Tying and Untying the Knot: Non-Compete Agreements in the UK, EU and Latin America — How to Write Them; How to Fight Them
# Table of Contents

Tying and Untying the Knot: Non-Compete Agreements in the UK, EU and Latin America – How to Write Them; How to Fight Them (Substantive PowerPoint Presentation) .................. Tab I

Lift-Outs and Raids – The Range Of Remedies in the UK (Substantive Outline) .................. Tab II

Drafting and Enforcing Non-Compete Agreements in the European Union: The Examples of France, Germany and Italy (Substantive Outline) .............................................................. Tab III

Legal Biographies ............................................................................................................... Tab IV
  John P Barry
  Daniel Ornstein
  Yasmine Tarasewicz
  Bettina B Plevan
  Howard Z Robbins
  Aaron J Schindel

Recent International HR Best Practices Tips of the Month ............................................... Tab V
The Latin American Non-Compete Landscape and Enforcement of International Restrictive Covenants in the United States
Selected Landscape of Latin America
Restrictive Covenants –
Are Restrictive Covenants Enforceable?

• **Argentina**: Yes, if they are restricted in time and the employee receives reasonable consideration for temporarily waiving his constitutional right to work.

• **Brazil**: Unclear. Although non-competition and nonsolicitation covenants are becoming more common in Brazil, Brazilian labor law still does not regulate them expressly.

• **Chile**: Yes, according to a decision just issued in June 2010 by the new Labor Court finding a 120-day restriction enforceable. Such agreements were generally considered unenforceable because of the employee’s fundamental right to work. Higher courts may rule on this issue in later cases.

• **Colombia**: No; the Labor Code provides that any agreement by an employee not to work in a certain field or for certain competitors is unenforceable. Several courts have found nonsolicitation clauses unenforceable because the constitutional right to work prevails over private agreements. Decree 2153, as amended by Law 1340, 2009, provides that non-competition clauses are unlawful per se.

• **Mexico**: No; Article 5 of the Federal Constitution (confirmed by Article 4 of the Federal Labor Law) provides that no person may agree not to engage in any lawful economic or professional activity.

• **Panama**: Doubtful that covenants not to compete/solicit are enforceable in Panama; limited authority.
Selected Landscape of Latin America
Restrictive Covenants –
Are Restrictive Covenants Enforceable? (con’t)

- **Peru**: Yes, within limits: a non-compete agreement may restrict the employee’s freedom to work only for a reasonable period of time and the employee must be compensated for such restriction.

- **Venezuela**: Yes, within limits: Venezuelan Labor regulations limit non-compete clauses to 6 months after termination of employment and only where (i) there are reasons that justify the non-compete, such as the relationship between the employee and clients, the employee’s status as a high-level executive, or knowledge of trade secrets; (ii) the non-compete was entered into at the beginning of the employment that required the non-compete clause; and (iii) consideration is given to the employee in compensation for the non-compete clause.

The Latin American Non-Compete Landscape and Enforcement of International Restrictive Covenants in the United States

Most commonly litigated issues
- Forum Non Conveniens
- Personal Jurisdiction
- Choice of Law
Forum Non Conveniens

- Court may dismiss pursuant to doctrine of forum non conveniens before considering issues of subject matter or personal jurisdiction.
- If a foreign tribunal is “plainly the more suitable arbiter of the merits of the case” then dismissal pursuant to the doctrine of forum non conveniens is appropriate.

Forum Non Conveniens (con’t)

Three Part Test – a court must:
1. determine the degree of deference to accord plaintiff’s chosen forum;
2. determine whether an adequate alternative forum exists; and
3. balance public and private interests implicated by the chosen forum.
**FNC: PART 1 – Degree of Deference to Plaintiff’s Chosen Forum**

- Does agreement have a forum selection clause?
  - is party resident of the jurisdiction
- Where did core facts of the dispute arise?
- Do defendants have any ties to the forum?

NY’s three-part test:
1. “reasonably communicated to the parties,” (language)
2. not “obtained through fraud or overreaching,” (local law) and
3. “enforcement would [not] be unreasonable and unjust.” (local law)

- NOTE: Local law not as well developed in many other countries. Evolving.

**FNC: PART 2 – Adequate Alternative Forum**

Two most commonly cited factors:
- Are the defendants amenable to service of process in foreign jurisdiction?
- Does the foreign jurisdiction permit litigation of the subject matter of the dispute?
FN: PART 3 – Balancing of Private and Public Interest Factors

“...comparison between the hardships defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country.”

Private Interest Factors:
- the relative ease of access to sources of proof;
- availability of compulsory process for attendance of unwilling witnesses;
- the cost of obtaining attendance of willing or unwilling witnesses; and
- all other practical problems that make trial of a case easy, expeditious and inexpensive.

Public Interest Factors:
- include “the local interest in having localized controversies decided at home” and avoiding “difficult problems in conflict of laws and the application of foreign law.”
Personal Jurisdiction

Two types:
1. General Jurisdiction
   and
2. Specific Jurisdiction

Personal Jurisdiction: General

- “Continuous and substantial contacts”
- Web-site – depends on the type of website and jurisdiction.
  - Sliding scale approach
- Mere department – does the local parent corporation have such pervasive control over the foreign-based subsidiary such that the subsidiary may be considered a “mere department” of the parent corporation.
  - Corporate formalities
  - Independent management
  - Limited amount of overlap between directors
  - Normal business influence is ok
Personal Jurisdiction: Specific

- State’s long-arm statute and due process
- 5 parts to NY’s long-arm statute:
  - CPLR 302(a)(1): two-part test:
    1. Defendant transacts business in New York, and
    2. The claim asserted arises out of that business activity
  - CPLR 302(a)(2): did the defendants commit tortious acts in NY
  - CPLR 302(a)(3): “situs of the injury” test
    - Location of the original event which caused the injury. Generally, it is NOT the location where the resultant damages are subsequently felt by the plaintiff.

Due Process

- Minimum contacts – has the defendant “purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and [the] protections of its laws.”
Choice of Law

New York applies an “interest analysis,” which has a two part test:

1. What are significant contacts and in which jurisdiction are they located.
   - Primary focus: parties domicile and locus of the tort

2. Is the purpose of the law to regulate conduct or to assess loss.
   If conduct, then law of the jurisdiction where the tort occurred will be applied because stronger interest in regulating conduct/behavior.

The United Kingdom

• The protection available to employers
• What makes a restrictive covenant enforceable
• The range of remedies available to employers
• Choice of law and jurisdiction in covenant cases
The Protections Available to Employers

- There is a broad range of contractual protection
  - Non-competes, non-deal, non-solicitation
  - Garden leave
  - Obligations to inform of approaches/competitive activities
  - Express protection regarding confidential information/intellectual property

Garden Leave

- An express right to reduce scope of duties or require Executive not to come into work and/or deal with customers for notice period
- Compensation/benefits obligations continue (but bonus accrual can be carved out)
- Duties as an employee ongoing – loyalty and fidelity
- The constructive dismissal risk
Obligations to Inform

- Increasingly common to insert express obligations into contracts to inform employer about approaches/competitive activities
- Recently held to be enforceable (not even a restraint of trade) – see *Tullett Prebon v BGC* [2010] EWHC 484 – although arguably fact sensitive and not the last word
- Not always observed – but a powerful deterrent (and a hook for breach of contract)

"If at any time during your employment you are directly or indirectly approached or solicited by a person, with a view to or with the intention of taking up employment or entering into some other business relationship, whether directly or indirectly, with any person who is involved in a business which is competitive with the current or then contemplated business of the company, or you become aware that a fellow employee has received such an approach, you shall disclose that fact and the names of the parties involved immediately to a Director of the company. Otherwise you will refrain from disclosure to any other person."
Enforceability of Restrictive Covenants

- Is it enforceable in principle – judged at time the covenant was entered into
- Should the court exercise its discretion to enforce – judged at time of trial

Enforceability in Principle

- Protection of legitimate business interest
  - Customer connections
  - Confidential information
  - Stability of workforce
- No wider than reasonably necessary to protect those interests
  - What is prohibited – should there be additional qualifications?
  - Period of restraint
  - Other, lesser protections available
Enforcement in Practice

- If enforceable in principle, should the court exercise its discretion to enforce – having regard to the position at the time of trial?
- Will enforcement in fact afford any real protection?
  - Damage already done
  - Others can lawfully do what is prohibited
  - Clean hands
- Constructive dismissal – covenants fall away

Drafting Tips

- Focus on the individual
- What are you seeking to protect?
- What do you reasonably need to obtain protection
- The promotion problem
Range of Remedies

- What is the breach in respect of which a remedy sought?
  - Focus on contractual and non-contractual terms
- What is the remedy?
  - Injunctive relief
  - Damages claims

Injunction Menu

- Preservation orders
- Delivery-Up orders
- Search Orders
- Orders preventing misuse of confidential information
- Enforcement of restrictive covenants
- Enforcement of garden leave
Damages Claims

- Less need for immediate action
- Lingering threat
- Personal liability

BUT
- Difficult to measure loss
- Take longer
- Inadequate to protect the business

Choice of Law and Jurisdiction

- Jurisdiction – which courts are entitled to hear the dispute?
- Choice of law – which law applies to the contract
- Protectionist regime for employees
  - Samengo-Turner v. Marsh & McLennan [2008] ICR 18
  - Duarte v. Black and Decker [2007] EWHC 2620
The Judgement Regulations

- Specific for contracts of employment – to protect employees
- Primarily to deal with jurisdiction issues within European member states
- Article 20 “an employer may bring proceedings only in the courts of the Member State in which the employee is domiciled”
- Article 21 an agreement to depart from article 20 can only be departed from if agreement is entered into after the dispute has arisen

Key Facts in Samengo-Turner

- UK employees and a stock plan with New York law exclusive jurisdiction clause containing non-competes and “co-operation clause”
- Proceedings brought in New York
- Anti-suit proceedings brought in the UK
Key Findings in Samengo-Turner

- Anti-suit granted
- Judgment Regulations apply to NY based claimant (even though they only expressly govern jurisdiction between members of the European Union)
- Broad definition of employer
- Broad definition of contract of employment
- A statutory right to be sued in England

Choice of Law

- Governed by Rome 1 Regulation (Article 21)
- Choice of law clauses valid but not where:
  - it would deprive the employee of the protection of provisions of English law that cannot be derogated from by agreement; or
  - where it would be manifestly contrary to English public policy
Key Facts and Findings in Duarte

- D participated in LTIP containing covenants and governed by Maryland law
- Covenants not provisions that cannot be derogated from
- Difference in Maryland and English law as to enforceability of covenants meant that it would be manifestly contrary to English policy to enforce them if enforceable in Maryland but not the UK
- The Double Test: covenants would have to be enforceable in UK and under governing law

Introduction

- Non-competition in the relations between employers and employees is not specifically governed by the law of the European Union.
- The only text which can be regarded as dealing with non-compete obligations concerning employees is the Charter of Fundamental Rights of the European Union, which became effective on December 1, 2009. Article 15 of this text provides that:
  - “Everyone has the right to engage in work and to pursue freely chosen or accepted occupation.”
Introduction

• In this context, global companies doing business in Europe cannot rely on a common set of rules governing the validity and the implementation of non-compete provisions. They must act on a case-by-case basis and take into consideration the specifics of local laws where their workforce is located.

• This presentation will provide an overview of the issues that may arise in three Member States of the European Union: France, Germany and Italy.

1. Is the employee entitled to compete with his/her employer during the period of employment contract?

• During the term of the employment contract, the obligation not to carry out activities that may compete with the employer is generally regarded as an implied term of the employment contract:
  - In **France**, the general duty of loyalty prohibits employee to compete during the term of employment (article L. 1222-1 of the Labor Code);
  - In **Germany**, article 60 of the Commercial Code, which initially applied to ‘commercial employees’, provides a non-competition principle that was extended to all kinds of employees;
  - In **Italy**, the duty of loyalty prescribed by article 2105 of the Civil Code also prevents the employee from competing against its employer during the term of the employment.
2. What are the general legal constraints on non-compete covenants in France, Germany and Italy?

- As a general principle, a balance has to be struck between the freedom of occupation, which is a fundamental right enshrined in the constitutions of all of the three states and the legitimate interest of the employer to protect its business.
- France, Germany and Italy share the same reasoning that, whereas the non-compete is justified by the interest of the company the non-compete covenant cannot forbid the employee to have a job which corresponds to its skill and experience.
- The non-compete obligation is understood widely, irrespective of the labeling of the clause. Therefore, the specific requirements of each jurisdiction cannot be avoided by labeling the clause as a ‘non-solicitation of clients’ clause or as a ‘protection of clients’ clause.

2. What are the general legal constraints on non-compete covenants in France, Germany and Italy? (con’t)

- Under German law, a customer or client protection clause (i.e. the clause that prohibits the employee from soliciting or enticing away customers of clients) is considered as a non-compete obligation and must provide for a compensation;
- The same was held in France, where a non-solicitation of clients clause was characterized as a non-compete clause (French Supreme Court, May 19, 2009).
3. How to draft a non-compete in France, Germany and Italy.

• What are the minimum requirements in each jurisdiction?
  - France
    - Non-compete covenants are not regulated by statute.
    - To guarantee the fundamental principle of freedom of occupation, case-law sets stringent conditions for non-compete covenants to be valid. The non-compete covenant must:
      - be essential to protect the company’s legitimate interest;
      - be limited in its geographical scope and in its duration;
      - take into account the specificities of the duties performed by the employee; and
      - provide for a sufficient financial compensation.

(con’t)

3. How to draft a non-compete in France, Germany and Italy. (con’t)

• What are the minimum requirements in each jurisdiction?
  - Germany
    - Non-compete clauses are regulated for all employees by articles 74 et seq. of the Commercial Code.
    - Non-compete obligations after the employment contract must meet the following conditions:
      - be in writing;
      - be provided to the employee;
      - serve legitimate business interest of the employer;
      - not exceed 2 years; and
      - provide for financial compensation for the agreement.
3. How to draft a non-compete in France, Germany and Italy. (con’t)

- What are the minimum requirements in each jurisdiction?
  - Italy
    - According to article 2125 of the Italian Civil Code, the non-compete covenant must:
      - be in writing;
      - be restricted to a specific activity and a specific area;
      - be limited in time; and
      - provide for a financial compensation.

3. How to draft a non-compete in France, Germany and Italy. (con’t)

- How to demonstrate the employer’s legitimate interest?
- The need to protect the legitimate interest is an express requirement for the validity of non-compete covenants both in France and Germany:
  - The mere interest of the employer to keep the employee away from the market does not characterize a legitimate interest;
  - It is incumbent on the employer to establish that if the employee works for a competitor, this is going to have a detrimental impact upon the company’s business.
3. How to draft a non-compete in France, Germany and Italy. (con’t)

- What are the geographical limits of non-compete covenants?

  - France
    - French courts are generally restrictive as to the geographical scope of non-compete covenants:
      - except in certain specific cases, the geographical scope of a non-compete agreement has to be limited to a region of France.
      - If the non-compete covers the French territory or several countries, French courts are inclined to conclude that the employer cannot require the employee to expatriate in order to perform work corresponding to his/her skills.
    - A wide geographic scope may be admitted for senior employees but it will be closely scrutinized by the court. Therefore, the employer should adapt the other elements of the covenant, namely duration and financial compensation to ensure, as much as possible, the validity of the non-compete.
      - Illustration: a one-year non-compete duty covering the European Common Market (which at the time was not so broad as the European Union is today) for a Marketing Director of L’Oréal was upheld, the financial compensation being 2/3 of his salary (French Supreme Court, January 30, 2002).
3. How to draft a non-compete in France, Germany and Italy. (con’t)

- What are the geographical limits of non-compete covenants?
  - **Germany**
    - The covenant must not go beyond the area where the employee can be in competition with the employer. If an employee worked in Germany only, a worldwide post-contractual non-compete clause would not be enforceable.
  - **Italy**
    - Italian courts may allow non-compete clauses with a broad geographic scope.

- What are the maximum permissible duration of non-compete covenants?
  - **France**
    - In the absence of statutory provisions setting forth the maximum duration of a non-compete covenant, the duration is assessed on a case by case basis:
      - Generally the duration of 1 to 2 years will be considered reasonable.
      - Certain collective bargaining agreements set out a maximum duration.
3. How to draft a non-compete in France, Germany and Italy. (con’t)

- What are the maximum permissible duration of non-compete covenants?
  - chemical industries: 2 years maximum and exceptionally up to 4 years (the 3 and 4th years are indemnified up to 100% of the last salary);
  - metallurgy sector: 1 year, renewable once for the executives of the.

3. How to draft a non-compete in France, Germany and Italy. (con’t)

- What are the time limits of non-compete covenants?

  • Germany
    - Pursuant to § 74a of the German Commercial Code, a non-compete covenant cannot be extended beyond a period of 2 years.

  • Italy
    - Pursuant to article 2125 of the Italian Civil Code, a non-compete covenant cannot exceed 5 years for executives, and 3 years for other types of workers.
3. How to draft a non-compete in France, Germany and Italy.

- How to determine the compensation of the non-compete covenant?
  - France
    - Compensation is mandatory in all non-compete agreements but is not determined by statutes:
      - The minimum amount can be determined by the applicable collective bargaining agreement;
      - If there is no provision in the applicable collective bargaining agreement, a financial compensation ranging from 30% to 50% of the employee’s monthly salary is generally regarded as reasonable.

- Germany
  - According to article 74 of the Commercial Code, a non-compete covenant is binding only if it provides for financial compensation which amounts to at least half of the employee’s most recent contractual remuneration paid during his employment.

- Italy
  - A non-compete covenant is binding only if it provides for a financial compensation.
  - Similar to French law, no amount is specified in the Civil Code:
    - The accepted practice is that the amount of the consideration ranges from 15% to 35% of the current salary of the employee.
3. How to draft a non-compete in France, Germany and Italy. (con’t)

- **What are the sanctions if the non-compete covenant does not meet the above requirements?**
  - **France**
    - A non-compete covenant that does not meet the requirements prescribed by case law cannot be enforced against the employee. However, the employee who complies with an illegal non-compete obligation must be indemnified by the employer.
    - If the non-compete complies with all four conditions, but the court considers it disproportionate, the judge can uphold the non-compete and modify it.

- **Germany**
  - Failure to provide for any financial consideration renders the non-compete covenant null and void.
  - If the non-compete clause is too far reaching with respect to its duration or geographic scope, the court will reduce the scope of the non-compete to the permissible extent so as to enforce it.

- **Italy**
  - If the non-compete covenant fails to meet the requirements stated in the Civil Code, it will be deemed null and void.
  - An exception, however, is that if the duration exceeds the term provided for in the Civil Code, it will be reduced to the legal duration.
4. Can the employer waive the non-compete covenant in order to be discharged of the payment of the compensation?

• France
  - French case law considers the non-compete covenant to be in favor of both the employee and the employer. As a consequence, the employer cannot unilaterally waive the non-compete obligation unless the clause or the applicable collective bargaining agreement provides so.
  - The waiver is generally subject to a formal proceeding (e.g., the waiver should be made within a specific period of time after the termination [1 or 2 weeks]). Failure to comply with this formality makes the waiver ineffective and the employer will be liable to the employee for payment of the financial compensation.

• Germany
  - The employer can waive the non-compete unilaterally provided that notice of the waiver is given before the termination of the employment agreement (end of the notice period):
    - The employee is immediately released from complying with the non-compete;
    - The employer has still to pay the indemnity for 12 months.

• Italy
  - the waiver provision is valid as long as it enables the employer to waive the non-compete no later than the time of termination of employment (communication of the termination letter).
5. What remedies are available in case of breach of the non-compete covenant?

• France
  - In case of breach, the employer is entitled to:
    - stop the payment of the financial compensation and obtain reimbursement;
    - seek a preliminary injunction to forbid the employee to carry out any competitive activity, or order the employee to cease working for his new employer;
    - sue the employee for damages.
  - The contract can provide for a penalty in case of breach of the non-compete by the employee.

• Germany
  - If the employee is in breach of a valid non-compete provision, the employer may turn to the labor court for a temporary injunction against that employee.
  - The labor court can order a former employee not to compete with its former employer and can also require the employee to pay damages to his/her former employer:
    - Penalty clauses are enforced by German Labor Courts.
5. What remedies are available in case of breach of the non-compete covenant? (con’t)

- **Italy**
  - If the employee is in breach of the non-compete covenant, the former employer is entitled to compensation for any damages suffered.
  - Generally, the damages are predetermined by the employment contract in a penalty clause.
  - A former employer may also seek an injunction to stop the employee from performing the same activity for a competitor.

6. Non-compete and choice of law provisions in the European Union:

- In case of cross border employment relationship the employer will face the question of the choice of law applicable to the non-compete covenant.
  - Freedom of choice of the applicable law.
  - However, such choice of law may not deprive the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law that, in the absence of choice of law, would have been applicable.
  - **Illustration:**
    - Employment contract subject to US law.
    - Stock options plan subject to US law.
Tab II
In the current economic climate team moves are becoming increasingly common. Proskauer has considerable experience in relation to dealing with hiring and retaining teams of individuals, acting for departing teams and those faced with losing a team to a rival, both domestically and internationally.

In dealing with lift-outs and raids, it is all too easy to focus solely on express contractual provisions, such as post-termination restrictions. These express restrictions, and the ability to enforce them through obtaining injunctive relief, will be highly significant when advising in relation to team moves. However, it is often just as important to consider the ability of the court to grant injunctive relief in relation to breaches of other obligations which are implied into contracts of employment regardless of express provisions or which otherwise arise under common law - examples include the duty not to misuse confidential information, an employee’s duty of loyalty and (in certain circumstances) fiduciary duties.

In relation to misuse of confidential information, depending on the factual circumstances and the available evidence, there are a range of remedies available to an employer seeking to protect its interests in the UK which, in terms of increasing power, include the following:

- **Preservation Orders** - these require alleged wrongdoers not to destroy, tamper with or otherwise alter any potentially relevant confidential information in their possession;

- **Delivery Up Orders** - these require alleged wrongdoers to deliver up items in their possession (such as computer hard drives) on the basis that they contain confidential information;

- **Search Orders** - these allow a search of the homes or offices of the alleged wrongdoers (including searching and taking images of computers), for the purposes of ascertaining whether any confidential information has been misused; and

- **Injunctions preventing misuse of confidential information** - these would prevent alleged wrongdoers misusing confidential information in their possession - though the type of confidential information to which such an injunction could apply would depend on a variety of factors including the relationship between the alleged wrongdoers and the wronged party (such as whether they are current employees or former employees) and the scope of any express contractual provisions relating to confidential information.
Although the availability of these remedies is long-established, they can often be overlooked in the heat of responding to a team move.

In addition, as a result of a recent development in the law, springboard relief is becoming an increasingly relevant consideration, both in relation to misuse of confidential information and more general breach of duties.

Springboard relief is a form of injunctive relief which is part of the equitable jurisdiction of the English courts. A springboard injunction is a court order prohibiting wrongdoers from taking certain actions in order to deprive them of the fruits of their unlawful action through restricting the wrongdoer's ability to compete with a wronged party for a set period of time. For example, it may result in an order that prevents a competitor and its staff from dealing with clients of the wronged party for a fixed period of time - it is therefore a form of Court imposed non-contractual restraint of trade.

In our experience, springboard injunctions are being increasingly relied upon in the UK, particularly in the context of team moves where there will often be allegations that employees have breached their duties. Accordingly, when advising on team moves, which ever side you act for, it is crucial to have an appreciation of the obligations owed by directors and employees and whether there have been breaches of those obligations that could result in a springboard injunction. From the perspective of a company losing a team, obtaining a springboard injunction could be a powerful means of protecting its interests. Conversely, when advising a company seeking to recruit a team, it is critical to convey that one possible consequence of breaching the duties owed to a current employer is a court order that could significantly restrain their future activities.

The law relating to when springboard relief will be granted is still developing. Traditionally, springboard relief was confined to cases involving the misuse of confidential information. However, in recent years there has been an increasing willingness of the courts to extend springboard relief as a means of neutralising any unfair advantage obtained by a person as a result of a breach of duty.

Perhaps the most authoritative statement that springboard relief can extend in principle to any breach of duties was in the judgment in *UBS v Vestra* [2008] EWHC 1974 (QB). In that case, it was held that "springboard relief is not confined to cases where former employees threaten to abuse confidential information acquired during the currency of their employment. It is available to prevent any future or further serious economic loss to a previous employer caused by former staff members taking an unfair advantage, an "unfair start" of any serious breaches of their contract of employment (or if they are acting in concert with others, any breach by any of those others)."

This is of particular significance given recent decisions in relation to team moves that have followed a line of authority that imposes high standards of disclosure on employees of their proposed activities. For example, in *Item Software v. Fassihi* [2005] ICR 450, it was held that the duty of loyalty extends to requiring an employee to disclose to an employer that there are plans afoot for a team of employees to move.

It remains to be seen how the law will develop in this area - both as to the nature of the duties owed by employees and the ability to obtain springboard relief for breaching those duties. For
example, there are no clear guidelines in relation to the factors that a Court will have in mind when exercising its discretion as to whether or not to grant springboard relief. However, on the basis of both our experience and recent developments of the law, our expectation is that the ability to obtain springboard relief, both in itself and in conjunction with the more traditionally available remedies outlined above, is likely to become an increasingly important consideration when advising on team moves.
INTRODUCTION

> Non-competition in the relations between employers and employees is not specifically governed by the law of the European Union.

> The only text which can be regarded as dealing with non-compete obligations concerning employees is the Charter of Fundamental Rights of the European Union, which became effective on December 1, 2009. Article 15 of this text provides that:

  - “Everyone has the right to engage in work and to pursue freely chosen or accepted occupation”.

> In this context, global companies doing business in Europe cannot rely on a common set of rules governing the validity and the implementation of non-compete provisions. They must act on a case-by-case basis and take into consideration the specifics of local laws where their workforce is located.

> This presentation will provide an overview of the issues that may arise in three Member States of the European Union: France, Germany and Italy.

1. Is the employee entitled to compete with his/her employer during the period of employment contract?

> During the term of the employment contract, the obligation not to carry out activities that may compete with the employer is generally regarded as an implied term of the employment contract:

  - In France, it is an implied term under the general duty of loyalty prescribed in article L. 1222-1 of the Labor Code;

  - In Germany, it is provided by article 60 of the Commercial Code, which initially applied to “commercial employees” but whose application was extended to all kinds of employees;

  - In Italy, the duty of loyalty prescribed by article 2105 of the Civil Code also prevents the employee from competing against its employer during the term of the employment.
2. What are the general legal constraints on non-compete covenants in France, Germany and Italy?

As a general principle, a balance has to be struck between the freedom of occupation, which is a fundamental right enshrined in the constitutions of all of three states; and the legitimate interest of the employer to protect its business:

- In France, non-compete covenants are considered as an infringement of the fundamental principle of freedom of occupation.
- Under the German constitution, a balance must be struck between the employees’ constitutional right to freedom of occupation and the constitutional principle of freedom of contract.
- The Italian Constitution includes numerous provisions prohibiting an unlimited non-compete obligation:
  - Article 4: “The Italian Republic recognizes as to all citizens the right to work and promotes its effectiveness”;
  - Article 35: “The Italian Republic protects work in all its forms and applications”;
  - Article 41: “Private economic enterprise is free”.

Based on the foregoing, France, Germany and Italy share the same general reasoning that, whereas the non-compete may be justified by the interest of the company:

- the non-compete covenant cannot forbid the employee to have a job which corresponds to his/her vocational training and experience (France);
- the non-compete clause must not unfairly jeopardize the employee’s future career (article 74 of German Commercial Code)
- the non-compete terms, extent and conditions as a whole must not prevent the employee from finding another job and must allow the employee to preserve her/his professionalism (Italian Supreme Court, September 10, 2003).

This makes it all the more difficult to impose non-compete covenants to those employees who have very specific skills.

These requirements aimed at protecting the freedom of occupation of the employee have a consequence on the validity of the non-compete over time.

- The most experienced the employee becomes in his functions, the more tenuous the non-compete covenant becomes. If the employee is dismissed after 15 years or 20 years of service, this can be taken into account by the judge to nullify the non-compete which would not allow the employee to find a job corresponding to his experience.

Lastly, the non-compete obligation is understood widely, irrespective of the labeling of the clause. All the provisions that have the nature of a non-compete covenant have to meet the legal requirements provided for by domestic laws.
Hence, under German law, a customer or client protection clause (i.e. the clause that prohibits the employee from soliciting or enticing away customers of clients) is considered as a non-compete obligation and must provide for a compensation; The same was held in France, where a non-solicitation of clients clause was characterized as a non-compete clause (French Supreme Court, May 19, 2009).

3. How to draft a non-compete in France, Germany and Italy.

1.1 What are the minimum requirements in each jurisdiction?

1.1.1 France

>- Non-compete covenants are not regulated by statute.
>- To guarantee the fundamental principle of freedom of occupation, case-law sets stringent conditions for non-compete covenants to be valid. The non-compete covenant must:
  - be essential to protect the company's legitimate interest;
  - be limited in its geographical scope and in its duration;
  - take into account the specificities of the duties performed by the employee;
  - provide for a sufficient financial compensation.
>- All four conditions must be met in order for a non-compete clause to be valid. Failure to comply with those may render the non-compete covenant null and void, or subject it to a redefinition of its scope by a judge.
>- In addition, the applicable collective bargaining agreements may provide specific conditions of validity (maximum duration, minimum amount of the financial compensation, possibility/impossibility to waive the non-compete obligation).
  - **Illustration**: the collective bargaining agreement for chemical industries provides that the non-compete must not exceed 2 years and the amount of the monthly compensation during the non-compete period cannot be less than 1/3 of the monthly salary, if the non-compete concerns one product or one production process, and not less than 2/3 of the monthly salary if the non-compete covers several products or several production processes.

1.1.2. Germany

>- Non-compete clauses are regulated for all employees by articles 74 et seq. of the Commercial Code. These rules are based on an amendment dated back to 1964 and have not changed significantly since then.
>- Non-compete obligations after the employment contract must meet the following conditions:
  - be in writing;
  - be provided to the employee;
  - serve legitimate business interest of the employer;
  - not exceed 2 years;
provide for financial compensation for the agreement.

If none of these conditions are met, the restrictive covenant is null and void and unenforceable.

1.1.3. Italy

The Italian Civil Code specifically regulates non-compete clauses in employment contracts:

- According to article 2125 of the Italian Civil Code, the parties to the employment contract may agree, while the employment contract is still in force, that the employee will be bound by a non-compete covenant at the end of the employment relationship.

To be enforceable under Italian law, the non-compete covenant must:

- be in writing;
- be restricted to a specific activity and a specific area;
- be limited in time;
- provide for a financial compensation.

1.2. How to demonstrate the employer’s legitimate interest.

The need to protect the legitimate interest is an express requirement for the validity of non-compete covenants both in France and Germany:

- The mere interest of the employer to keep the employee away from the market does not characterize a legitimate interest;
- It is incumbent on the employer to establish that if the employee works for a competitor, this is going to have a detrimental impact upon the company’s business.

A non-compete covenant may, therefore, be invalidated if the employee is successful in demonstrating that due to his qualifications or his job level, he could engage in the same activity for a competitor without any impact upon his former employer’s business.

A landmark case in France on this issue concerned a non-compete obligation for a window washer. The French Supreme Court ruled that the Company had no legitimate interest in imposing a restrictive covenant on the employee (French Supreme Court May 14, 1992) due to the low level of his qualification.

As a result, in order to ensure that a restrictive covenant will be successfully enforced, it is essential that the employer always closely identifies the interests which must be protected in order to determine whether those interests are sufficiently legitimate to restrain the employee’s freedom of work in light of what is generally considered as acceptable in the relevant industry.

In a French contract, it is recommended that the language of the clause specifies several reasons why the non-compete covenant serves the legitimate interest of the company.

1.3 What are the geographical limits of non-compete covenants?

The geographical scope of the non-compete must be limited so as not to prevent the employee from finding another job compatible with his/her skills and qualifications.
1.3.1. France

> French courts are generally restrictive as to the geographical scope of non-compete covenants:

- except in certain specific cases, the geographical scope of a non-compete agreement has to be limited to a region of France:
  - This is particularly the case regarding sales representatives to whom a particular sector is assigned in France (e.g., Paris area). In such a case, the practice is generally that the employer lists in the non-compete provision all the departments of the Paris area where the employee would not be allowed to work when the non-compete is enforced.
  - Such a limitation of the geographical area preserves the company’s interests as well as those of the employee.

> French courts are inclined to conclude that the employer cannot require the employee to expatriate in order to perform work corresponding to his/her skills and qualification and therefore are reluctant to accept the validity of a non-compete covenant with a geographical scope covering the whole territory of France or several countries.

> A wide geographic scope may be admitted for senior employees but it will be closely scrutinized by the court. Therefore, the employer should adapt the other elements of the covenant, namely duration and financial compensation to ensure, as much as possible, the validity of the non-compete.

  - Illustration: a one-year non-compete duty covering the European Common Market (which at the time was not so broad as the European Union is today) for a Marketing Director of L’Oréal was upheld, the financial compensation being 2/3 of his salary (French Supreme Court, January 30, 2002).
    - The Court took into consideration the responsibilities of the employee, the international scope the company and the importance of the financial counterpart.

1.3.2. Germany

> The covenant must not go beyond the area where the employee can be in competition with the employer. If an employee worked in Germany only, a worldwide post-contractual non-compete clause would not be enforceable.

1.3.3. Italy

> Italian courts may allow non-compete clauses with a broad geographic scope:

  - Illustration: The Court of Milan found enforceable a non-compete covenant with a geographical span encompassing the entire European Union (Court of Milan, October 22, 2003).
1.4 What are the maximum permissible durations of non-compete covenants?

1.4.1. France

> In the absence of statutory provisions setting forth the maximum duration of a non-compete covenant, the duration is assessed on a case by case basis:

- Generally the duration of 1 to 2 years will be considered reasonable.

> Certain collective bargaining agreements set out a maximum duration:

- When drafting a non-compete clause, one must ensure that the duration indicated does not exceed the duration provided for by the relevant collective bargaining agreement.

  **Illustrations:**

- 2 years maximum and exceptionally up to 4 years in the chemical industries (the 3 and 4th years are indemnified up to 100% of the last salary);
- 1 year, renewable once for the executives of the metallurgy sector.

1.4.2. Germany

> Pursuant to § 74a of the German Commercial Code, a non-compete covenant cannot be extended beyond a period of 2 years, and otherwise will be considered non-binding.

1.4.3. Italy

> Pursuant to article 2125 of the Italian Civil Code, a non-compete covenant cannot exceed 5 years for executives, and 3 years for other types of workers.

> If the non-compete provides for a longer term, it is automatically reduced to the term provided by statute.

1.5 How to determine the compensation of the non-compete covenant.

1.5.1. France

> Compensation has been made mandatory in all non-compete agreements since a French Supreme Court decision dated July 10, 2002.

- Such requirement is applicable to all non-competes, even those entered into before the Court made the provision of compensation mandatory.

> The financial compensation is mandatory whatever the cause for termination may be: dismissal, dismissal for serious misconduct or gross misconduct (French Supreme Court June 28, 2006), resignation (French Supreme Court May 31, 2006).

> The amount of the financial compensation is not determined by statutes:

- The minimum amount can be determined by the applicable collective bargaining agreement;
If there is no provision in the applicable collective bargaining agreement, a financial compensation ranging from 30% to 50% of the employee’s monthly salary is generally regarded as reasonable.

A recent decision of the French Supreme Court ruled that it is not permitted to provide for the reduction of the amount of the financial compensation in case of misconduct (April 8, 2010). Interestingly, the Court only nullified the provisions providing for the reduction but upheld the validity of the non-compete.

Payment of the compensation cannot be made during the employment contract (French Supreme Court, March 7, 2005). Apart from this prohibition, the parties are free to determine the details of payment, subject to the provisions of the applicable collective bargaining agreement (either as monthly installments, which is the common practice in France, or as a lump-sum – which is not advisable).

The financial compensation is considered to be salary. As such, it is subject to social charges and gives rise to holiday pay.

1.5.2. Germany

According to article 74 of the Commercial Code, a non-compete covenant is binding only if it provides for financial compensation.

The compensation for each year of compliance with the non-compete must amount to at least half of the employee’s most recent contractual remuneration paid during his employment.

If the termination is based on redundancy, the compensation has to be increased up to the full remuneration of the employee for the non-compete to be enforceable.

The employer must reimburse to the unemployment authority the unemployment benefits paid to the employee. The employer is entitled to deduct the unemployment benefits from the indemnity paid to the employee, within certain limits.

The compensation must be paid in monthly installments.

Given the fact that non-compete covenants in Germany are costly, they are generally only inserted in the employment contracts of managerial or highly skilled employees.

1.5.3. Italy

According to article 2125 of the Civil Code, a non-compete covenant is binding only if it provides for financial compensation.

Similar to French law, no amount is specified in the Civil Code. The generally accepted minimum amount is slightly less than in France.

The accepted practice is that the amount of the consideration ranges from 15% to 35% of the current salary of the employee.

The parties are free to determine how the financial consideration is going to be paid to the employee (either as a lump-sum or as monthly installments).

A ruling of the Court of Milan banned the payment during the employment contract, considering that the amount of the compensation has to be reasonable at the moment of the payment and that payment along the employment renders this amount
dependent on the duration of the employment and not on the duration of the non-compete (September 11, 2004). This is the same reasoning that was applied in France to ban this type of payment.

Payment at the end of the employment contract benefits from a favorable taxation and an exemption of social security contributions.

1.6. What are the sanctions if the non-compete covenant does not meet the above requirements?

1.6.1. France

A non-compete covenant that does not meet the requirements prescribed by case law cannot be enforced against the employee.

Only the employee can seek nullification of the clause before a court (French Supreme Court January 25, 2006):

- The employer is, therefore, not entitled to rely on the nullity of the clause to try to avoid payment of the financial consideration.

The case law considers that the employee who complies with a non-compete obligation must be compensated by the employer (French Supreme Court, November 15, 2006) even though the clause could be regarded as null and void if it had been challenged by the employee.

- In that case, an employee was forbidden to work for a competitor for two years. The non-compete agreement also provided that he would be entitled to a monthly payment during the non-compete period equal to 1/10th of his gross monthly salary. The employee, who had resigned, decided to challenge this provision before the court, arguing that receiving 2.4 months of salary for a non-compete obligation lasting 24 months was not sufficient.

- This court agreed and the company was ordered to pay to the employee damages amounting to 15,000 Euros, i.e., roughly 25% of the employee’s annual salary.

If the non-compete complies with all four conditions, but the court considers it disproportionate (for instance, the geographical scope is too large), the judge can uphold the non-compete and modify it (reduce the geographical scope) so as not to totally prevent the employee from earning a living.

1.6.2. Germany

Failure to provide for any financial consideration renders the non-compete covenant null and void.

- If the non-compete clause is too far reaching with respect to its duration or geographic scope, the court will reduce the scope of the non-compete to the permissible extent so as to enforce it, as provided in the Commercial Code.

- If the compensation is not sufficient, the non-compete will not be binding on the employee:
  - The employee may choose to abide by the non-compete covenant, and to receive the amount stated, or;
  - The employee may decide not to comply with the non-compete covenant. Hence he will not receive any compensation;
The option must be exercised at the beginning of the period of restriction.

1.6.3. Italy

> If the non-compete covenant fails to meet the requirements stated in the Civil Code, it will be deemed null and void.

> An exception, however, is that if the duration exceeds the term provided for in the Civil Code, it will be reduced to the legal duration.

> As in France and Germany, clearly unfair or disproportionate compensation will result in the nullification of the covenant (Italian Supreme Court, May 14, 1998).

4. Can the employer waive the non-compete covenant in order to be discharged of the payment of the compensation?

1.1 France

> French case law considers the non-compete covenant to be in favor of both the employee and the employer. As a consequence, the employer cannot unilaterally waive the non-compete obligation unless the clause or the applicable collective bargaining agreement so provides.

> The waiver is generally subject to a formal proceeding (e.g., the waiver should be made within a specific period of time after the termination [1 or 2 weeks]). Failure to comply with this formality makes the waiver ineffective and the employer will be liable to the employee for payment of the financial compensation:

- As the waiver period is usually very brief, close attention must be paid to when it begins. Usually, the starting point is the termination of the employment, e.g., the day on which the termination letter is sent, or the day on which the dismissal letter is handed over and not the end of the notice period.

> To avoid these risks, some companies have drafted provisions whereby the employer is entitled to activate the non-compete at the end of the contract. These non-compete clauses have, however, been held null and void by the Supreme Court (French Supreme Court, April 20, 2005).

1.2 Germany

> The employer can waive the non-compete unilaterally provided that notice of the waiver is given before the termination of the employment agreement (end of the notice period):

- The employee is immediately released from complying with the non-compete;
- The employer has still to pay the indemnity for 12 months.

> If the employee is dismissed for cause, the employer may choose either applying or waiving the non-compete clause:

- In case of waiver, the employee can no longer demand payment of the compensation.
1.3 Italy

> The waiver is governed mainly by case law:

- the employer may waive the non-compete until no later than the time of termination of employment (communication of the termination letter).

5. What remedies are available in case of breach of the non-compete covenant?

1.1. France

> In case of breach, the employer is entitled to:

- stop the payment of the financial compensation and obtain reimbursement;
- seek a preliminary injunction to forbid the employee to continue the competitive activity, or order the employee to cease working for his new employer;
- sue the employee for damages.

> The contract can provide for a penalty in case of breach of the non-compete by the employee. The judge is not bound by this provision and may decide to reduce the amount of the penalty.

> The new employer may also be sued by the former employer in civil or commercial courts for complicity in violation of the employee’s non-compete obligation.

> Proof of breach of the non-compete covenant can be difficult as French courts tend to have a strict interpretation of the language of the non-compete covenants:

- A non-compete restricting the non-compete obligation to the companies selling identical products that those of the former employer does not prevent the employee from working for competitors selling different products even if they act within the same industry (French Supreme Court, October 12, 1967).
- A clause prohibiting an employee from being involved directly or indirectly in a similar activity to the company’s activity or which could compete with the company’s activity, is not breached if the activity of the employee for the competitor of the former employer is not a competitive activity (French Supreme Court, December 5, 2005).

1.2. Germany

> If the employee is in breach of a valid non-compete provision, the employer may turn to the labor court for a temporary injunction against that employee.

> The labor court can order a former employee not to compete with its former employer and can also require the employee to pay damages to his/her former employer:

- Penalty clauses are enforced by German Labor Courts.

> The employer may also seek compensation for losses from the competitor for whom the employee works.
1.3. Italy

> If the employee is in breach of the non-compete covenant, the former employer is entitled to compensation for any damages suffered.

- Generally, the damages are predetermined by the employment contract in a penalty clause.

> The employer can also seek reimbursement of the compensation paid to the employee in consideration of the non-compete covenant.

> A former employer may also seek an injunction to stop the employee from performing the same activity for a competitor.

> The former employer, however, has no remedy against the new employer.

6. Non-compete and choice of law provisions in the European Union:

> In case of cross-border employment relationship the employer will face the question of the choice of law applicable to the non-compete covenant.

> Non-compete covenants in international employment contracts will be enforceable as long as they are valid according to the law applicable to the employment contract:

- In the European Union, choice of law provision must comply with Regulation n° 593/2008 on the law applicable to contractual obligations (Rome I), dated June 17, 2008.
  - The regulation is applicable to contracts entered into as from December 17, 2009. The contracts entered into before this date are governed by Rome Convention of June 19, 1980.
  - According to this regulation, the parties are free to choose the law applicable to the employment agreement.
  - However, such choice of law may not deprive the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law that, in the absence of choice of law, would have been applicable.
  - In the absence of choice of law, the applicable law is the law of the country in which the employee habitually carries out his work in performance of the contract.

> Illustration: if an employee was hired by a US company with a US contract to work in France, the choice of US law would be enforceable to the extent that it would not deprive the employee of the protection afforded by French labor law.

- If the contract includes a non-compete for which there is no compensation, the employee will be in a position to challenge the non-compete because he would be denied the protection afforded by French law, or he may abide by the clause and seek damages to compensate for the lack of financial consideration.

- The same may be true for stock option plans. It is not unusual for the US parent of a company to grant stock options to senior employees on the basis of a US plan that...
requires these employees to enter into non-compete covenants for which the consideration is the grant of stock options.

- The non-compete obligation could still be characterized by a French court as an obligation linked to the employment contract and, as such, subject to the conflict of laws rules applicable to employment contracts.

- Then, the same reasoning as previously described would be applicable: as the employee is working in France, he could not be deprived of the protection afforded by French law and the non-compete would be considered invalid as it is not specifically compensated.
## SCHEDULE

### The structure of the non-compete covenant in France

<table>
<thead>
<tr>
<th>Rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td>Considering the functions of [name of employee] that make him aware of confidential information and pursuant to which he is in contact with the clients of the Company, [name of employee] agrees that the Company legitimately needs to protect its interests while still permitting [her/him] to engage in professional activity.</td>
</tr>
<tr>
<td>It is highly advisable to specify in the covenant the rationale for including the non-compete: for instance that due to the nature of the duties of the employee, the confidential information he will be acquiring during the course of his employment or the competitive market in which the company is active, the specific skills of the employee, the company needs to protect its interests.</td>
</tr>
<tr>
<td>Some second degree courts of law require that the rationale for inserting a non-compete obligation must be stated in the provision, although it is not yet expressly required by the French Supreme Court (French Supreme Court, October 29, 2008).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Duration and geographic scope</th>
</tr>
</thead>
<tbody>
<tr>
<td>Therefore, [name of employee] agrees that for the period of [-] months commencing on the effective departure of employment and over the territory of [-]</td>
</tr>
<tr>
<td>The duration must comply with the maximum duration stated in the collective bargaining agreement, if any.</td>
</tr>
<tr>
<td><strong>Starting point:</strong> if the employee is released from work during the notice period, the starting point of the non-compete obligation will be considered the effective date of the employee’s departure (French Supreme Court, July 15, 1998). Therefore, the employer will at the same time be liable to pay for the notice period indemnity and for the financial compensation.</td>
</tr>
<tr>
<td>The geographic scope is determined by listing precisely departments, regions or countries. Providing that the obligation applies in the European Union should be avoided. Apart from the fact that it may be considered too large, as the list of the Member States is likely to evolve, this could create a doubt on the exact scope of the obligation and then jeopardize the validity of the clause.</td>
</tr>
<tr>
<td>Obligations</td>
</tr>
<tr>
<td>-------------</td>
</tr>
<tr>
<td>[she/he] will not, either alone or jointly with or on behalf of any person or entity, directly or indirectly, own, manage, operate, join, control, finance or participate in, or be connected as a principal, agent, representative, consultant, employee, investor, owner, partner, manager, or otherwise with, any business, enterprise or other entity, in competition with any business or operations of the Company as at the effective departure date or during the period of [-] months prior to that date and with which [she/he] was materially concerned during such period.</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>In addition, [name of employee] agrees that for the period of [-] months commencing on the effective departure date, he will not, either alone or jointly with or on behalf of any person or entity, directly or indirectly:</td>
</tr>
<tr>
<td>a. in connection with the carrying on of business in competition with the business of the Company, solicit, divert, take away or attempt to take away any of the customers of the Company with whom [name of employee] had regular or material dealings during the period of [-] months prior to the effective departure date; or</td>
</tr>
<tr>
<td>b. in any way interfere with, disrupt or attempt to disrupt any relationships existing prior to termination of [name of employee]’s employment, between the Company and any of its customers with whom [name of employee] had regular or material dealings during the period of [-] months prior to the effective departure date;</td>
</tr>
<tr>
<td>c. deal with any of the customers of the Company with whom [name of employee] had regular or material dealings during the period of twelve [-] prior to the effective departure date.</td>
</tr>
<tr>
<td>The non-compete activity needs to be clearly defined.</td>
</tr>
<tr>
<td>French courts tend to strictly interpret language of the non-compete covenants provided for in the employment contracts.</td>
</tr>
<tr>
<td>A non-compete restricting the non-compete obligation to the companies selling identical products that those of the former employer does not prevent the employee from working for competitors selling different products even if they act within the same industry (French Supreme Court, October 12, 1967).</td>
</tr>
<tr>
<td>A clause prohibiting an employee from being involved, directly or indirectly himself or through a third party, in a similar activity as the company’s activity or which could compete the company’s activity is not breached when the activity of the employee for a competitor of the former employer is different from the competitive activity (French Supreme Court, December 5, 2005).</td>
</tr>
<tr>
<td>It is incumbent on the employer who considers the employee to have breached the non-compete covenant to demonstrate such breach.</td>
</tr>
</tbody>
</table>
For the purpose of this article, the business of the company is defined as [definition].

### Compensation

During each month of the non-compete period, [name of employee] will receive as compensation a gross monthly indemnity amounting to [- %] of his/her base monthly salary. This lump-sum indemnity will include the holiday paid indemnity.

The compensation cannot be paid during the employment contract (French Supreme Court, March 7, 2005) but must be paid during the non-compete period.

The compensation is considered as a salary. As such, it is subject to social charges and gives rise to holiday paid indemnity.

If it not provided that the compensation is a lump-sum payment which includes the holiday-paid indemnity, the employer will be liable to pay it additionally.

### Waiver

The Company will be entitled within a three-week period as from termination for any reason whatsoever to waive the non-compete by registered letter with acknowledgement of receipt. As a consequence, [name of employee] shall not be subject to the non-compete duty and the compensation shall not be due to him/her.

The waiver may be governed by the applicable collective bargaining agreement, whose provisions must be complied with.

The waiver has to be provided for in the employment contract. If it is not provided that the employer can unilaterally waive the non-compete’s, such renunciation will require the employee consent.

If the waiver is not made according to the provisions of the collective bargaining agreement or to those of the employment contract, it renders the employer liable to the employee for payment of the financial compensation for the whole term of the non-compete.

As the waiver period is usually very brief it must be watched very closely. Usually, the starting point is the termination, e.g., the day on which the termination letter is sent, or the day on which the dismissal letter is handed over, not the end of the notice period.
### Penalty Clause

In case of breach of the non-compete, [name of employee] shall be liable to reimburse the compensation for each month he/she shall have breached the non-compete. In addition, [name of employee] shall be liable to pay the Company an indemnity of at least six times [his/her] last monthly gross base remuneration. This indemnity shall not prevent the Company from seeking judicial remedy such as injunctions and compensation for the suffered damage.

| Strictly speaking, the duty to reimburse the financial compensation is not a penalty clause, as the French Supreme Court held that an employee who breaches a non-compete agreement has to pay back the financial compensation from the date of the breach. |
| --- | --- |
| Pursuant to article 1229 of the Civil Code, the employer may not seek both the principal and the penalty, unless the penalty was asserted for a mere delay. |
| This means that the employer cannot claim at the same time before the court for the end of the competitive activity and payment of the penalty, unless it is expressly stipulated. |
| The penalty is automatic and the employer does not need to prove that it suffered any losses. |
| However the court may, “even of its own motion”, decrease (or increase) the agreed penalty (article 1152 of the Civil Code). |
Tab IV
John P Barry
Partner

John P. Barry is a Partner in the Labor & Employment Law Department and co-head of the Non-Compete & Trade Secret Group, resident in the Newark office.

John is experienced in representing management in a wide range of employment and labor law matters in both New Jersey and New York. He provides counsel and litigates cases concerning compliance with equal opportunity laws, disability, harassment, retaliation, family leave, wage and hour, privacy, contract, handbook, restrictive covenants, force reduction and general discrimination laws. He conducts training in sexual harassment and related areas. John also represents colleges and universities concerning employee, faculty and student issues.

As co-head of the Non-Compete & Trade Secret Group, John litigates and counsels clients concerning employee movement between competitors, with emphasis on the meaning, enforceability and drafting of various types of restrictive covenants, such as non-competition, non-solicitation, invention assignment and confidentiality provisions.

John’s practice extends across several key industries, including retail, financial services, pharmaceutical, higher education, technology and wireless communications.

John regularly appears before various administrative and judicial bodies in both New York and New Jersey, including the Department of Labor, New York’s State Division on Human Rights, New Jersey’s Division on Wage and Hour Compliance and Division on Civil Rights, the Equal Employment Opportunity Commission, FINRA, Department of Education and federal and state courts.

A noted author and speaker, John frequently writes and speaks on employment-related topics. He has been quoted by *The National Law Journal* and other publications regarding employment law, privacy in the workplace and restrictive covenants.

**Court Admissions**

- U.S. District Court, New Jersey
- U.S. District Court, New York, Eastern District
- U.S. District Court, New York, Southern District
- U.S. Court of Appeals, Second Circuit
- U.S. Court of Appeals, Third Circuit

**Memberships**

- New York State Bar Association
New Jersey State Bar Association

Other Distinctions
New Jersey Super Lawyers Rising Star
Best Lawyers in America
Daniel Ornstein
Partner

Daniel Ornstein is a Partner in the Labor & Employment Law Department, resident in the London office. He has more than ten years of experience dealing with a broad range of UK and international employment issues, including High Court litigation, collective labour law, large-scale redundancies, Employment Tribunal litigation and training.

Dan has extensive experience in litigation involving team moves and restrictive covenants before the High Court, and has been involved in some of the most high profile recent cases in the UK, including *UBS v. Vestra* and *Farr v. Thomas*. He also has an in-depth knowledge of Employment Tribunal litigation, including claims for discrimination, victimisation, working time, and unfair/wrongful dismissal.

In addition, Dan counsels employers on all aspects of trade union and collective labour law, including trade union recognition, international and domestic works councils, industrial action and negotiating collective agreements, both on a freestanding basis and in connection with mergers and acquisitions. His experience also includes large-scale redundancies, and is often consulted by his clients at the very early planning stages of the process, advising on the level of compensation to offer, managing the collective consultation process and balancing the legal and commercial risks.

Dan frequently provides training on a range of topics, including diversity, outsourcing, TUPE issues and handling of disciplinary and grievance matters. He also regularly speaks at conferences, and has published a number of articles.

**Memberships**

Employment Lawyers Association

Industrial Law Society
Yasmine Tarasewicz
Partner

Yasmine Tarasewicz is a Partner in the Paris office and co-head of the International Labor & Employment Group.

Yasmine has been practicing for more than two decades with a principal focus on French and European labor law and litigation for French and international clients. Her practice centers on collective issues with an emphasis on the employment law aspects of major reorganizations. She also appears before all of the relevant courts in matters such as wrongful dismissals, collective layoffs and litigation against unions or works councils.

Chambers Europe 2009 notes that Yasmine “is hailed by sources for her ‘eloquence, strong personality and superstar profile,’” and that “she is widely acclaimed for her abilities and exceptional work on collective employee issues arising out of complex restructurings, as well as for her work on discrimination cases.” The most recent edition of Legal 500 EMEA says that “Proskauer Rose LLP’s reputation is directly linked to the expertise and track record of practice head Yasmine Tarasewicz, who is ‘very impressive and really helpful in assisting clients to find their way through French employment law.’”

Yasmine is established as an opinion leader. As one of France’s leading experts in this field, she lectures and writes extensively. Her opinion and comments are sought by many experts and journalists and she hosts regular committees during which experts and clients can discuss practical employment issues.

Languages Spoken
French
English

Other Distinctions
Chambers Europe 2009
Legal 500 EMEA 2009
PLC Which Lawyer 2009
Who’s Who Legal: Labor 2009
Bettina B Plevan
Partner

Betsy Plevan is a Partner in the Labor & Employment Law Department, co-head of both the International Labor & Employment Group and Class/Collective Action Group, and a member of the firm’s seven-person Executive Committee. She has built her practice handling all types of labor and employment litigation, as well as counseling clients in employment matters. In addition to maintaining her active practice, she recently completed a two-year term as President of the New York City Bar.

Betsy’s practice includes representing clients in such diverse industries as banking and finance, health care, entertainment, publishing and consumer products. She spends considerable time representing leading law firms in counseling and litigation assignments. She has handled both single plaintiff and class action lawsuits involving issues of discrimination, harassment and employee benefits matters. Betsy has successfully tried a number of jury and non-jury cases in New York and elsewhere in the U.S., and her trial work has been recognized by her induction as a Fellow of the American College of Trial Lawyers. She also has argued more than 50 appeals in state and federal courts, and she has been elected a member of the American Academy of Appellate Lawyers.

Betsy has been involved in representing employers in sexual harassment matters for many years. Noteworthy cases include, among others, her retention by Meritor Savings Bank to handle the remand of the landmark Supreme Court case in this area. She also handled, on appeal, the landmark case in which the New York Court of Appeals reversed a $4 million punitive damages award against the magazine Penthouse on the ground that no punitive damages are available under the State Human Rights Law.

In the employee benefits area, Betsy has handled class action lawsuits involving alleged breaches of fiduciary duty, COBRA violations and termination of retiree benefits. She also has extensive experience counseling employers on litigation avoidance and sexual harassment investigations and training management employees in these areas.

Betsy is frequently quoted in national newspapers, legal and other trade publications and has appeared on television to discuss employment issues, especially sexual harassment suits, about which she has lectured and written extensively.

Court Admissions
U.S. District Court, New York, Eastern District
U.S. District Court, New York, Southern District
U.S. Court of Appeals, Second Circuit
U.S. Court of Appeals, Third Circuit
U.S. Court of Appeals, Fourth Circuit
U.S. Court of Appeals, Fifth Circuit
U.S. Court of Appeals, Sixth Circuit
U.S. Court of Appeals, Ninth Circuit
U.S. Court of Appeals, District of Columbia Circuit
U.S. Supreme Court
U.S. Tax Court

Memberships
American Bar Association (Board of Governors, Standing Committee on Pro Bono and Public Service)
New York City Bar (Past President, Executive Committee, Former Chair of Committee on State Courts of Superior Jurisdiction, Former Chair of Council on Judicial Administration, Former Chair of Special Committee on Women in The Profession, Former Chair of Long-Range Planning Committee)
Federal Bar Council (Past President)
American Law Institute – American Bar Association (Director)
Lawyers’ Committee for Civil Rights Under Law (Regional Co-Chair and Director)
Committee for Modern Courts (Director)
New York Lawyers for the Public Interest (Director Emeritus)
American Law Institute (Advisory Committee on the Restatement of Employment Law)
Second Circuit Judicial Conference (Former Chair)
Southern District of New York (Chair of Magistrate Judge Selection Panel)
Chief Judge’s Task Force on New York Commercial Courts
Second Circuit Task Force on Fairness in Courts (Co-Chair of Committee on Gender Bias)

Other Distinctions
Fellow, American College of Trial Lawyers
Fellow, American Academy of Appellate Lawyers
Fellow, College of Labor & Employment Lawyers
“100 Best Lawyers in New York,” *New York Magazine*
50 Most Influential Women Lawyers in America, *National Law Journal*
*Chambers USA:* Labor and Employment
The International Who’s Who of Management Labour & Employment Lawyers

Best Lawyers in America 1993-2010

“Best of the Best,” 2009 Euromoney Expert Guides

ORT Jurisprudence Award

American Jewish Congress Louis D. Brandeis Award

Boston University Law School, Silver Shingle Award for Distinguished Service to the Legal Profession

Jewish Theological Seminary, Simon Rifkind Award

John J. McCloy Memorial Award, Fund for Modern Courts

Milton Gould Award for Outstanding Oral Advocacy, The Office of the Appellate Defender

Human Relations Award, Anti-Defamation League Lawyers Division

Whitney North Seymour Award, Federal Bar Council

NYLPI Law & Society Award
Howard Z Robbins
Partner

Howard Robbins is a Partner in the Labor & Employment Law Department in the New York office, and a co-head of the International Labor & Employment Group and Strategic Planning & Corporate Due Diligence Group.

In the traditional labor law arena, Howard represents clients in a broad range of industries, including sports and entertainment, retail and fashion, newspapers, pharmaceutical companies, hotels and clubs, not-for-profit and educational institutions. As a member of the firm’s Sports Law Group, Howard serves as counsel to the National Hockey League and Major League Soccer, and has represented numerous individual NHL clubs. He has represented employers in various industries in representation hearings and unfair labor practice trials before the National Labor Relations Board, and in scores of discharge and contract arbitrations, and regularly negotiates collective bargaining agreements. Howard also provides daily advice and counsel to clients in applying collective bargaining agreements and in complying with applicable labor laws.

As co-head of the Strategic Planning & Corporate Due Diligence Group, Howard is often called upon to provide labor and employment advice in corporate transactions. He works with clients and investment bankers and negotiating with union representatives to facilitate these deals.

Howard’s practice also includes a significant employment law component. In his practice, Howard represents clients in state and federal district and appellate courts and administrative agencies with respect to discrimination and employment disputes. Aside from litigation, Howard has an active counseling practice, providing practical advice to clients on issues like hiring, terminations, restructuring, wage-and-hour laws, WARN compliance, leave issues and other EEO compliance matters.

As a co-head of the International Labor & Employment Group, Howard often assists clients with cross-border labor and employment issues and coordinates with local counsel around the world.

Court Admissions
U.S. District Court, New York, Eastern District
U.S. District Court, New York, Southern District
U.S. Court of Appeals, Seventh Circuit
U.S. Court of Appeals, Second Circuit
Memberships
New York City Bar (Chair of Sports Law Committee)

Other Distinctions
New York Super Lawyers

US Legal 500: Labor-Management Relations
Aaron J Schindel
Partner

Aaron Schindel is a Partner in the Labor & Employment Law Department and co-head of the International Labor & Employment Group. His career spans the full range of labor and employment matters for clients ranging from multinational corporations to small not-for-profit organizations, to large and small public sector entities. Aaron has been first chair in jury and non-jury trials and appeals in numerous federal and state courts and administrative agencies throughout the country, including individual plaintiff, multiple plaintiff and class actions, and matters involving employment discrimination, tort, contract, ERISA and wage-hour claims, as well as representing employers as plaintiffs in injunction proceedings.

Aaron also has an active practice in traditional labor law matters before the NLRB, including successful representation of employers in representation and unfair labor practice claims, and has handled hundreds of labor arbitrations in all manner of disciplinary and contract interpretation disputes. Much of Aaron's time is devoted to counseling clients on both day-to-day and extraordinary matters, such as discharge and disciplinary issues, preparation and implementation of reduction in force programs, collective bargaining, and compliance with the vast array of federal, state and city labor and employment laws.

Aaron is an adjunct professor of labor law at Cardozo Law School, the author of numerous articles on labor and employment law, and has spoken on labor and employment matters before clients and bar association groups in New York, London, Amsterdam, Rome, Madrid, Budapest and elsewhere.

Court Admissions
U.S. Supreme Court

U.S. District Court, New York, Eastern District
U.S. District Court, New York, Southern District
U.S. District Court, New York, Western District
U.S. District Court, New Jersey
U.S. Court of Appeals, Second Circuit
U.S. Court of Appeals, Third Circuit

Memberships
New York State Bar Association (Co-Chair of International Employment Law Committee, International Law and Practice Section)
American Bar Association
New York City Bar

Other Distinctions
New York Super Lawyers
Tip of the Month

Protecting Your Business against Raiding and Lift-Outs in the UK

When the Vikings roamed the North Sea, a deep moat, a high wall and a vat of boiling oil were essential tools to keep raiders at bay. Unfortunately, these tools are not as effective at keeping corporate competitors from raiding a company’s key employees, leaving employers to search for new and more suitable weapons. In several recent decisions, UK courts have given approval to some important and controversial techniques to keep teams of key employees from joining a competitor. In particular:

> In *Item Software Ltd v. Fassihi*, the Court of Appeal held that, in certain circumstances, employees owe implied duties to disclose to their employer their own competitive activities. This decision has been questioned by a number of practitioners, who have expressed the view that it overextends the concept of implied duties.

> In the Court of Appeal decision in *Farr v. Thomas*, a twelve-month non-compete clause was held to be enforceable at a time when many practitioners believed that such a period of time was too long to be enforceable.

> In *UBS v. Vestra*, the court enjoined a team of employees from dealing with their former clients. The significance of the decision was that the injunction was not based on contractual restrictions. Rather, the court granted a “springboard injunction” — relief that is designed to deprive an employee from benefiting from any headstart derived from his or her own wrongdoing. The significance of the *UBS* decision was that until that case there was authority that springboard relief should be confined to cases where the wrongdoing involved misuse of confidential information, but the UBS held that the relief was available to protect against any wrongdoing by employees. However, a more recent decision in the case of *Vestergaard Frandsen v. Bestnet*, which did not refer to *UBS*, has raised some questions as to the availability of springboard relief.

> Most recently, the High Court handed down a 200-page judgment in the case of *Tullett Prebon v. BGC*, which held, among other things, that contractual provisions that require employees to report to their employer an approach by a competitor are enforceable (thus enabling companies to use express contractual terms to banish uncertainty about the scope and applicability of implied terms to confess to any competitive activity). However, arguably, an unusual fact pattern made it far easier for the court to enforce such a contractual term in *Tullett* than would generally be the case.
These decisions remain controversial, and practitioners and scholars debate the extent to which they will be applicable in less favourable scenarios, but there is little doubt that cumulatively they provide employers with a robust framework for protecting themselves against raiding and lift-outs. However, in order to benefit as fully as possible from these protections, there are a number of steps and strategies that employers should adopt.

**Restrictive Covenants**

**Have you got them right?**

Restrictive covenants are enforceable in the UK, provided they go no further than is reasonably necessary to protect a legitimate business interest (such as misuse of confidential information or client connections). This creates a danger that across-the-board covenants will be unenforceable, especially where no proper consideration has been given to what restraints are necessary to protect a business in respect of a particular employee. We would recommend tailoring covenants to individuals as far as is possible, where the differences in the circumstances warrant differences in restraints.

On the other hand, it is not uncommon, especially in companies formed through mergers and acquisitions, for comparable employees to have different restrictions in their contracts of employment in circumstances where there is no good reason for the difference. Such irrational differences can undermine the enforceability of the more onerous restraints.

The enforceability of a restrictive covenant is based on the state of affairs at the time at which a covenant was agreed (rather than when a company seeks to enforce the covenant). This can cause a situation where an employee who has been promoted through the ranks over a number of years has a covenant that may be appropriate, and would have been enforceable, if obtained in the context of the employee’s current role, but which is unenforceable because of the more junior position the employee held when the restrictive agreement was signed.

Conversely, reviews of contracts often reveal employees who have been promoted through the ranks attaining senior positions while remaining employed under the terms of junior contracts of employment without any restrictive covenants.

**Changing, renewing and entering into new covenants**

As a result of these issues, we recommend that employers carry out regular audits of the covenants contained in the employment contracts of their workforce so that they can identify any problems with covenants and make appropriate changes. This then raises the issue of how to address any deficiencies identified, especially because it often can be difficult to persuade employees to enter into new or amended covenants.

In our experience, one effective strategy for dealing with this is to make promotions or payrises contingent upon an employee renewing, changing or entering into new, restrictions. Employees generally are willing to enter into restrictions in such circumstances; moreover, connecting the covenants to a payrise or promotion also satisfies the legal requirement for consideration to pass to an employee in order for a covenant to be enforceable.
Contractual Duties To Confess

On the basis of the Tullett decision, provisions in contracts of employment requiring employees to actively disclose information about competitive activities (including their own activities) are enforceable, even where they go beyond duties that would otherwise be implied in a contract of employment. It is possible that Tullett will not be the last word in relation to this — some commentators maintain that the reasoning in that decision was highly fact sensitive.

However, there is no doubt that, insofar as such contractual terms are enforceable, they provide companies with a powerful shield against raids and lift-outs. If employees comply with them, the resulting knowledge can be used to persuade employees to stay, as well as enabling a company to be extra vigilant at an early stage to protect against some of the problems associated with raids — such as misuse of confidential information and solicitation of customers. Moreover, such terms provide companies with greater scope to protect their business without having to resort to litigation. Instead, more subtle means can be used to persuade employees to remain loyal to a business, such as incentive arrangements, assurances about the employee’s value to the business and selling a vision about the future potential of the business.

If employees do not comply with the disclosure agreement, it enables a company to point to specific breaches of contract, which can be used as a basis for damages claims, or, in light of the UBS decision, a springboard injunction.

Similarly as to covenants, one strategy for inserting such terms into the contracts of existing employees would be through making payrises and promotions contingent upon accepting such terms.

Recruiting Teams

The corollary of the above is that the current state of UK law means that extreme caution is needed when trying to recruit a team of employees from a rival. Practical considerations include:

> Ensure information is only provided on a strictly need-to-know basis — people are not under a duty to disclose what they do not know;
> When recruiting or hiring employees from competitors, make sure they give you full disclosure of the contractual restraints that currently apply to them; and
> Make it clear to these prospective employees that they should not breach their obligations to their current employer, including those relating to confidential information and solicitation of business.

Indeed, there is an increasing view among practitioners that the current state of the law, with its potent combination of contractual and implied duties to confess, and the willingness of courts to enforce restrictive covenants and grant injunctive relief even in the absence of contractual post-termination restrictions, affords such protection to employers that it is practically impossible for a team of employees to move to a competitor. Given the controversy that has surrounded some of the more recent decisions and the increasing concerns that, cumulatively, they stifle legitimate competition, it is conceivable that the current position represents a high-water mark for employer protection. We will keep you updated about any further developments.
Proskauer Rose LLP’s International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

For more information about this practice, click here or contact:

**Bettina B. Plevan**
212.969.3065 – bplevan@proskauer.com

**Aaron J. Schindel**
212.969.3090 – aschindel@proskauer.com

**Howard Z. Robbins**
212.969.3912 – hrobbins@proskauer.com

**Yasmine Tarasewicz**
33.1.53.05.60.18 – ytarasewicz@proskauer.com

**Anthony J. Oncidi**
310.284.5690 – aoncidi@proskauer.com

**Jeremy M. Mittman**
310.284.5634 – jmittman@proskauer.com

**Allan H. Weitzman**
561.995.4760 – aweitzman@proskauer.com

**Daniel Ornstein**
44.20.7539.0604 – dornstein@proskauer.com

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.
Tip of the Month

Religious Discrimination Claim Roils UK

It has been said that the U.S. and the U.K. are two nations “divided by a common language,” and the same observation also could be applied to their discrimination laws. Prohibitions that sound the same may operate in very different ways, as a recent decision from the UK Court of Appeal illustrates.

The issue concerned discrimination in employment on the basis of religion, which is prohibited in the U.S. by Title VII of the 1964 Civil Rights Act, and in the U.K. by the Employment Equality (Religion or Belief) Regulations 2003. The particular case was brought by Nadia Eweida, a check-in agent for British Airways in London, who wanted to wear a silver cross on a chain as a symbol of her Christianity. The company’s rules prohibited employees in public contact positions, who were required to wear a company uniform, from wearing visible jewelry. The company made exceptions for religious attire that could not be concealed under the uniform – hijabs, turbans and yarmulkes – but insisted that Ms. Eweida’s cross had to be worn out of sight. Ms. Eweida refused to comply with the policy, and was sent home. After being pilloried in the press and pulpit for its allegedly anti-Christian position, BA changed its policy to permit religious lapel pins and other religious jewelry, and Ms. Eweida returned to work. The company refused to pay her for her three months without pay, and she brought a claim for religious discrimination.

In the U.S., such a claim would be analyzed under the reasonable accommodation requirements of Title VII. According to the EEOC Compliance Manual, “absent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee’s religious dress or grooming practices.” Whether Ms. Eweida would prevail on her claim under this standard would depend on BA’s ability to show that making an exception to its uniform policy would cause an “undue hardship.”

The U.K. statute, however, does not have a reasonable accommodation requirement. The case was therefore evaluated as a claim of “indirect” discrimination (in U.S. terms, “disparate impact” discrimination), which the law defines as the application of a “ provision, criterion or practice” that “puts or would put persons” of a particular religion or belief “at a particular disadvantage when compared with other persons,” where the employer cannot show that the provision, criterion or practice complained of is “a proportionate means of achieving a legitimate aim.”
Ms. Eweida argued that forbidding her to wear a visible symbol of her religion while allowing other employees to wear visible symbols of theirs constituted discrimination against Christians as a group. The Court of Appeal, affirming a judgment of the Employment Appeal Tribunal, did not agree.

As the justices saw it, Ms. Eweida’s claim foundered on the fact that she was the only Christian who claimed to be disadvantaged by BA’s uniform policy. The law’s use of the plural “persons” means that “some identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares.” The Employment Appeal Tribunal had rejected the argument that one could assume that there must be other employees in the workforce who felt as Ms. Eweida did, and the Court of Appeal refused to overturn this determination.

The moral of this story, for multinational corporations and their counselors, is that laws of different countries that seem the same may have very different terms, may require different modes of analysis, and may lead to different results.
Religious Discrimination Claim Roils UK

It has been said that the U.S. and the U.K. are two nations “divided by a common language,” and the same observation also could be applied to their discrimination laws. Prohibitions that sound the same may operate in very different ways, as a recent decision from the UK Court of Appeal illustrates.

The issue concerned discrimination in employment on the basis of religion, which is prohibited in the U.S. by Title VII of the 1964 Civil Rights Act, and in the U.K. by the Employment Equality (Religion or Belief) Regulations 2003. The particular case was brought by Nadia Eweida, a check-in agent for British Airways in London, who wanted to wear a silver cross on a chain as a symbol of her Christianity. The company’s rules prohibited employees in public contact positions, who were required to wear a company uniform, from wearing visible jewelry. The company made exceptions for religious attire that could not be concealed under the uniform – hijabs, turbans and yarmulkes – but insisted that Ms. Eweida’s cross had to be worn out of sight. Ms. Eweida refused to comply with the policy, and was sent home. After being pilloried in the press and pulpit for its allegedly anti-Christian position, BA changed its policy to permit religious lapel pins and other religious jewelry, and Ms. Eweida returned to work. The company refused to pay her for her three months without pay, and she brought a claim for religious discrimination.

In the U.S., such a claim would be analyzed under the reasonable accommodation requirements of Title VII. According to the EEOC Compliance Manual, “[a]bsent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee’s religious dress or grooming practices.” Whether Ms. Eweida would prevail on her claim under this standard would depend on BA’s ability to show that making an exception to its uniform policy would cause an “undue hardship.”

The U.K. statute, however, does not have a reasonable accommodation requirement. The case was therefore evaluated as a claim of “indirect” discrimination (in U.S. terms, “disparate impact” discrimination), which the law defines as the application of a “provision, criterion or practice” that “puts or would put persons” of a particular religion or belief “at a particular disadvantage when compared with other persons,” where the employer cannot show that the provision, criterion or practice complained of is “a proportionate means of achieving a legitimate aim.”
Ms. Eweida argued that forbidding her to wear a visible symbol of her religion while allowing other employees to wear visible symbols of theirs constituted discrimination against Christians as a group. The Court of Appeal, affirming a judgment of the Employment Appeal Tribunal, did not agree.

As the justices saw it, Ms. Eweida’s claim foundered on the fact that she was the only Christian who claimed to be disadvantaged by BA’s uniform policy. The law’s use of the plural “persons” means that “some identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares.” The Employment Appeal Tribunal had rejected the argument that one could assume that there must be other employees in the workforce who felt as Ms. Eweida did, and the Court of Appeal refused to overturn this determination.

The moral of this story, for multinational corporations and their counselors, is that laws of different countries that seem the same may have very different terms, may require different modes of analysis, and may lead to different results.
Tip of the Month

Common Pitfalls to Avoid When Drafting Global Compensation Plans

Paying employees on a commission basis is commonly accepted as a good way to increase sales of a product or service – in the United States. Outside the U.S., commission plans are far more problematic. What is perfectly legal in the U.S. simply won’t pass muster under the invasive labor laws of many other countries. A company that decides to simply roll out a compensation plan across borders in other countries without first ensuring that it complies with local labor laws may find out too late that key aspects of the plan are void or unenforceable.

One Plan or Many?

It is often tempting for a multinational company to try to harmonize the laws of several different jurisdictions and arrive at a uniform company-wide commission plan that can be utilized across the globe. However, while clearly an admirable goal, the idea rarely works in practice. Too often, the changes required to make a key provision acceptable under one country’s laws make it unlawful in another country, or imposing those changes in other countries is simply too burdensome.

Mandatory Home Country Provisions

Despite a U.S. multinational’s preference to have the law that it is most comfortable with apply (for instance, the State where it is headquartered) and despite the fact that U.S. law, with its relatively laissez faire approach, is generally more employer-friendly than most other countries’ labor and employment laws, a U.S. choice of law clause will generally be considered void. Under the Rome Convention of 1980, which governs the choice of law of a European employment relationship, the choice of law will generally be deemed to be the country in which the employee habitually performs his or her work—irrespective of the choice of law specified in the commission plan. The same result will obtain in almost all countries outside Europe.

Many U.S. employers also use compensation plans as an opportunity to insert a provision whereby employees agree to submit any claim to binding arbitration. However, arbitration is a totally foreign concept in many jurisdictions, especially in the labor context. In all but a handful of jurisdictions, a multinational organization will find that an arbitration agreement to govern employment disputes will be unenforceable. In Italy, for example, where 99% of employees are subject to one of several industry-wide collective bargaining
agreements, an arbitration agreement will only be permissible if it is provided for in the applicable collective bargaining agreement.

Problems often arise not only in the substantive provisions of a commission plan, but in the way it is distributed to employees. Often, a company will assume that because all company business is conducted in English and all employees understand English, the documents governing their compensation are also permitted to be in English. Not so. Several countries require compensation plans to be in the local language in order to be enforceable, such as France, Russia, and Turkey, to name a few. In other countries, such as Spain, while not mandatory it is often recommended to give employees a local language translation of the document when distributing it to the local workforce, in the event an authoritative local translation is needed when a dispute arises.

Pitfalls in Global Compensation Plans
Wary of offering anything to employees that could be construed as a binding contract, U.S. commission plans often contain language expressly denying that any language in the plan is intended to create a contract of employment. However, in many countries, such as the United Kingdom, due to the very nature of its subject matter, a commission plan will likely be deemed part of the contract of employment with the employee. In France, a compensation plan is likely to be regarded by a French court as an addendum to the employment contract because (i) it is linked to the performance of the employee’s job; and (ii) it deals with remuneration, which is a matter that French courts generally consider to be contractual by nature.

The designation of a plan as an addendum to an employment contract has serious consequences: the company would likely not be able to change the amount of variable compensation—or even the method of calculating it on a discretionary basis—in the absence of the employee’s explicit consent. Indeed, if the company retains the discretion to amend the plan, and amends it unfavorably (or terminates the plan unilaterally), a plan participant could claim that doing so constitutes a unilateral termination of contract and could seek not only payment of commissions allegedly generated under the Plan, but payment of damages for unfair termination as well. In those countries where a commission plan would not automatically be deemed to constitute an employment contract, it is still important that the plan not state that the company anticipates that its employees will achieve all of their performance objectives under the plan each year, lest such language creates a vested or acquired right to receive a commission payment at the full performance level.

Introducing commission plans in Japan has its own set of hurdles to overcome. For instance, companies sometimes desire to implement provisions that provide that under certain circumstances, advanced compensation will be reconciled and offset against a participant’s future compensation or base salary. However, Japan’s Labor Standards law prohibits offsetting against salary unless there is an agreement between the employer and a labor union to which the majority of its employees belong or, if such labor union does not exist, an employee representative who represents the majority of the employees. Further, any provision that requires the employee to object to the calculation of the commission within a certain period of time will likely run afoul of Japanese labor laws which provide that promised compensation must always be paid in full.
Brazil is another country that presents its own special set of challenges to the implementation of a commission plan. As a preliminary manner, even if sales are calculated in dollars, payment of commissions must be in the local currency, in order to avoid a claim by an employee that he was subject to a reduction in compensation due to fluctuations in the exchange rate. In addition, companies wishing to offer a “ramp up” period in their commission plan, whereby employees receive a fixed salary for several months before transitioning to fully commissioned salespersons, is fraught with peril, as a Brazilian court could find that even the initial payment of a fixed regular sum could result in a continuing obligation to pay a salary (notwithstanding the terms of the plan) until the employee’s separation of employment. Further, by operation of Brazilian law, a commission is deemed earned when the company accepts the sale; therefore, any limitations to the definition of when a commission is earned (such as a limitation providing that the commission is not earned until a particular trial or revocation period has expired) will be problematic.

Commission plans are challenging enough to implement in the U.S., but companies with a multinational presence must tread carefully before rolling out a new commission plan.
Tip of the Month

French Supreme Court Limits the Scope of SOX Whistleblowing Procedures

The Sarbanes Oxley Act requires covered companies to implement procedures for “the confidential, anonymous submission by employees of . . . concerns regarding questionable accounting or auditing controls” and mandates protection of whistleblowers from retaliation. Driven, at least in part, by this legal obligation, many companies have adopted broad codes of conduct, specifying a host of legitimate corporate concerns (for example, compliance with anti-bribery, antitrust, environmental, employment and other laws and regulations) and setting up hotlines to field anonymous complaints and tips that might lead to the discovery of wrongdoing within the company.

The implementation of these codes of conduct and whistleblower hotlines is expanding at the international level, but global companies must pay attention to local law requirements when rolling out these codes in foreign countries, where strict data protection laws, largely absent in the United States, may bar the company from inviting or processing anonymous allegations and charges.

A recent decision by the French Supreme Court provides a good illustration of issues that may be raised by local laws in the implementation of whistleblower procedures abroad. For the first time, the French Supreme Court addressed the issue of the validity of a code of conduct that had been implemented by a listed company (Dassault Systèmes, a French software company) in order to comply with the Sarbanes Oxley Act.

In its December 8, 2009 decision, the French Supreme Court overruled the decision of the Court of Appeal, which had declared the whistleblowing system implemented in the code of conduct of Dassault Systèmes compliant with the requirements imposed by the French data protection authority (CNIL) and therefore legal.

This was not the first time that a multinational company’s whistleblower policy had run afoul of French data protection law. In a landmark decision rendered in 2005, the CNIL declared that the broad and anonymous whistleblowing procedures of several companies, including McDonald’s Corporation, that had been adopted in order to implement the requirements of the Sarbanes Oxley Act, were contrary to French law and in particular to the French data protection law of January 6, 1978. The CNIL held that it had no fundamental objection to that kind of system, but it expressed the opinion that whistleblowing processes should not be transformed into an organized system of professional denouncement that could jeopardize the rights of the accused employees.
In order to reach a compromise between SOX requirements and French law, the CNIL issued a formal Délibération on December 8, 2005. The Délibération states that companies are authorized to roll out their whistleblowing systems provided they formally disclose the existence of the system and they comply with the requirements of the Délibération. In particular, Article 1 of the Délibération authorizes companies to adopt whistleblowing systems implemented in response to French legislative or regulatory internal control requirements (for example, regulations governing banking institutions) or the whistleblowing requirements of the Sarbanes Oxley Act. Article 3 of the Délibération provides that alleged wrongdoing that is not encompassed within these core areas may be covered by the whistleblowing system only if vital interests of the company or the physical or mental integrity of its employees is threatened.

If the scope of the whistleblowing process exceeds that authorized by the CNIL’s Délibération, the company is under the obligation to enter into a burdensome approval process with the CNIL, which requires the company to provide detailed disclosure concerning the information to be collected, the recipients of the information, and the end-purpose for which the data will be used. So far, the CNIL has never given its authorization when the scope of the whistleblowing system exceeds its Délibération.

In the case at hand, Dassault had implemented a whistleblowing system, and a trade union challenged the validity of the system on the grounds that the company should have sought a formal authorization from the CNIL, because its scope exceeded auditing and financial matters.

The Supreme Court ruled that the scope of Dassault’s code of conduct was too broad, in that it invited employees to report violations relating to more than just finance, accounting and anti-corruption matters, including intellectual property rights, confidentiality, conflict of interest, discrimination, and sexual or psychological harassment.

It ruled that the Dassault code of conduct’s whistleblowing scheme was invalid because it permitted whistleblowers to report on alleged violations of company policies other than those enumerated under Article 1 of the CNIL Délibération. According to the Court, a whistleblowing system that would allow complaints concerning other breaches of the code of conduct besides those listed must be authorized specifically by the CNIL on a case-by-case basis. Even though these breaches are material and might threaten the vital interest of the company or the physical or mental integrity of its members, the Court determined that case-by-case review was required.

The Supreme Court also found that Dassault’s Code of Business Conduct was defective because it did not expressly state that the individuals accused of wrongdoing had the right to access the information reported, and a right of correction where the information was not correct.

From a practical point of view, there is a strong likelihood that the CNIL will refuse to grant an authorization for a whistleblowing system exceeding the scope of the CNIL’s Délibération, so multinational companies may end up restricting their whistleblowing systems to the core areas specified in the CNIL’s Délibération of December 8, 2005 to avoid their procedures being invalidated.
Proskauer Rose LLP’s International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

For more information about this practice, click here or contact:

Bettina B. Plevan
212.969.3065 – bplevan@proskauer.com

Aaron J. Schindel
212.969.3090 – aschindel@proskauer.com

Howard Z. Robbins
212.969.3912 – hrobbins@proskauer.com

Yasmine Tarasewicz
33.1.53.05.60.18 – ytarasewicz@proskauer.com

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Jeremy M. Mittman
310.284.5634 – jmittman@proskauer.com

Allan H. Weitzman
561.995.4760 – awitzman@proskauer.com

Daniel Ornstein
44.20.7016.3687 – dornstein@proskauer.com

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.
Tip of the Month

Benefit Plans of Multinational Companies Must Take into Account the Employer’s Multinational Status

It’s not easy to be a multinational corporation, and one of the difficulties, it turns out, is remembering that the company has employees in many countries besides the U.S.. A multinational company acts at its peril when it forgets that its foreign affiliates are not governed by U.S. laws. That was the lesson delivered by the Seventh Circuit Court of Appeals last month to Eli Lilly and Company, the multinational pharmaceutical giant, in Bandak v. Eli Lilly and Co. Retirement Plan.

In 1995, Lilly transferred Stephen Bandak, who had been working in Lilly’s UK affiliate for nearly seventeen years, to the U.S. To protect Bandak from a loss of pension benefits as a result of his transfer, Lilly told him that under the company’s U.S. pension plan, the pension calculation would include his prior years of service in the UK. When Bandak retired in 2004, the company duly calculated his pension based on his full 26 years of service, yielding a monthly benefit of about $18,000 – then subtracted the $4,000 per month benefit he was receiving from the UK affiliate’s pension plan to prevent double-counting of those years he spent in the UK. Even with the offset, calculating the pension in this manner resulted in a much larger pension for Bandak than he would have received if the UK years had not been included in calculating the U.S. portion of his pension benefit. Bandak objected, however, insisting he was entitled to receive both the pension under the UK plan for his years of service in the UK and the full benefit under the U.S. plan, for his combined years of service in the UK and the U.S., without offset.

The offset to prevent double-counting is standard fare in U.S. defined benefit pension plans, and the Lilly plan included a specific provision requiring the offset of the benefit payable to an employee “under a qualified defined benefit plan maintained by [a Lilly] affiliate . . . if such benefit accrued during a Benefit Year of Service credited under [the U.S. plan].” The court, however, sided with Bandak. The problem with Lilly’s attempt to apply the offset provision in the U.S. plan is that the UK plan could not be considered a “qualified” defined benefit plan.

The plan itself did not contain a definition of a “qualified” plan. Judge Posner, writing for the court, held that this is a technical term that must have been used by the plan’s authors in its technical sense: “Lilly is a sophisticated enterprise,” Posner said, and “the plan document was undoubtedly drafted by lawyers specializing in ERISA, and those lawyers would, unless it were stated otherwise in the document, use technical legal terms in their technical legal sense.” Technically, he concluded, a “qualified” defined benefit
plan is a plan that qualifies for favorable tax treatment under the US Internal Revenue Code. The UK plan did not fit this definition.

It seems that Lilly, for all its sophistication and its array of lawyers steeped in ERISA, simply forgot, when drafting the offset provision in the US pension plan, that some employees would be transferring into the US plan with pension service under foreign plans that were not qualified under U.S. tax laws.

To make matters worse for Lilly, at least in this case, the U.S. plan was amended specifically to cure this defect. That amendment, however, was adopted two years after Bandak was transferred to the U.S., and by its terms only applied to employees coming under the U.S. plan after its adoption. The company’s contention that the U.S. plan was always understood to mean that service could not be counted twice under an affiliate plan and the U.S. plan received short shrift from the Seventh Circuit, both because the plan document failed to include such an arrangement and because there was no evidence in the record that the offset had been applied in that fashion.

The lesson for multinational employers is clear: When drafting benefit plans (and other HR documents), remember that multinational employers have employees in countries where U.S. laws do not apply.
Age Discrimination and Retirement in the UK

The UK implemented age discrimination legislation just over three years ago. During those three years, there has been a steady increase in the number of claims, rising from just under 3,000 in the year ending March 2008 to nearly 4,000 in the year ending March 2009.

This upward trend, especially in combination with some recent high-profile cases relating to retirement and an expectation that retirement ages will be increased, means that, more than ever, organizations with UK workforces need to be sure that their practices and policies are not discriminatory on the grounds of age.

Superficially, the prohibition on age discrimination sounds familiar to an American manager, but there are important differences between the UK and US laws.

Key concepts of UK age discrimination law

The main source of age discrimination law in the UK is the Employment Equality (Age) Regulations (the “Regulations”) which implements underlying European legislation. The UK is currently in the process of implementing a new piece of umbrella legislation — known as the Equality Bill — covering all forms of unlawful discrimination (e.g., sex, race, disability, sexual orientation, religion or belief, as well as age) and which currently is anticipated to take effect in October 2010. However, the expectation is that this new legislation will not substantively change the law relating to age discrimination.

The Regulations apply to all aspects of workplace relationships and vocational training, such as recruitment, terms and conditions of employment, promotions, training and dismissals.

Unlike the US ADEA, age discrimination in the UK does not just apply to those who are 40 and over. Rather, under UK law, people of any age can seek redress for age discrimination, and discrimination against an individual because he or she is younger than others also is prohibited.

UK law prohibits “direct” and “indirect” discrimination (what Americans refer to as disparate treatment and disparate impact), harassment and “victimisation” (retaliation). Discrimination is defined as treating a person less favorably because of his or her age, or applying a provision, criterion or practice that disadvantages those of a particular age,
where such treatment cannot be justified objectively as "a proportionate means of achieving a legitimate aim."

As well as being lawful where it can be objectively justified, age discrimination also is permissible in other limited circumstances.

One of the most important of these circumstances is mandatory retirement, which is generally prohibited under US law. Under UK law, it is lawful to require an employee to retire at the statutory “default retirement age” – currently 65 – provided that the employer complies with some relatively complex procedural requirements. The employer may establish a retirement age above age 65 or, if it can be justified objectively, below 65. However, if such a lower age cannot be justified objectively, any contract term permitting the employer to retire an employee at an age below 65 will be unenforceable against that particular employee.

Recent cases

In September of this year, the UK courts handed down a much anticipated judgment in a case commonly known as Heyday (officially, Age UK v. Secretary of State for Business, Innovation & Skills). Following a decision by the European Court of Justice in March 2009 holding that the UK law’s retirement provision was not prohibited by the EU’s antidiscrimination directive if it could be justified by important considerations of social policy, the Heyday case returned to the UK high court for a determination whether the government had such a justification. The plaintiffs argued that there should not be a default retirement age in the UK or, if there is one, it should be higher than 65. Ultimately, the challenge was not successful, and the default retirement age of 65 was deemed lawful. However, the court indicated that if a default retirement age of 65 had been introduced in 2009, rather than 2006, it would not have found it to be lawful, but accepted that, as a matter of law, the challenge to the Regulations had to be judged as of the date the law was adopted. In reaching this decision, the court relied on the fact that in the consultations on the Regulations before they came into force, the vast majority of those consulted supported 65 as the default retirement age. However, and highly significantly, the judge commented that he might have reached a different conclusion about the lawfulness of a retirement age of 65 if the government had not moved up its review of the Regulations to 2010 (from 2011). He also noted that he presently could not see how 65 could remain as the default retirement age after the review.

Another recent case is that of Seldon v Clarkson Wright & Jakes. This related to the forced retirement of Mr. Seldon at the age of 65 from the law firm in which he was a partner, in accordance with the partnership deed he had signed. (It is of note that in the case of partners, in contrast to employees, there is no ability to require people to retire when they reach 65 – the opposite of the situation in the US.) Mr. Seldon sued the firm for age discrimination. The firm defended the claim on the basis that the discrimination was objectively justified in pursuit of six aims. The case is being appealed currently, but in the decisions to date, the Employment Appeal Tribunal has accepted the principle that retention of associates, facilitating long-range planning, and maintaining collegiality by avoiding the need to review and criticize the performance of older partners are legitimate grounds for maintaining a mandatory retirement age, though they do not necessarily suffice to justify the selection of 65 as that age.
Practical tips

The Heyday decision, and its criticism of a default retirement age of 65, especially in the context of the pending review of the Regulations in 2010, makes it highly likely that the default retirement age in the UK will at least be increased beyond 65 and may be abolished entirely.

Accordingly, businesses with UK operations need to start giving thought now as to how a higher default retirement age (or even no default retirement age) would impact them, particularly in relation to issues such as costs, succession planning and retaining talent. In addition, if a higher default retirement age is unattractive, it will be increasingly important for a UK business to assess why, and ascertain whether or not there is objective justification for imposing a retirement age that is lower than the default retirement age.

In this regard, the Seldon and Heyday decisions provide helpful practical guidance for determining whether a lower retirement age can be justified objectively, which have general application beyond the issue of retirement:

- Any reason advanced should not itself be tainted by discriminatory factors or based on unsubstantiated stereotyping. In the Seldon case, one reason advanced to support compulsory retirement at 65 was that it maintained a turnover of partners, allowing any partner to aspire to become senior partner in due course. However, this argument was rejected as it made the age discriminatory assumption that the partner best suited to the senior partner role would be an older partner.

- Any reason put forward needs to be supported by evidence. A mere assertion, however plausible, risks being rejected by the courts if it is not backed by hard facts. In the Seldon case, it was accepted (somewhat controversially) that maintaining a congenial atmosphere by avoiding the need for performance management could, in principle, be a legitimate aim. However, no evidence was adduced that the performance of partners tailed off at age 65. It was held that no matter how laudable and legitimate the aim is in theory, a justification will fail if there is an insufficient basis for showing that the measure in question is a proportionate means of achieving it. While it was accepted that it is not necessary for a court to have “concrete evidence, neatly weighed, to support each assertion,” there at least needs to be some evidentiary basis for any assertion that is made. Notably, the court indicated that there might be such evidentiary support for a mandatory retirement age of 70.

- The fact that a measure has been consented to may assist in showing it can be justified. In Seldon, Mr. Seldon’s agreement to the retirement rules he was now challenging contributed to the court holding that they were justified. As such, consulting with employees or their representatives about policies, and having them agree to them, will assist in showing that the policies are justifiable. However, despite the ruling in Seldon, consent may be of greater assistance in cases where policies have been agreed after consultation with partners, senior employees or employee representative bodies. Where standard policies have been agreed with more junior employees without any consultation, the perception is that there is a greater inequality in bargaining positions such that any consent is less meaningful and therefore less influential as a means of justifying a policy.
The Heyday decision suggests that it would be a high-risk strategy for a company to rely on cost alone as a legitimate reason for justifying age discrimination. In other words, a business would be unable to justify a discriminatory practice, such as a lower retirement age, on the sole basis of cost. However, cost may be one factor that is relevant to determining whether a legitimate aim is proportionate. For example, if a business is reviewing a number of different retirement ages, the relative costs of the different options may be a factor that can be accounted for in order to show that the option chosen was a proportionate one.

More generally, when considering these issues, other tips to bear in mind in relation to justifying policies that have the potential to be discriminatory on the grounds of age include the following:

- where a policy has the potential to be age discriminatory, a failure to have considered properly its age discriminatory impact is likely to increase the difficulties of showing it is justified objectively;
- as far as possible, have a clear paper trail demonstrating the reasoning behind any policy or practice; for example, document and retain any analysis carried out in support of a policy;
- ensure that any reasons for a policy are coherent and consistent and will stand up to critical scrutiny; and
- if appropriate and practical, consult with workers about policies in order to obtain their agreement to such policies.

Government consultation
As part of the consultation process involved in reviewing the Regulations, the government has asked businesses and individuals to submit evidence on the default retirement age, including on: the operation of the default retirement age in practice; the reasons that businesses use mandatory retirement ages; the impact on businesses, individuals and the economy of raising or removing the default retirement age; the experience of businesses operating without a default retirement age; and how any costs of raising or removing the default retirement age may be mitigated and benefits realized. Any evidence must be submitted by 1 February 2010. We would be happy to assist in any submissions you may wish to make.
Proskauer Rose LLP’s International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

For more information about this practice, [click here](#) or contact:

**Bettina B. Plevan**  
212.969.3065 – bplevan@proskauer.com

**Aaron J. Schindel**  
212.969.3090 – aschindel@proskauer.com

**Howard Z. Robbins**  
212.969.3912 – hrobbins@proskauer.com

**Yasmine Tarasewicz**  
33.1.53.05.60.18 – ytarasewicz@proskauer.com

**Anthony J. Oncidi**  
310.284.5690 – aoncidi@proskauer.com

**Jeremy M. Mittman**  
310.284.5634 – jmittman@proskauer.com

**Allan H. Weitzman**  
561.995.4760 – awitzman@proskauer.com

**Daniel Ornstein**  
44.20.7016.3687 – dornstein@proskauer.com

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.