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The Non-Competition Covenant: The Recent Supreme Court Decision on the Validity of the Employer's Option to Enforce It

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Italian statutory provisions on non-competition covenants

If an employer wishes to extend protection against competitive conduct even after the termination of an employment relationship, it must provide an ad hoc non-competition covenant within the employment contract or in a separate stand-alone document.

Pursuant to Article 2125 of the Italian Civil Code a non-competition covenant must comply with certain requirements, regarding prescribed form, limited object and proper consideration, aimed at compensating the employee for the restriction of his/her professional activity.

With regards to the non-competition indemnity, it should be pointed out that this may be paid in monthly instalments during the period of employment, or upon termination of the employment relationship as a lump sum. In the latter case, it is common practice that the non-competition covenant expressly reserves for the employer the option to choose whether or not to apply the covenant itself.

Case study

An employee signed an employment contract which provided a non-competition covenant, subject to the employer's choice whether or not to apply it, upon termination of their employment relationship. As

a result, the payment of the non-competition indemnity provided upon termination of the employment relationship would be fulfilled only in the case of the execution of the covenant.

In this instance, the employee communicated his resignation to his employer, remaining available to work during the applicable notice period, whilst stating that he would not perform any competitive activity afterwards.

Later, the employer informed the employee of his intention not to apply the non-competition covenant and, consequently, that the corresponding non-competition indemnity was not due.

The employee contested that, having assumed he was bound by the non-competition covenant, his ability to consider new jobs had been significantly restricted since he had not considered approaching any businesses that competed with his former employer. This restriction – he claimed – should be compensated with the previously agreed non-competition indemnity at the end of the notice period, in compliance with the statutory provisions of the contract, assuming that the employer decided not to use the non-competition covenant following the employee's resignation letter.

Specifically, the employee contended that, since the employer's request to work during the notice period was merely a possibility and that, consequently, the employer would easily have been able to pay the relevant indemnity in lieu of it, the exact time of the employer's decision about whether to enforce the non-competition covenant should be regarded as the time of the communication of the resignation by the employee, and not the effective date of the termination of the employment relationship.

The Labour Court of Appeal of Rome found that the non-competition indemnity was not due, as the employer had communicated its decision not to make use of the non-competition covenant when the termination of the employment relationship became effective, as expressly provided by the wording of the same covenant agreed by the two parties.

Supreme Court decision

In January 2013, Supreme Court Decision no. 212 overturned the Labour Court of Appeal's decision, referring to the following principle, which established that:

> *"the provision related to the termination of a non-competition covenant or agreement subject to the employer's choice is null and void because it violates Italian mandatory provisions. "*

The Supreme Court specified that the employee may be subject to an intentional restriction of his/her working capability only when this restriction is compensated for by the non-compensation indemnity, as stipulated in Article 2125 of the Italian Civil Code.

The employer does not have the power to act in a one-sided manner regarding the non-competition covenant after the communication of the termination of the employment relationship without paying the non-competition indemnity, because this violates the abovementioned statutory provision. This is because the significant and exceptional limitation to the free use of an employee's working capabilities in any professional activity he/she pursues is compatible only with the benefits afforded by a non-competition indemnity.

In the case study, on the basis of the non-competition terms, the employee based his potential resignation decision, and his plan for a new, non-competitive working activity, upon the termination of

the former employment relationship. However, afterwards he discovered that the employer did not intend to apply the non-competition covenant.

Since the parties' intentions under the non-competition covenant were clear, even if the effects of the same non-competition covenant were postponed until after the termination of the employment relationship, the employee relied on them when making plans about his future position, possibly refusing certain competitors' offers. He nevertheless did not receive any indemnity for these actions.

On this basis, the Supreme Court found that the part of the non-competition covenant which referred to the option available to the employer to decide whether or not to make use of it upon termination of the employment relationship was null and void. The Court explained that it would restrict the professional capability of the employee, with a consequent advantage for the employer, without providing for the payment of the relevant indemnity.

Conclusions

Considering that conflicting decisions exist on this subject, the Supreme Court's decision on this issue confirms past case law, which had a negative approach to the employer's options within a non-competition covenant.

In this scenario, with respect to future employment contracts, for those employers who believe that they are highly unlikely to enforce a non-competition covenant, it is advisable not to insert such a covenant at all.

On the contrary, if the employer decides to provide the non-competition covenant with the option in question, in order to avoid any possible risk that in a later judicial proceeding the same option is declared null and void in compliance with the aforementioned Supreme Court decision, it would be advisible to:

i. Restrict the application of the employer's option to cases of termination of the employment relationship by means of dismissal, consequently excluding the employee's resignation from the covenant; and (or at least)

ii. Communicate the employer's decision to not enforce the non-competition covenant as soon as possible, but at the latest within the dismissal letter or the preliminary mandatory communication introduced by the recent Reform of the Italian Labor Market (Law no. 98 of June 28, 2012).

For the same purpose, existing employment contracts providing the employer with the option of enforcing a non-competition covenant could be amended along the lines of the abovementioned point (i) and taking into account point (ii) - or by deleting the covenant entirely.

Finally, should any employer not wish to amend the employment contract and/or should any employee refuse to sign such an amendment, it is strongly recommended that the employer formally communicate in writing, as soon as possible, that he/she will not enforce the non-competition covenant.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.