Non-competition clauses under Swiss labour law

I. Introduction

The use of non-competition clauses has substantially increased over the last decade. Such increase was triggered, on the one hand, by the 2008 economic crisis, which led employers to more actively protect their business and client base and, on the other hand, by the uniformisation of the Swiss civil procedure rules which, since 1st January 2011, permit the introduction of interim measures, not only before ordinary courts, but also before special courts, such as the Geneva Labour Court.

The purpose of the present article is to highlight the issues potentially faced by employers when inserting a non-competition clause into the employment agreements concluded with their employees, as well as the issues relating to the enforcement of such clause; this article will also touch upon the loopholes which an employee can take advantage of when bound by a non-competition clause. It does not, however, purport to provide an exhaustive summary of all aspects relating to non-competition clauses, or to dwell on criminal law issues in connection with that theme.

II. From the employer's perspective

a. The limitations of non-competition clauses

An employer wishing to protect his/her business from a competing activity conducted by one of his/her employees is entitled to introduce a non-competition clause into the employment agreement concluded with such employee. Such clause may force the employee to refrain from running a rival business for his own account or from working for or participating in such business, whether as partner or shareholder[1] (art. 340 of the Swiss Code of Obligations).

Given that such a clause is likely to have an adverse effect on the employee's economic freedom, it is subject to a number of limitations, relating notably to the type of business concerned, time limits and location. In principle, the effects of a non-competition clause may not exceed three years from the end of the employment relationship (art. 340a of the Swiss Code of Obligations). Failure to comply with these limitations, or the absence of such limitations does not, in principle, render the non-competition clause null and void.

That being said, a clause which would compel the employee to change his professional activity altogether should be deemed null and void in accordance with art. 20 of the Swiss Code of Obligations, in that it would be considered as contrary to morality[2]. It should be emphasized that such a clause would not be considered as valid even if it was paired with financial consideration provided by the employer, as such consideration is not a prerequisite to the validity of a non-competition clause under Swiss law.

b. Ex-parte interim measures and interim measures

An employer wishing to efficiently protect his/her business from an act of competition carried out by a former employee should provide for the termination of the competing business in the employment agreement itself (art. 340b al. 3 of the Swiss Code of Obligations). If the employment agreement does not contain such a provision – a situation frequently encountered in practice -, the employee will be in a position to conduct a competing business and the employer will, at best, be able to claim damages, or even the payment of a contractual penalty, following a lengthy judicial process, and will, in all likelihood, be deemed to have acted too late.

[1] Aubert Gabriel, Commentaire romand, 2nd édition, ad art. 340 CO, p. 2115, Bâle, 2012

[2] ATF 101 II 277

Therefore, an employer wishing to efficiently protect his/her business should provide, in the employment agreement itself, for the possibility to act urgently, by way of ex-parte interim measures and interim measures, in accordance with articles 261 and 265 of the Swiss Code of Civil Procedure. According to such provisions, the employer will be able to file a motion before the competent court, which in Geneva would be the Labour Court, with a view to obtaining a restraining order within a short period of time. In order to achieve this, he/she will have to demonstrate the existence of his/her right, without having to provide formal evidence thereof, and proceed swiftly, such a motion requiring urgent action. Swiss law and jurisprudence do not provide for a formal timeline as regards such a motion, the concept of emergency being relative and dependent on the circumstances of each case[3]. That being said, and on the basis of recent experience, a motion filed after a timeframe of ten days following the discovery of the relevant facts is likely to be considered as belated.

c. Contractual penalty

An employer suffering from the exercise of a competing activity on the part of his/her former employee may apply for the payment of damages through the introduction of ordinary judicial proceedings (art. 340b al. 1 of the Swiss Code of Obligations). In this context, he/she might not be able to quantify the amount of the damages suffered (the burden of proof being on him/her), all the more so due to the fact that the clients of the company are often the only entities in a position to confirm the exercise of a competing activity and that their intervention is, in most cases, incompatible with business imperatives.

In order to overcome this issue, the employer may require the insertion, into the employment agreement, of a provision compelling the employee to pay an amount corresponding to a contractual penalty, which would be payable in case of a breach of the non-competition clause. Although the parties are free to determine the amount of such penalty, it should not be forgotten that a judge may reduce the amount thereof, should it consider it excessive (art. 163 of the Swiss Code of Obligations). On this topic, the doctrine considers that the maximum amount to be agreed is the employee's gross annual salary[4]. The fact remains that a provision containing a contractual penalty, which is a priori excessive, continues to have a deterrent effect.

d. The difficulty to insert a non-competition clause

In practice, and as outlined above, the employer wishing to efficiently protect his/her business should insert, into the employment agreement to be entered into with his/her employee, a non-competition clause, reserve the right to act by means of ex-parte interim measures and interim measures, and include a contractual penalty clause in case of breach of the non-competition provision. Such a clause is likely to refrain the employee from joining another company, especially in a market where changes of employment are more frequent than in previous years.

The employer will not be in a position to validly introduce a non-competition clause via an internal reglement. Indeed, such a clause should be in written form in accordance with art. 12 et seq of the Swiss Code of Obligations, as requested by art. 340 of the Swiss Code of Obligations. In view of this, which solutions are available to an employer wishing to attract talented workers to make his business prosper, while limiting the risk of competition?

In our view, there are two options. The first option available would be to agree on notice periods which would be longer than the usual periods provided for in employment agreements. Indeed, as long as the employee is bound by his/her employment agreement and receives his/her salary, he/she remains under his/her duty of diligence and loyalty as provided for under art. 321a of the Swiss Code of Obligations. This provision stipulates, among other things (al. 3) that the employee must not perform any paid work for third parties in breach of his duty of loyalty. The introduction of longer

[3] SJ 1991 p. 113

[4] Federal Tribunal decision of 12 November 2012 in case 4A_466/2012

notice periods therefore represents an efficient protection for the employer, although it is associated with costs and does not refrain the employee from preparing to exercise a competing business, especially if such employee has been released from his/her obligation to work upon termination of the employment agreement[5].

The second option available would be to submit to the employee an addendum to his/her employment agreement shortly after the beginning of the employment relationship, with the risk that the employee refuses to sign such addendum and that the relationship of trust, which forms the basis of the employment agreement, is impaired by such behaviour.

III. From the employee's perspective

a. The invalidity of a non-competition clause

The employee who has agreed to the application of a non-competition clause in his employment agreement may claim the invalidity of such clause if the employment relationship does not allow him/her to have knowledge of the employer's clientele or manufacturing and trade secrets and if the use of such knowledge is not likely to cause the employer substantial harm (art. 340 al. 2 of the Swiss Code of Obligations). In order to examine the validity of a non-competition clause, one must consider the moment of actual employment, instead of the day on which the employee has started an employment relationship with a competing entity[6].

As regards the knowledge of the employer's clientele, it should be specified, from the outset, that such clientele includes individuals and entities who have established more or less long-term business relationships with the company concerned, and not individuals and entities who have merely expressed an interest in collaborating[7]. In the banking sector, and more specifically in the wealth management area, the distinction between clients and prospects is a determining factor.

Further, one should pay particular attention to the decision rendered in 2012 by the Federal Tribunal in relation to the validity of non-competition clauses having regard to the knowledge of the employer's clientele[8]. Indeed, in a decision relating to an employee in charge of human resources, our High Court held that, when the employee provides the client with a service based predominantly on the employee's personal capacities, to the extent that the client becomes more attached to such personal capacities than to the employer's identity, a non-competition clause based on the knowledge of the employer's clientele will not be deemed valid[9].

In 2015, the Labour Law section of the Geneva Court of Justice applied the above principle to a limited company active in brokerage and advisory services in the banking sector[10]. Thus, a wealth manager in a position to demonstrate that his employer's clients place greater emphasis on such manager's capacity than on the employer's identity should be released from his non-competition obligation. Such will no doubt be the case for a wealth manager to whom clients continue to entrust their portfolios despite several changes of employers.

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[5] According to constant case law, the Federal Tribunal has held that the employee is not in breach of his/her duty of loyalty when he/she devotes his/her entire time to the employer and prepares to exercise a competing activity by creating his/her own company, the business of which is only due to begin after termination of the employment agreement and as long as all other duties resulting from the employment agreement have been complied with (ATF 117 II 72 c. 4 = JT 1992 I 569; ATF 104 II 28 = JT 1978 I 514).

[6] Favre/ Munoz/ Tobler, The employment agreement, Code annoté, 2nd éd., ad art. 340 al. 2, p. 384, note 2.1, Lausanne, 2010

[7] Favre/ Munoz/ Tobler,o p. cit., note 2.8, p. 386

[8] Decision of 12 November 2012 in case 4A_466/2012; see also ATF 138 III 67

[9] Decision of 13 July 2007 in case 4C_100/2006 relating to a dentist

[10] Decision of the High Court of 21 December 2015 in case CAPH/218/2015

b. The absence of private interest to enforce the non-competition clause

According to art. 340c al. 1 of the Swiss Code of Obligations, the prohibition of competition is extinguished once the employer demonstrably no longer has a substantial interest in its continuation.

The courts have held that this had been the case for an employer who had let a long period of time lapse before invoking the non-competition clause, when he was fully aware of the fact that his former employee had undertaken a competing business. Some courts even went as far as to hold that, in this case, the employer's action was foreclosed, which could not have been the case had the delay been caused by the slow progress of the proceedings[11].

c. The termination of the non-competition clause following the termination of the employment agreement

Art. 340c al. 2 of the Swiss Code of Obligations also stipulates that the prohibition to compete is also extinguished if the employer terminates the employment relationship without the employee having given him/her any just cause to do so or if the employee terminates such relationship for good cause attributable to the employer. In light of the above provision, the motives for termination ought to be considered in a less restrictive manner than the motives of art. 337 of the Swiss Code of Obligations, in that it is not necessary to prove a breakdown of the trust relationship[12].

There is abundant case law on the enforcement of a non-competition clause following a termination of the employment relationship by the employee for just cause attributable to the employer. Thus, it was held for instance that a prohibition to compete was extinguished when the employee had terminated his/her employment agreement due to a work overload, when he had repeatedly complained about such overload and the employer had not tackled the issue[13]. This was also the case for an employee terminating his employment agreement following a substantial decrease of his/her remuneration[14] or for an employee terminating his employment agreement due to a deteriorating atmosphere on the workplace[15].

In the future, and considering the current banking environment in Switzerland, wealth managers could be tempted to justify the termination of their employment agreements by invoking a work overload, a constant increase in their administrative duties, the growing expectations in terms of compliance, and any other factors likely to impair the development of their client portfolio, or even an unclear middle to long term strategy on the part of their employers. Future case law will determine whether such motives constitute sufficient ground to justify the waiver of non-competition clauses in the employment agreements concerned.

d. Ex-parte interim measures, interim measures and protective letter

Although, in substance, a non-competition clause should be considered as invalid (see above, III lit. a) or of no further force and effect (see above, III lit. b and c), it cannot be excluded that the employee might be served with a prohibition to exercise an activity by way of ex-parte interim measures and interim measures.

In order to reduce this risk, an employee could take advantage of a mechanism referred to as the protective letter, governed by art. 270 of the Swiss Code of Civil Procedure. Such mechanism allows the employee to set out his/her position before any action is taken against him/her, if he/she has

[11] Favre/ Munoz/ Tobler, op. cit., ad art. 340c CO, note 1.1, p. 397
[12] Federal Tribunal decision of 26 May 1998 in SJ 1989 p. 689; ATF 92 II 31
[13] JAR 1990 p. 335
[14] JAR 2006 p. 562
[15] Favre/ Munoz/ Tobler, op. cit., ad art. 340c CO, p. 401

reasons to believe that judicial proceedings will be applied for and that a decision will be rendered without prior hearing. In such a case, the opposing party shall be served with the protective letter only if he/she initiates the relevant proceedings. If such is not the case, the protective letter becomes ineffective six months after it has been filed.

To the best of our knowledge, this institution is seldom used in practice, although it represents a powerful defence mechanism, especially when a non-competition clause binds two parties and when there are reasons to believe that the employee is likely to be heckled after terminating his/her employment agreement. It goes without saying that such institution could prove to be extremely useful in the wealth management world.

IV. Conclusion

Even though the employer has numerous ways of limiting competing activities on the part of his/her employee, such employee can resort to powerful tools in order to safeguard his/her professional future. In both instances, it is vital to put preventive measures in place.