RESTRICTIVE COVENANTS IN THE E-COMMERCE WORLD THOUGHTS ARISING FROM THE ANALYSIS OF THE FRENCH AND SPANISH REGULATIONS

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Abstract

Restrictive covenants are similarly framed in Spain and France, both jurisdictions requiring the limitation of the restriction in time, geographical scope, activities and compensation. Are these requirements adequate for the growing e-commerce business industry? Are the differences between the two jurisdictions (and other European jurisdictions) reasonable from a unified European labor market perspective? The current interpretation of these clauses does not yet take into account the specificities of the e-commerce business. This business is rather delocalized in terms of where the services are rendered, has a changing and dynamic geographical scope, and a changing offer of products and services. A restrictive interpretation of the current restrictive covenant requirements could reduce the interest of agreeing on such clauses in the e-commerce business; a more flexible interpretation of the requirements would seem more effective in the industry. In addition, considering globalization of the companies' markets, it would be worth considering whether different restrictive covenant requirements and interpretations in different European Union jurisdictions could somehow limit the freedom of work and movements in the European Union. Perhaps these restrictions should be the object of uniform regulations throughout the European Union.

Las cláusulas restrictivas se enmarcan de manera similar en España y Francia: ambas jurisdicciones requieren la limitación de la restricción en el tiempo, ámbito geográfico, actividades y compensación. ¿Son estos requisitos adecuados para la creciente industria del negocio de comercio electrónico? ¿Son las diferencias entre las dos jurisdicciones (y otras jurisdicciones europeas) razonables desde una perspectiva unificada europea del mercado de trabajo? La interpretación actual de estas cláusulas todavía no tiene en cuenta las especificidades de la empresa de comercio electrónico. Este negocio es bastante deslocalizado en términos de dónde se prestan los servicios, tiene un cambiante y ámbito geográfico dinámico y una oferta cambiante de productos y servicios. Una interpretación restrictiva de las necesidades actuales del pacto podría reducir el interés de acordar este tipo de cláusulas en el negocio de comercio electrónico; una interpretación más flexible de los requisitos parecería más eficaz en la industria. Además, teniendo en cuenta la

globalización de los mercados de las empresas, valdría la pena considerar si los diferentes requisitos restrictivos e interpretaciones en diferentes jurisdicciones de la Unión Europea podrían limitar de alguna manera la libertad de trabajo y movimientos en la Unión Europea. Tal vez estas restricciones deben ser objeto de una reglamentación uniforme en toda la Unión Europea.

Título: Cláusulas restrictivas en el e-comercio mundial. Reflexiones en torno a las normas francesas y españolas

Keywords: restrictive covenants, e-commerce business industry, comparative study.
Palabras clave: cláusulas restrictivas, comercio electrónico, estudio comparativo.

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Summary

1. Introduction

Restrictive covenants are similarly framed in Spain and France, both jurisdictions requiring the limitation of the restriction in time, geographical scope, activities and compensation. Are these requirements adequate for the growing e-commerce business industry? Are the differences between the two jurisdictions (and other European jurisdictions) reasonable from a unified European labor market perspective?

Before going into the discussion of whether the current interpretation of restrictive covenants is well fit for the e-commerce business, we will first describe the regulation of restrictive covenants in France and Spain, with a special look at the post-contractual non-competition covenants. We will later review their requirements applied to the e-commerce business, and finally suggest whether these clauses should be the object of a European Union regulation.

2. Setting the ground play: French and Spanish regulation of restrictive covenants

2.1. Post-contractual non-competition

Non-competition clauses are, both in Spain and in France, a limitation to the freedom of employment of companies and employees, both during the employment contract and upon its termination.

Unlike in Spain, where section 21 of the Workers' Statute Act specifically regulates post-contractual non-competition, French regulation of this restrictive covenant is a case-law development, and courts continue issuing an abundant number of decisions on it every year. Therefore, there is no statute governing this restriction in France, although French collective bargaining agreements sometimes regulate these clauses and its terms, while this is out of practice in Spain.

Despite the different sources of law, non-compete clauses are subject to a number of enforceability requirements that are similar in both countries:

a. Employer's interest

Both countries require that a post-contractual non-compete clause is justified by the legitimate interest to restrict the employee's freedom to be employed. There is no legal definition of the legitimate interest of the company. Courts analyze this

requirement on a case-by-case basis and the enforceability of the clause depends on it.

b. Limitation in time

Non-compete covenants have to be limited in time. Spanish law foresees a maximum length of 2 years, while there is no specific time limitation in France, unless foreseen in the applicable collective bargaining agreement. French courts will review the duration of the clause in light of the legitimate interest of the company, and on the safeguard of the employee's employability.

c. Limitation in space

Non-compete covenants have to be geographically limited. Under French case law, the geographical limitation cannot be general, but has to be specific. The territories involved cannot change with time without an express agreement between the parties, as the employee has to be aware of the scope of the restriction at the time of entering the non-compete.

Under Spanish law, the geographical scope has to be bound to the company's interest as well, but clauses are generally broad and sometimes simply refer to territories where the company operates, without further details. To some extent, the limitation has to be identifiable, but not necessarily identified to the degree of detail that seems to be required in France.

d. Limitation on activities

Non-compete covenants have to describe the specific activities the employee cannot undertake in the future. This restriction is present both in Spanish law and in the French case law. As in the case of the other requirements, this limitation has to be justified on the legitimate interest of the company and, in the French case, balanced out with the safeguard of the employee's employability.

e. Financial compensation

Both France and Spanish non-compete clauses have to be duly compensated to be enforceable.

In France, the compensation requirement arises from a set of judicial decisions issued in 2002, while Spanish legislation specifically provides for this requirement.

French court decision determined that all non-compete clauses required financial compensation, even if signed before the court rulings in 2002.

Under French law, compensation cannot be paid before the post-contractual non-compete becomes enforceable. If paid during the execution of the employment contract, courts deem that there is no real financial compensation for the restriction.

This point is less clear under Spanish legislation, and it is not unusual to see non-competition clauses being paid during the execution of the contract. Payment during the execution of the contract can raise some problems as to whether the compensation for the non-compete is adequate or not. Imagine, for example, that a company pays a monthly lump sum or a percentage of the monthly salary as non-compete compensation. If the parties have not agreed on a maximum or minimum compensation, the employee may actually receive a disproportionate compensation for non-compete, because the total amount paid will depend on the duration of the employment contract. Likewise, this compensation system may suggest that the parties are not specifically compensating the non-compete, but are actually pretending to compensate it by distributing the total agreed salary in various payroll concepts.

There is no reference in neither jurisdictions as to how much compensation is acceptable. Courts tend to deem post-contractual non-compete clauses void if compensation is very low (5% -10% of the ordinary salary would be probably deemed inadequate compensation for a broad non-compete clause). The assessment on whether the compensation is sufficient to enforce the clause depends on the specific circumstances of the case.

f. Safeguard of employee's employability

French case law has developed an additional requirement for the post-contractual non-competition obligation, which is that it cannot unduly restrict the employee's possibility of future occupation in the market. The safeguard of the employee's employability is not a specific requirement under Spanish law, but the disproportionate limitation of the employability of the employee is sometimes used in court to argue on the disproportion of the clause and the company's legitimate interest.

Both in France and Spain, courts will be able to review the enforceability of restrictive clauses, and sometimes moderate the limitations agreed by the parties, especially in connection with time, geographical scope, and activities. However, courts will not be able to change compensation.

A relevant difference in regulation of non-compete clauses in both countries has to do with the possibility of waiver by the company. French courts allow parties to agree in writing that the company may waive the non-competition obligation and payment at its will, before the clause enters into force. Although the requirements for executing such waiver are becoming more strict (in terms of when and how to do it), it is still a valid option.

On the contrary, Spanish law deems void any agreements foreseeing that the company can unilaterally waive the obligation. Courts regard these provisions as an illegal unilateral execution of a bilateral obligation, which is generally banned under Spanish civil law. As a consequence, if the parties have agreed to a post-contractual non-compete clause, they will have to abide by it, even in cases of fair disciplinary dismissal of the employee.

The possibility of a unilateral waiver, where accepted, makes it easier for companies to reevaluate whether they still have a legitimate interest for the non-compete at the time of the enforcement of the obligation. However, Spanish case law in this regard would impede it. Should companies not have an interest in the clause, they would have to argue this lack of interest in court.

Both in France and Spain, the remedy in case of breach of the obligation by the company is payment of damages.

2.2. Other restrictive covenant regulations: confidential information and non-solicitation

Both in France and Spain, employees have a general obligation not to disclose confidential information that could lead to unfair competition, regardless of whether this is included or not in the employment contract. Unfair competition laws foresee the consequences of such breaches, and define this obligation, which is inherent to the existence of an employment relationship.

Confidential information clauses are valid and enforceable, and would not require specific financial compensation. There is no limitation as to the duration of such clause, neither in Spain, nor in France.

Both jurisdictions also allow non-solicitation clauses. In France, case law regards non-solicitation of customers as a partial non-compete covenant, and is consequently subject to the same enforceability requirements as “full” non-compete covenants. This is less clear under Spanish regulation.

Non-solicitation of employees is also a valid and enforceable clause both under French and Spanish law, and it generally does not require financial compensation.

3. Restrictive covenants in the e-commerce world

3.1. Is the current interpretation of post-contractual non-compete clauses fit for the e-commerce business?

The growing e-commerce business shows some specificities that are somehow different from other traditional business. To analyze the post-contractual non-competition obligations, it is worth mentioning that the e-commerce business is delocalized in the sense that the location of the employee is not necessarily where the products are sold, or the services are rendered; it is open in terms of geographical market; and it is changing in terms of products and services offered.

The debate over the limits of the non-compete has already reached the United States courtrooms over the past years, especially in the battle between Amazon Inc. and Google, Inc. In 2012, Amazon claimed against his former Amazon Web Services vice-president who joined Google on the non-competition clauses basis, but the court moderated the non-compete clause in its duration because it deemed it too broad in the restriction of its activities. The debate is again open with Amazon's claim against another employee who joined Google, Mr. Szabadi.

We just saw that both French and Spanish regulation require limitations in certain areas for post-contractual non-competition clauses to be valid. Under French law, courts examine the validity of the clauses at the time of their signature, as employees should be aware of their restrictions before entering into the contracts, and these restrictions have to be specific.

This geographical limit sometimes refers to the place where the employee is rendering services from: in traditional businesses, if someone is rendering services in Spain, Spain would be the natural geographical scope of the restriction. However, the place where the employee renders services in the e-commerce business is somehow irrelevant, as their market will usually include different locations. Too much detail in non-compete clauses could become an issue in the fast-changing e-commerce business. Let's take, as an example, a non-compete clause of a marketing manager of an e-commerce retail company based in France. The clause could provide that the non-compete applied to France because this is the starting market of the business. However, this could become obsolete a few months after the signature

of the contract if the company started operating in other territories, simply because the clause had to be limited at the time of the signature of the contract

It would be perhaps more efficient to define a geographical scope of the restrictive covenant referred to the business market existent at the time of the execution of the clause, rather than to the location of the services.

The same problem would arise in connection with defining the activities with which the employee cannot compete. This restriction would typically define the activities and the market that the company undertakes at the time of the signature of the contract (following our example, rendering marketing services in the retail business). However, the company's market could change rapidly in terms of the services and products offered to the market, as e-commerce businesses tend to be more dynamic than traditional ones. Likewise, it would be unclear whether traditional business (non e-commerce) would actually compete against e-commerce business, and whether a restriction in that non-e-commerce business would be justified. As an example of this, during 2015, Amazon Inc. removed its 18-month non-compete clauses for his hourly warehouse employees, as the clause restricted employees from working for any industries relating to the products and services offered by Amazon Inc., which, are almost all industries in the world.

On some occasions, we see non-compete clauses that identify the competitors affected by the restriction, so that the employee can easily identify which companies should not be the future employers. Again, the e-commerce world raises some challenges there, as this solution could not be effective in a world where new companies and competitors appear rapidly.

What seems clear is that the dynamism of the e-commerce business makes it harder for companies to protect their interest upon the signature of a non-compete clause. Of course, the parties could renegotiate these clauses at any time, and include new markets, new functions, and new activities to fully cover the company's interest. But employees could simply refuse to change the terms of the clause and the company could be left without an effective clause (and in the Spanish case, without the possibility of waiving the clause unilaterally). At the same time, it is obvious that too much flexibility would unduly restrict the possibility of employees to find new jobs.

As per the calculation of damages in case of breach of the non-compete obligation, the problems faced in the traditional industry are the same in the e-commerce world. However, the dynamism of the latter, and sometimes the high speed increase or

decrease of business volume and value may bring even some additional uncertainty to the calculation of damages.

In this scenario, perhaps courts should allow parties to agree on more dynamic and flexible limitations of the non-compete clauses, whereby the activities and the geographical scope of the clause would refer more to the real situation of the business served by the employee at the time of the execution of the restriction. The restriction would be identifiable, but not identified at the time of the signature, while protecting the employability of the employee.

3.2. Work-related restrictions in the European Union market

Finally, reviewing the different regulations of restrictive covenants in France and Spain shows some disparity on their regulation within the European Union market. Most businesses, especially e-commerce businesses, cover more than one jurisdiction in the European Union territory and in the world. Considering that the European labor market should be based on the same freedoms all over the European Union, and that European Union employees should be free to move around the European Union territory, it is somehow surprising that restrictions to the right of employment over the European Union territory are left at each of the European Union member states' regulation.

On the contrary, it would seem that the conditions for these restrictions should be equal for all the European Union members, so that workers in the European Union would not be deterred or incentivized to go to a certain country because of its limitations to the freedom of employment. Therefore, perhaps the European Union should regulate restrictive covenants at a European Union level, and let the European Union Court of Justice interpret its requirements. This could allow an open work market, not limiting the freedom of movement of employees throughout the territory.

4. Conclusions

French and Spanish restrictive covenants requirements and regulation are similar, not the same. Courts interpret these clauses on a case-by-case basis, balancing-out the companies' legitimate interest to protect their market, and the employee's right to find a job in the future.

The current interpretation of these clauses does not yet take into account the specificities of the e-commerce business. This business is rather delocalized in terms

of where the services are rendered, has a changing and dynamic geographical scope, and a changing offer of products and services. A restrictive interpretation of the current restrictive covenant requirements could reduce the interest of agreeing on such clauses in the e-commerce business; a more flexible interpretation of the requirements would seem more effective in the industry.

In addition, considering globalization of the companies' markets, it would be worth considering whether different restrictive covenant requirements and interpretations in different European Union jurisdictions could somehow limit the freedom of work and movements in the European Union. Perhaps these restrictions should be the object of uniform regulations throughout the European Union, the same way that it has been defined in the franchising world.

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