

Non-competition clauses in Russian labour law | BY ANTON KLYACHIN

More and more Russian businessmen who created their own businesses are thinking of passing management and day-to-day control to professionals. In order to do so, they seek mechanisms ensuring liability of managers. An important issue in such circumstances is an obligation not to compete with the employer during the employment term and for a certain amount of time thereafter.

However, there is no certainty as to the legal power of such an obligation under Russian law. Many researchers and practitioners believe this is an unenforceable obligation since it: (i) violates the freedom of labour guaranteed by the Russian constitution; and (ii) is not provided in the Labour Code of the Russian Federation.

We shall distinguish between a non-competition obligation undertaken: (i) during the employment; and (ii) after the employment is over.

In the first case, according to the Labour Code of the Russian Federation, the employer may prohibit its employee from undertaking any out-of-hours work only if this employee is a general director or member of the management board – collegial managing body of a company. Any other employee is free to undertake an out-of-hours job. This regulation is obviously too imperative. In our opinion Russian law should be modified to include the right of the employer and the employee to agree on whether or not they are allowed to undertake a part-time position. For certain employees, especially those carrying commercial secrets of the employer, a secondary job would be restricted.

In the second case, when a non-compete obligation is undertaken for a certain time period after actual employment, the situation is even more restrictive. The courts tend to declare such provisions as violating Article 37 of the Constitution of the Russian Federation, which provides that “Everybody shall be free in applying his labour abilities and to choose occupation and profession”. The courts say that it is impossible to prohibit a person from employment since it would restrict his freedom to choose occupation.

In our view this approach is incorrect and the language of the Constitution should not be construed as prohibiting a non-competition clause.

First, the Constitution article is based on the norms of International law, in particular on Article 23 of the Universal Declaration of Human

Rights and Article 6 of the International Covenant on Economic, Social and Cultural Rights. These documents contain very similar language guaranteeing the freedom of labour. These documents are legally binding in most countries. However, in the majority of countries the freedom of labour is not being construed as a prohibition of non-competition undertakings.

Second, when construing the freedom of labour clause as a prohibition to undertake a non-competition obligation, we actually constrict the freedom of labour because it shall include the freedom to refuse from labour for a compensation.

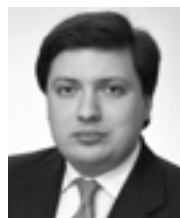
Third, restricting non-competition clauses we violate the freedom of contract, a basic principle of Russian civil law stipulated in Article 1 of the Russian Civil Code.

Finally, Russian antimonopoly law is prepared to construe breach of non-competition undertaking as an unfair competition. Russian law on commercial secrecy would probably consider a non-competition clause as a measure to ensure the confidentiality of commercial secrets of a company. Furthermore, the Russian Corporate Conduct Code, which is a recommendatory document issued by the government of the Russian Federation, directly recommends the inclusion of non-competition clauses in labour contracts for general directors of companies.

All these positions show that non-competition clauses would be readily adopted by Russian law.

To be accepted by Russian courts and practice, the concept of non-competition obligation should be regulated by the Labour Code. In our view, the regulation should include the following restrictions on non-competition obligations: (i) it shall be limited in time (usually for no longer than two to three years); (ii) it shall be limited in territory; (iii) it shall describe which companies are prohibited employers; (iv) it shall define what occupation is prohibited (e.g., employment, consultancy services, membership in board of directors, shareholding); and (v) it shall be compensated.

If these restrictions are honoured, we believe the non-competition clause would not infringe the employee’s rights and freedoms. At the same time, it would be of great benefit for the employer who will be able to protect its commercial secrets from competitors. ■



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