added two extra considerations. For the English courts, besides the territory, duration and legitimate economic interests, it is important to see whether the obligation in question is compatible with the principle of free competition and whether there is no public interest in forbidding the obligation.[266]

American States that do allow imposition of non-compete obligations also follow the three general requirements.[267] However, the State of Virginia, for example, also adds that a clause in an employment agreement imposing such post-contractual obligations will in addition have to be neither oppressive in curtailing efforts to find a new work place, nor unduly harsh.[268]

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[262] Doris-Maria Schuster, Christian Mathias, 'Post-Contractual Non-Compete Restrictions in Germany' (WWL, June 2013) <http://whoswholegal.com/news/features/article/30586/post-contractual-non-compete-restrictions-germany> accessed 2 April 2015

[263] Marco Ardizzoni, German Tax and Business law (Sweet & Maxwell 2005), p.7022

[264] Blanpain, Bisom-Rapp, Corbertt, Josephs, Zimmer (n255)

[265] Yann Richard, David Al Mari, 'Should Non-compete Clauses Be Compensated?' (Association of Corporate Counsel 24 April 2014) <http://www.acc.com/legalresources/quickcounsel/snccc.cfm?makepdf=1> accessed 2 April 2015

[266] Richard W.Painter, Keith Puttick, Ann Holmes, Employment Rights (3rd edn, Pluto Press 2004) p.163

[267] Aubry (n 260)

[268] Paramount Termite Control Co. v. Rector, 380 S.E.2d 922 (Va. 1989), para.171-174

Finally, Lithuania has the most differentiating model of requirements for the imposition of post-contractual non-compete obligations. This is not only true regarding relationships of employment, but also regarding other commercial agreements. Just like laws in all other discussed jurisdictions, Lithuanian statutory laws require a post-contractual non-compete obligation to be limited in the territorial scope and time.[269] However, there is no mentioning of legitimate business interests in the statutory law. Instead it is required that a clause is just, reasonable and equitable. Furthermore, a requirement of financial compensation is also entrenched in the statutory and case law. However, just like in the French system, there is no set minimum of the amount of compensation, only provisional guidelines are provided.[270] In addition, to these requirements, the High Court of Lithuania has also introduced another requirement specifically for employment contracts. The Court emphasized that within the field of employment law, a clause imposing a post-contractual non-compete obligation will have to balance interests of the employee and the employer.[271]

None of the jurisdictions recognize an implied non-compete obligation that survives the termination of the original agreement. All jurisdictions will require a post-contractual non-compete obligation to be explicitly agreed upon in writing by the contracting parties.

As regards the enforcement and subsequent modification of post-contractual non-compete clauses by national courts, the situation is varied as well. In some of the analyzed jurisdictions, domestic courts have the power to modify the clause imposing a post-contractual non-compete obligation. However, this power is limited. In France, modification will usually be possible, including substantive changes, unless it is unreasonable.[272] The same goes for the US, in the states that

[269] Article 2.164(1)&(2) Lithuanian Civil Code
[270] Article 2.164(4) Lithuanian Civil Code
[271] Mačiulaitis (n 259)
[272] Laurence Dumure Lambert, 'A global guide to restrictive covenants: France' (Mayer Brown 2013)
<http://www.mayerbrown.com/files/uploads/Documents%5CGuide%20to%20Restrictive%20Covenants/MB_rest-cov_emea.pdf> accessed 20 March 2015

follow the majority model,[273] while the UK courts will only be able to modify a clause by taking out certain words or phrases, provided that a clause still makes sense and the original intentions of the parties are not distorted. That means that English judges will not be able to make any substantive changes.[274] In the State of Virginia, the courts will not have any power to modify a clause in any way, because they must read the clause the way it has been originally drafted.[275]

6.2. Confidentiality

With regard to confidentiality obligations all jurisdictions demonstrate a positive approach. It is not so difficult to impose a post-contractual confidentiality obligation. This is especially noticeable in the French jurisdiction, where the use of post-contractual confidentiality obligations, which are not seldom drafted in a very wide and extensive manner, is considered a common in practice.[276] That is further emphasized by the fact that post-contractual confidentiality obligations in France may even be implied. French courts have extended the scope of the original provision on contractual confidentiality in the sphere of employment contracts, to obligations arising after the period of employment.[277] Furthermore, a violation of post-contractual confidentiality, may even result in a criminal punishment, according to the French doctrine.[278] In the meantime, German laws in general also recognize confidentiality obligations, which survive the termination of contract. However, since the possibility of imposing implied post-contractual confidentiality obligations is limited, as it was discussed in the

[273] Aubry (n 260)
[274] Mark. S Pulliam, Lionel Vuidard, Natalia Drozdovskaya, Norma Studt, Carherine Drinnan, 'Working World: Global Non-compete Summary' (Latham & Watkins LLP)(Lexology, 13 April 2010) <http://www.lexology.com/library/detail.aspx?g=6dd69807-d197-4d64-82f8-628fcce3b979> accessed 2 April 2015
[275] Aubry (n 260) 2
[276] Lambert (n 272)
[277] Samuel Estreicher, Global Labor and Employment Law for the Practicing Lawyer: Proceedings of the New York University 61st Annual Conference on Labor (Kulwer Law International 2010), p. 212
[278] Patrick Thiebart, 'Restrictive Covenants in France' (American Bar Association 2001) <http://apps.americanbar.org/labor/lel-aba-annual/papers/2001/thiebert.pdf> accessed 28 March 2015

context of employment agreements, explicit clauses are normally included in contracts to avoid practical problems, related to, for example, evidence gathering.[279] Nevertheless, in certain situations ex-employees may incur a criminal punishment for disclosure of information that was protected by an implied confidentiality obligation.[280] In Republic of Lithuania, post-contractual confidentiality obligations are also a common concept met in various kinds of contracts.[281] This is also witnessed by the fact that the Civil Code of Lithuania itself already entrenches the concept of implied confidentiality restrictions in a number of different types of commercial contracts, including franchise, insurance, distribution, construction and transfer of technology.[282] Nevertheless, in order for an implied obligation to arise, as the provisions of the Civil Code instruct, it must be contracted in the first place, which information will be considered as confidential between the two parties. The practice of national courts limit this power of parties, by defining what information will normally be categorized as confidential.[283] Similarly, in the United Kingdom, post-contractual confidentiality obligations are also widely acknowledged. This is particularly noticeable in the recent case law concerning employment contracts of senior employees.[284] In this country the concept is deeply rooted in the law of equity.[285] In the United Kingdom trade secrets will be afforded an automatic protection after the termination of an employment agreement. While other confidential information, will only give raise to post-contractual confidentiality, if that was contracted explicitly.[286] In another common law country – the United States, even the most employee friendly jurisdictions do allow imposition of post-contractual confidentiality, which may even arise as a consequence of rules of

[279] Sabine Bechtel, Nadia Rossmy (Synapse, March 2014)
[280] Carsten Domke, 'Trade Secrets in Employment Relationships in Germany' (American Bar Association CLE Conference, Denver, 12 September 2008) <http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/125.authcheckdam.pdf> accessed 8 April 2015
[281] Janceviciute (n 258)
[282] Articles 6.771(5), 6.995, 6.802(13), 6.669, 6.709 (respectively) Lithuanian Civil Code
[283] Janceviciute (n 258)
[284] 'Post Termination: Restrictive Covenants' (Slater & Gordon Lawyers, April 2012) <https://www.slatergordon.co.uk/media/340283/post-termination.pdf> accessed 3 March 2015
[285] Seager v. Copydex Ltd [1967] 1 WLR 923
[286] Faccenda Chicken Ltd. v. Fowler et al [1986] 1 All ER 617 (CA)

common law.[287] Nevertheless, this will only be the case if a trade secret is at issue. Therefore, other types of information, which a businessman considers worthy of protection afforded by post-contractual confidentiality, will have to be protected explicitly.[288] It might not be enough to contract that information at hand is confidential. Courts will still check whether prerequisite of confidentiality is actually fulfilled.[289] It is not complicated to notice, that the general approach adopted by the two common law countries is very comparable and present the same conceptual features. However, it must be noted that this is only true when you look at the main tendencies, since different American States contain different rules on the issue.

As regards the enforceability of explicitly drafted clauses, French clauses, containing obligations of post-contractual confidentiality will have to be limited in their duration, geographical and material scope. In the sphere of employment relationships, such clauses also must not result in an unreasonable burden on ex-employees bound by them.[290] However, there will be not requirement of any financial compensation for the validity of a clause. This rule was very recently confirmed by the French Court of Cassation.[291] In Germany, the courts will be greatly concerned with a legitimate business interest justifying an explicit clause on post-contractual confidentiality. It is interesting, that among other reasons, this is due to a strong position of a constitutionally guaranteed right of freedom of expression.[292] The common requirements of time, material and geographical scope will normally apply in all discussed jurisdictions. However, the substantial scope of those requirements will slightly differ. For example, while in one

[287] Lamorte Burns & Co., Inc v Walters 770A.2d 1158, 1166 (N.J.2001)
[288] Arnold Pedowitz, Michael P. Royal, 'Enforcing Restrictive Covenants in the United States' (American Bar Association Annual Meeting Section of Labor and Employment Law, August 2011), p.4
[289] Wendi S. Lazar, 'Employment Agreements and Cross Border Employment – Confidentiality, Trade Secret, and Other Restrictive Covenants In a Global Economy (American Bar Association ERR/International Labor and Employment Subcommittee Annual Meeting, Denver, September 2008), p.3
[290] ibid 8
[291] SNC Adex v. MD Cour de Cassation, Civile, Chambre Socialie, 15 Octobre 2014, 13-11.524
[292] Michael Beuger, 'Employment Law: Confidentiality vs. Freedom of Expression' (Wilde Beuger Solmecke, 19 August 2013) <https://www.wbs-law.de/eng/employment-law-eng/employment-law-confidentiality-vs-freedom-of-expression-44669/> accessed 15 March 2015

jurisdiction post-contractual confidentiality obligations of only two years will be enforceable, other will even allow them to be indefinite, like the State of Pennsylvania, where the duration is unlimited, as long as information in question has not entered the public domain.[293] However, it is interesting to note that in the United States, in most cases, there will be no requirement of geographical scope of a clause.[294] Perhaps it is due to the fact, that drafters in America are already faced with a very difficult task, when drafting post-contractual restrictions. This is because laws of different constituent states differ. These differences might lead to a situation that a perfectly valid clause under laws of one state will not be enforceable in another state. Consequently, certain geographical constrains are already placed in this manner. So explicit geographical limitations would double burden American drafers. On the other hand, having in mind the size of the country itself and the fact that some of its states are bigger than many other countries, where geographical limitations are indeed in place, this may not be a very convincing argument.

Unlike in the case of post-contractual non-compete obligations, implied post-contractual confidentiality obligations are wide-spread. Such obligations can be found in all discussed jurisdictions. However, the scope and features will differ. On the other hand, one particularly vivid common trend is noticeable. It is clear that post-contractual obligations will normally be imposed as regards trade secrets. Such situation can most easily be observed in the two common law jurisdictions. This also holds true for the German jurisdiction, where automatic protection will be afforded to highly confidential information of an ex-employer, whether it is a trade secret or a business secret, [295] based on the Unfair Competition Act, German Criminal and Civil Codes. [296] While in Lithuania a specific reference to trade secrets is not made, it is established in the statutory and case law, that implied obligations arise only as regards information, which

[293] James C. Bruno, David C. Hissong, 'Enforcement of Non-Disclosure Agreements: Does MCLA 445.1901 and Related Case Law Apply in Other States? (2002) Michigan Bar Journal <https://www.michbar.org/journal/pdf/pdf4article375.pdf> accessed 1 May 2015, p. 58
[294] Pedowitz, Royal (n 288) 6
[295] Remember that the both terms are used interchangeably in the context of German laws on post-contractual confidentiality.
[296] Domke (n 280)

presents real or potential commercial value.[297] Consequently, it is safe to assume that conceptually one does speak about trade secrets.

As was the case with post-contractual non-compete clauses, common law countries demonstrate the most receptive attitude towards modification of post-contractual confidentiality clauses by domestic courts. This will happen when clauses are found to be overly broad and unreasonable. The courts of the United Kingdom, will be empowered to strike down a part of a clause and/or modify some parts. Although substantive alterations are outside the scope of the powers of courts.[298] In the United States, even though some of the States, for instance Wisconsin, will not permit any modifications of an agreed clause, courts of a number of states will certainly blue-pencil. One of the most interesting examples is the State of California. California is a very employee-friendly state within the sphere of post-contractual non-compete obligations, since in most cases such obligations will be impossible to impose. Surprisingly, not only post-contractual confidentiality obligations are allowed in California, Californian courts will even modify clauses, containing a post-contractual confidentiality obligation, so they become enforceable.[299]

6.3 Non-state law

Unfortunately, international instruments do not have much to say about post-contractual obligations. Normally, they will acknowledge the concept as such. Nevertheless, will not specify much further into detail. Perhaps the most elaborate international document on the matter is the UNIDROIT Principles on International Commercial Contracts of 2010. The Principles not only recognize post-contractual obligations as such[300], but also most likely hints that they may

[297] Janceviciute (n 258)
[298] 'Post Termination: Restrictive Covenants' (Slater & Gordon Lawyers, April 2012) <https://www.slatergordon.co.uk/media/340283/post-termination.pdf> accessed 3 March 2015
[299] Bruno, Hissong (n 293) 59
[300] UNIDROIT Principles of International Commercial Contracts 2010, Article 7.3.5(3), p.256

not only be expressly contracted by the parties, but also implied.[301] Even though this is not specifically stated in a concrete, but stems from articles read together. Furthermore, the issue of post-contractual obligations is touched upon in comments, following certain articles.[302] This is another indication that drafters of the Principles have indeed had this issue in their minds.

The other two non-state law instruments, analyzed in this thesis, namely ICC Model Confidentiality Agreement and Principles of European Law on Commercial Agency, Franchise and Distribution Contracts, illustrate that confidentiality is a commonly recognized type of post-contractual obligations. While Principles of European Law merely state that confidential information must be kept confidential after the contract has been terminated.[303] This is not only an acknowledgement of a post-contractual obligation, but also an implication that such obligation can arise as a matter of law, without explicitly drafted clauses. Furthermore, the Model Confidentiality Agreement is interesting due to the fact that in one of the optional clauses, as regards the survival of contractual clauses, it is suggested that post-contractual confidentiality could be indefinite and only constrained by limits of national law.[304]

The discussed instruments witness the fact that non-state law does not reveal a lot about post-contractual obligations. Normally, the concept will be recognized as such, but not examined into detail. This is not only reflected in the documents discussed in this thesis, but also in other international instruments, such as the Vienna Convention of International Sale of Goods[305] or Principles of European Contract law,[306] where analogous general provisions on survival of obligations are contained, but no other provisions specifying any details can be found.

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[301] ibid Article 5.1.1, p.148
[302] ibid Article 4.8, Comment 3, Illustration 2, p.147; Article 7.3.5, Comment 3, Illustration 2, p.257
[303] Principles of European Law on Commercial Agency, Franchise and Distribution Contracts of 2006, Article 1:204(1)
[304] ICC Model Confidentiality Agreement: ICC Model Confidentiality Clause by International Chamber of Commerce 2006, Article 11 Option A, p.11
[305] United Nations Convention on International Sale of Goods 1988, Article 81(1)
[306] Principles of European Contract Law 1998, Article 9.305(2)

7. Conclusion

The research on two of the most common post-contractual obligations, namely non-compete and confidentiality, proved that their regulation is primarily left to domestic jurisdictions.[307] For this reason, drafters of contracts must be very careful when dealing with this subject matter, especially in the case of international agreements, because even though some general rules might seem to be similar, details differ greatly. This is perfectly exemplified by the situation of the United States. A great number of legal authors address the topic of enforceability of post-contractual obligations (restrictions) originating in a contract agreed upon under laws of another State. The majority of those articles warns businessmen and particularly contract drafters to carefully consider the scope of the obligation they intend to impose. Here of course it is necessary to take into account the laws of the State, where the agreement may "end up". In any case, a most insightful solution will probably be to keep the restriction as reasonably limited as possible. Otherwise, there is a great level of risk that a clause will be declared null and void. Even though the risk is lessened in jurisdictions where domestic or state courts are allowed to modify the clause, it does not necessarily mean that courts will adjust the clause to the maximum limits. As a result, a businessman wishing to enforce a post-contractual obligation, contained in an overly broad clause could be worse off after the modification by the domestic or state courts, than if he had included a clause of lesser, but reasonable scope.

What concerns post-contractual obligations that exist as a matter of national law and thus do not require explicit contractual clauses, the situation is quite controversial. First of all, it is important to note that, from the two obligations that have been discussed in detail in this thesis, only post-contractual confidentiality can arise in such a manner. However, contracting parties, who choose to rely on such automatic protection, in practice are quite often faced

[307] Inevitably, states of the European Union will have to implement relevant policies on the matter. However, this is outside the scope of this thesis.

with a number of problems related to enforcement.[308] This due to the fact that, while general on post-contractual obligations are quite clear, a lot will depend on the individual circumstances of the case, and thus, on national courts. One could argue that, in any case, courts will be involved, and having a contract will not necessarily protect parties from an undesirable outcome. However, a reasonable drafter will understand that such an argument has not much value. Nevertheless, the fact that only post-contractual confidentiality obligations will arise as a matter of law, signals that these obligations have a much stronger stance in domestic jurisdictions, than post-contractual non-compete obligations.

Furthermore, faced with more severe restrictions for the imposition of post-contractual non-compete obligations than for post-contractual confidentiality obligations, one comes to realize that jurisdictions are more positive as regards the latter category. This can be understood in light of the competitiveness encouraged by countries all over the world. While post-contractual confidentiality will limit the competitive position of parties to some extent, this will hinder access to new business or employment opportunities much less than in the case of post-contractual non-compete. For example, consider a situation of an English ex-employee bound to a post-contractual confidentiality obligation. Although he will not be able to reveal some valuable information, which would potentially bring certain gains, he will not be denied his rights to use the skills he has obtained during the course of the previous employment in any other establishment. While, if he was restricted by a post-contractual non-compete, that might not only result in him having to spend more time in finding a new place of employment, but also having to settle for a less desirable position due to a smaller number of options available to him, because he cannot exploit the knowledge and skills obtained during the course of his previous contract. As a result, his competitive position is reduced. The fact that a person bound by non-compete in most states would receive a financial compensation may make matters even worse. Again, think of an ex-employee bound by a post-contractual non-compete and receiving a compensation of, for instance, 60% of his previous

[308] Sabine Bechtel, Nadia Rossmy (Synapse, March 2014) <http://www.taylorwessing.com/synapse/ti_safeguarding_employees_germany.html> accessed 7 April 2015

gross salary. Even though he is reimbursed to some extent, that, however, does not mean that his competitive position is better now, since that does not increase the amount of new employment positions available to him. What is more, the compensation might not be adequate anymore, since it is likely that, during the course of his previous employment, his level of experience has increased, perhaps even significantly. As a consequence, it is possible that he would be able to find a better paid job in the same market, however due to the scope of his non-compete he has to look for employment in another market, where his level of expertise might be lower.

On the other hand, even though non-compete covenants are considered to be employer-friendly[309], the burden of compensation generates immediate losses for an employer imposing a non-compete, while it is not absolutely certain that a departing employee will generate the same losses by way of competition. In addition, being exposed to competition does not mean that unfair competition will be allowed.[310]

In addition to a reduced level of competitive potential, some legal scholars argue that non-compete clauses seriously hinder prospects of innovation.[311] Reasons for this are again practically the same and revolve around the fact that individuals are denied opportunities to engage freely in new businesses and make use of their knowledge. In other words, their full potential is not being exploited and processes of innovation are disturbed.

In light of these considerations, it is understandable why countries are reluctant to maintain non-compete obligations. As it was discussed, some jurisdictions even choose to forbid them altogether. Consequently, regarding this matter an

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[309] Eric A. Savage, 'Non-Compete Clauses: An International Guide: USA' (Ius Laboris, 2010) <http://www.iuslaboris.com/files/documents/Public%20Files/Publications/2010_Publications/non-compete-clauses-an-international-guide.pdf> accessed 29 March, p.340

[310] ibid

[311] Grant R.Garber, 'Noncompete Clauses: Employee Mobility, Innovation Ecosystems, and Multinational R&D Offshoring' (2013) 28(1079) Berkeley Technology Law Journal <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2000&context=btlj> accessed 2 April 2015, p.1081

employee-friendly attitude is demonstrated by all considered jurisdictions, which is quite reasonable in the economic reality of these days. In the meantime, all jurisdictions proved to be quite receptive of post-contractual confidentiality obligations. Not only lower standards are applied as regards their validity and enforceability, but also state laws provide for an automatic imposition of post-contractual confidentiality regarding certain types of information. This is very reasonable, because it is crucial that some information is protected from disclosure to third parties. This is deeply rooted in the laws against unfair competition or even intellectual property law. Therefore, it is not surprising that countries tend to advocate post-contractual obligations of such kind.

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