

# Cross-Border Restrictive Covenants - Are They Worth The Paper They Are Written On?

**Employment Partner Juliet Carp of Speechly Bircham LLP looks at the practical reality of protecting a multinational business when employees leave.**

Drafting cross-border restrictive covenants is notoriously complicated. Different countries have different rules and, even with the help of good lawyers from all relevant jurisdictions, it is difficult to produce wording that employers can be confident will “work” in every jurisdiction. What “works” in one place will often be unsuitable in another.

## Legal Constraints

For example, the key remedy for breach of an English post termination restrictive covenant is an interim Court order (injunction) to stop the employee (or third party) from doing whatever it is that they should not be doing. To obtain an interim order in England the business usually needs to demonstrate that damages (i.e. a cash remedy) would not be sufficient. So an English employment contract will rarely specify a financial remedy for breach of an employee obligation. In other countries a pre-determined financial payment is the normal method of enforcement and injunction may not be a realistic alternative. Provision for fixed cash payments as a remedy can not only create problems with the availability of interim orders in the UK but may, depending on how they are formulated, also be regarded as unenforceable “penalty” clauses. In some countries enforcement of post termination restrictions is not possible at all, regardless of the remedy specified in the contract.

Even where relevant jurisdictions take a similar approach to enforcement, or a compromise can be reached, wording the restriction properly can still be a challenge. For example, tight drafting may be appropriate in one country but protect less of the business than might have been possible in another. The employer may feel that an opportunity has been lost. Covenants that are too “loose” or too long may be cut down to size by the Courts in

some countries. In others a loose or long covenant may be struck out altogether, so that employers who require too much are left with nothing. In some countries a regular monthly payment (for example, a percentage of the earlier salary) must be paid for the duration of the covenant. In others covenants set out in a mandatory collective agreement must be observed.

## Enforcement

So, where to begin? As with any knotty problem the best place to start is usually to focus on the preferred outcome and then work out how to get there. If a need to enforce in Court or by threat of legal action is a real possibility, and the financial consequences of breach are likely to be significant, then the business is likely to commit more time and money to finding the right legal formula. If the covenants are intended to deter but it is accepted that enforcement may be difficult in practice then a different approach might be taken. For example, whilst legally focused employers might think about complicated links to incentive plans or parallel covenant deeds to apply in different jurisdictions, others might conclude that simple standard covenants with listed competitor organisations would be a more effective deterrent. It is worth bearing in mind that a covenant that is obviously unenforceable is unlikely to deter employees or prospective new employers from prohibited activity. Sometimes less is more: it is worth thinking about where the employee is most likely to seek legal advice and whether a potential new employer is likely to be discouraged by (or even see) proposed restrictions.

It is also prudent to think about where enforcement is likely to take place. So, for example, in the EU if a covenant is to be enforced against an individual under an EU-wide regulation, the individual must be sued by his employer in his country of domicile. Of course the business may also anticipate suing another commercial organisation, perhaps a new employer, based in another jurisdiction.

## Which Lawyers Should Draft The Covenants?

Having narrowed down the relevant jurisdictions it makes sense to seek advice from lawyers qualified in those places. Practically, it also makes sense to think about language before deciding which country’s lawyers will take the lead.

One coherent explanation of what is needed commercially can be very helpful for those trying to find the best legal solution. What is it exactly that the business wishes to protect and why? For example, customer connections may be very important for a salesman. For others protecting the workforce or financial information or marketing plans may be a bigger issue. How long does the business really need the protection for? Focusing on needs at an early stage is not only likely to lead to more accurate drafting but should help cut the costs of managing piecemeal questions.

## Governing Law

Choice of “governing law” for the covenants should be confirmed in the contract. This is a different thing from jurisdiction (i.e. which country’s courts can hear a legal claim). Governing laws normally affect the way contracts should be interpreted. However, mandatory rules designed to protect employees from oppressive restrictions (think slavery) are also likely to flow from that choice. If the chosen governing laws are different from the jurisdiction where the claim is heard, or the jurisdiction where the legal decision needs to be enforced against an employee, the employer may well have to jump double or triple hurdles of protection. So, for example, if a New York Court decides that covenants governed by New York law should be enforced against an employee domiciled in London, the employer may need to satisfy both English and US protective rules. Choice of governing laws is lawyer territory and frankly not worth worrying about in abstract: the key take away for business is that choosing head office governing laws and pro forma documents is not always the best option for employees working wholly or partly in another country.

### Lateral Thinking

Whilst the lawyers are wrestling over wording and choice of laws, it is also worth thinking laterally. Given the difficulty and expense associated with enforcing covenants, there may be easier ways to protect the business either in addition to, or instead of, the traditional legal approach. For example, in a country where covenants are not enforceable there may still be a strong tradition of protecting confidential information in other ways – and time might be better spent on identifying what exactly is confidential and communicating that clearly to the individual in writing.

### Old Fashioned Housekeeping

Old fashioned housekeeping, like ensuring client details, are properly entered on office databases; that more than one individual develops relationships with key clients; and that access to premises, telephones, databases and IT equipment is managed when employees leave, can make a much bigger impact when employees are internationally mobile or located in remote offices.

### Continuity

Forward thinking businesses, particularly those who use technology such as “LinkedIn” extensively, may also think about whether it is simpler and more effective to promote replacements than restrict departing employees.

Where a period of “garden leave” is possible in the local jurisdiction, this may be far more effective to protect the business than enforcing covenants and a reasonable handover period may be very helpful. Where practical, garden leave, and the option to pay in lieu of notice, should be included in the employment documentation.

### Carrot Or Stick?

And as with other aspects of employee relations, for most individuals the HR carrot will be more effective than the legal stick. The desire to maintain good relationships with a former employer and be viewed as professional may be stronger in a market where the expatriate population is small and close, or where there is a limited number of market players who may employ in future.

Funding a personal visit by a senior member of staff to the overseas location and taking time to help with employees’ personal issues related to job hunting, housing, schooling or whatever may concern them, may be more effective than getting the paperwork right - and a lot cheaper than cross-border litigation.



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