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NON-COMPETITION CLAUSE (PRACTICAL ASPECTS)

Article 118 of the C.O.C recognises the validity of the non-competition clauses by stating that:

" Is null and nullifies the dependent obligation, any condition that restrict or prohibit the exercise of the rights and faculties of any human person such as marrying, exercising their civil rights. This provision does not apply in the case that a party prohibit a limited activity for a specified time and area".

However, in the absence of consistent Tunisian jurisprudence concerning the interpretation of the article 118, judges generally consider that it is essential to refer to comparative doctrine and jurisprudence and in particular to French jurisprudence."

1 the possibility of the non-competition clause becoming effective at the time the contract is concluded.

If it is obvious that the employee has to devote all the planned working time to the service of his employer, he shall, however, retain the freedom, unless otherwise stipulated, to pursue another activity (self-employed) outside his working hours. However, he could be guilty of an act of unfair competition if, without the knowledge of his employer, he lends his services or advice to a competitor company. In the same context, the employee commits a serious fault, when he creates another company competing with the one where he initially works. In this regard, the jurisprudence requires that the competitor company created must actually harm the employer. It is not enough to prove that it was created to justify the existence of a serious fault of the employee.It is preferable, when concluding the employment contract with the employee, to include that the non-competition clause is activated as soon as the contract is concluded and remains valid for a certain period after the end of the contractual relationship to prohibit the even the simple creation of a competing enterprise.

2 Prior determination of the financial contribution:

The French jurisprudence considers that the non-competition clause is valid only if it involves an obligation on the employer to pay the employee a financial compensation. This financial consideration is fair compensation for the damage suffered by the employee as a result of the application of the non-competition clause. The financial contribution must be significant and not trivial. Thus a monthly allowance corresponding to one-tenth of the monthly salary paid during the last twelve months is not sufficient, it appears as " insignificant" in view of the infringement of the employee's right and considered as non-existent. A paltry financial contribution to the non-competition clause contained in an employment contract is tantamount to an absence of consideration".A judgment of the Commercial Chamber of the Court of Cassation (15 March 2011, no. 10-13824) imposed as a condition of validity that the undertaking of a non-competition clause taken by an employee in a shareholders' agreement must be remunerated. To avoid hazards of a Tunisian jurisprudence that has not yet decided the question of financial consideration in labour law, it is preferable to set a remuneration for the non-competition commitment.

3 Limitation of the non-competition clause in space:

An examination of Tunisian jurisprudence makes it possible to affirm that the clause of non-competition must be limited in time and space. The Tunis's First Instance Court considered null and void the clause of unlimited non-competition geographically. The employer cannot set a geographic area that is larger than planned by the collective agreement, and in the absence of an agreement, it must establish an area responding to the need of protection from potential competition. However, the fact that a non-competition clause applies throughout the national territory does not necessarily make it null and void. A broad geographical scope "does not in itself make it impossible for an employee to pursue a professional activity". This depends on the activities prohibited by the clause (which covers the entire national territory), the person concerned is in fact unable to carry out an activity in accordance with his training, knowledge and professional experience. If so, the clause is void.

4 The preliminary determination of the penalty for a breach of the non-competition clause:

Under Tunisian law, the legislator did not refer to the penal clause by a specific regulation. Faced with this legislative silence, the jurisprudence has upheld the validity of this clause referring to Article 242 of the COC, which states that "the legally binding obligations validly formed should be considered as law for those who have made them, and may be revoked only by their mutual consent or in the cases provided for by law". In order to force the employee to respect the non-competition commitment and to protect the company against the risk of poaching, it is possible to provide for a penalty amounting, for example to double the annual income received by the employee.

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5 The need to safeguard the legitimate interests of the company.

This requirement, which is not stated in Article 118, is advocated by a large part of the doctrine and confirmed by the jurisprudence. Many French collective agreements provide that "the restriction of an employee's professional activity after the end of his employment must be aimed only to safeguard the employer's legitimate professional interests..." The requirement of a legitimate interest, to which the validity of the non-competition clause is linked, is satisfied only if the clause "is intended only to prohibit truly possible and truly harmful competition". In order to assess the validity of the non-concurrence, the first instance court, stated that the Commission's decision on the application of the competition rules of the European Court of Justice was based on the principle of equal treatment. However, it must be examined whether the employee's qualification or contact with clients poses a major risk to his former employer. Article 340 of the Swiss Code provides that the prohibition on competition is valid only if the employment relationship allows the employee to have knowledge of the employer's clientele or of the manufacturing or business secrets and if the use of this information is likely to cause the employer material injury". It is also in this sense that German law (§ 74 a HGB) requires that the clause has to be justified by a legitimate commercial interest of the employer, which means that the transmission to competition is not sufficient in the absence of risks of transmission of trade secrets. In the United Kingdom, the common law imposes a reasonable infringement on freedom of work and requires the employer to be able to prove a risk of disclosure of trade secrets or confidential information.This attests to the fact that the interests of the company which it is legitimate to protect are those which constitute the intellectual patrimony of the company, and particularly the attractive elements of the clientele. The know-how of the enterprise, commercial or technical, is one of these elements, but should be distinguished from the know-how of the employee, inherent to the professional qualification and the experience of the employee. It also appears that the legitimacy of the interest of the company is assessed by jurisprudence in view of the intensity of competition in the sector of activity in which the company operates, or the "sensitive" nature of a sector of activity.