

This website uses cookies to offer you a better browsing experience. By using this website, you acknowledge and consent to our use of cookies.



HOME ([HTTPS://WWW.GVZH.COM.MT/](https://www.gvzh.com.mt/)) | ARTICLES ([HTTPS://WWW.GVZH.COM.MT/MALTA-PUBLICATIONS/](https://www.gvzh.com.mt/malta-publications/)) | **PROTECTING BUSINESS INTERESTS FOLLOWING TERMINATION OF EMPLOYEES**

EMPLOYMENT AND INDUSTRIAL RELATIONS LAW ([HTTPS://WWW.GVZH.COM.MT/MALTA-LAW/EMPLOYMENT-INDUSTRIAL-RELATIONS/](https://www.gvzh.com.mt/malta-law/employment-industrial-relations/)) | DEC 05, 2018

PROTECTING BUSINESS INTERESTS FOLLOWING TERMINATION OF EMPLOYEES

Authors: Dr. Ann Bugeja (<https://www.gvzh.com.mt/about-us/the-team/ann-bugeja/>), Mr. Alejandro Mifsud and Ms. Francesca Hili

In today's world, one of a businesses' most valuable asset would be its know-how, client base and trade secrets, all of which are becoming increasingly more difficult to protect with the rate of employment turnover of 2018.

In fact, it has become popular for employers to insert restraint of trade clauses in employment contracts (<https://www.gvzh.com.mt/malta-law/employment-industrial-relations/conditions-of-employment/>) to safeguard their business interests by restricting an employee from exercising his/her trade or profession after the termination of the employment (<https://www.gvzh.com.mt/malta-law/employment-industrial-relations/dismissal/>). These clauses are not specifically regulated in terms of Maltese law and thus their enforceability has been cast to the interpretation of the Maltese Courts through case law.

Restraint of trade clauses are also sometimes referred to as non-compete clauses, non-competition clauses or non-solicitation clauses. A distinction may be made between non-competition clauses and non-solicitation clauses which are both restrictive clauses in their nature.

Non-competition clauses refer to a restriction preventing an employee from competing directly against his/her employer whilst **non-solicitation clauses** refer to a restriction preventing an employee from contacting and soliciting the employer's clients and/or employees. Such restraint of trade clauses are also usually tied up with a provision for pre-liquidated damages.

Maltese Courts have held that restrictive clauses are to be considered null and void unless the restrictions are deemed reasonable. For it to be deemed reasonable, it must protect the interests of both the employer and the employee equally. On the one hand, an employee who has specialised in a particular sector is not legitimately expected to be restricted from working in the same industry as this would inhibit the employee's capability to make a living and on the other hand, an employer may have valid reasons for wanting to protect business interests following the termination of any employee.

Maltese Courts have affirmed through various case law that in order for a restrictive clause to be regarded as enforceable, it would need to meet the following criteria:

- The restrictive clause has to be made in writing;
- The restriction must be necessary in order to protect the employer's legitimate interests;
- The restricted employee has to be compensated adequately for respecting a restrictive clause following the termination of employment; and
- The clause has to be certain as regards object, time and place.

In order to ensure that a restrictive clause is enforceable, a clause must cater for a specified amount of time and may not perpetually bar an employee from seeking to establish a commercial or working relationship with such clients and/or employees. Taking a European comparative perspective, it seems as if there is a clear divide in legislation with respect to this particular matter. In jurisdictions such as Italy, Germany and France, it is clear that indicating a specific geographical limitation is a mandatory requirement, however in other jurisdictions such as Poland and The Netherlands, it seems as if such limitation is not required. However, there seems to be a shared consensus that the Courts have the power to mitigate the geographical scope if it is seen to exceed the area of the employer's present or planned activities, that is the company's local area of operation. UK courts are likely to consider whether there is a link between the interest to be protected and the specific geographic area, the size, nature and density of the population and where the employee's activities take place. An overview of local case law suggests that the Maltese Courts, despite not having any legislation to base their decisions on, [unlike the aforementioned jurisdictions (Italy, Germany and France)], tend to evaluate each situation on a case-by-case basis, therefore having similar to the reasoning to that of the UK courts.

Maltese judges have also stated that if an ex-employee breaches a restrictive clause, the onus is on the employer to prove that damage which can be identified, evidenced and quantified has been incurred. If this has been satisfied, the Courts are entitled to award compensation to the employers normally resulting from the penalty included in the restrictive clause foreseen upon drafting the employment contract.

The Maltese Courts, when analysing enforceability, have often referred to and quoted Norman Selwyn and his book 'Law of Employment'. They quoted and applied Selwyn's writing that "*a covenant can restrict the right to solicit or endeavour to entice away former customers, or to have post-employment dealing such customers, but it is likely that such clauses should be limited to customers with whom the ex-employee had some dealings for otherwise the restraint is likely to be regarded as to be designed to prevent competition. A restrictive covenant that prevents an employee from soliciting or accepting business from his former employer's customers will be unenforceable if it extends to customers with whom the employee personally had no dealings*".^[1] Thus, for a non-competition clause to be enforceable under Maltese law, the Courts have held that it should be restricted only to those clients which the employee had dealt with personally during the term of his employment.

The Courts have also quoted Selwyn in saying that “*a covenant which purports to restrict the right of an employee to solicit or entice other employees to leave the employer’s employment and to work for another employer is generally void.*”^[2] This entails that whilst the employer is entitled to certain protection against former employees concerning existing customers, any clauses relating to non-solicitation or the enticing away of clients should be limited to clients with whom the former employee had dealings with during the employment period. This shows that, for a non-solicitation clause to be enforceable and not designed to prevent fair competition under Maltese law, it must be reasonable and there must be a justified reason for the restriction placed on the ex-employee. Reasonableness will include such factors as the post fulfilled by an employee, the nature of employee’s work and what information s/he had access to during the employment. A non-solicitation clause may not be too far reaching and must be in favour of free competition.

With regards to penalties imposed by the Courts, there seems to be no particular pattern which the Court follows. These penalties are given on a case-by-case basis and tend to depend on the amount agreed upon by the employer and the employee in the employment contract in case of a breach by either party.

The Maltese Parliament is currently in discussions to transpose Directive 2016/943/EU on the protection of undisclosed know-how and business information against the unlawful acquisition, use and disclosure into the Trade Secrets Act, which whilst not directly related to restraint of trade clauses, will result in employment secrets of a commercial value being protected by law. In the event that the employee is not to be restrained or only partially restrained by any particular clause relating to post-contractual, non-competition agreements between employers and employees, the Trade Secrets Act is going to dictate that any trade secrets are not to be disclosed under any particular circumstance unless they are not compliant with the definition of a trade secret as found in Article 2 of the same Act or else, where over time the information in question becomes generally known or readily accessible to, persons within the circles that normally deal with that kind of information. Strict sanctions are in place for non-compliance with any of the above measures, which penalties will amount to a fine of not less than five hundred euro (€500) but not more than one hundred fifty thousand euro (€150,000).

The present situation in Malta measures up to there being no legislation regulating restraint of trade clauses and thus it falls in the hands of the Courts to decide upon any issues which arise regarding the enforceability of any contested restraint of trade clauses. One must keep in mind that the doctrine of precedent does not apply in Malta and this means that the Courts are not bound to base themselves on previous case law and this results in there being some uncertainty as to the parameters within which restraint of trade clauses in Malta may be drafted and enforced.

[1] Cutrico Services Limited vs Josef Penza, 23rd February 2017, (524/2014)

[2] First United Insurance Brokers Limited vs Karl Farrugia Wismayer, 30th November 2010, (765/2009)

For further information about how GVZH Advocates can help you with your employment or industrial relations (<https://www.gvzh.com.mt/malta-law/employment-industrial-relations/>) legal requirements, kindly contact us on employment@gvzh.com.mt (<mailto:employment@gvzh.com.mt>).

KEY CONTACTS

JOSEPH J. VELLA

[VIEW PROFILE > \(HTTPS://WWW.GVZH.COM.MT/ABOUT-US/LAWYERS/JOSEPH-J-VELLA/\)](https://www.gvzh.com.mt/about-us/lawyers/joseph-j-vela/)[DOWNLOAD VCARD > \(HTTPS://WWW.GVZH.COM.MT/APP/UPLOADS/2016/03/JOSEPH-J-VELLA.VCF\)](https://www.gvzh.com.mt/app/uploads/2016/03/joseph-j-vela.vcf)

KARL BRIFFA

[VIEW PROFILE > \(HTTPS://WWW.GVZH.COM.MT/ABOUT-US/LAWYERS/KARL-BRIFFA/\)](https://www.gvzh.com.mt/about-us/lawyers/karl-briffa/)[DOWNLOAD VCARD > \(HTTPS://WWW.GVZH.COM.MT/APP/UPLOADS/2016/07/KARL-BRIFFA.VCF\)](https://www.gvzh.com.mt/app/uploads/2016/07/karl-briffa.vcf)

CYNTHIA PORTELLI

[VIEW PROFILE > \(HTTPS://WWW.GVZH.COM.MT/ABOUT-US/LAWYERS/CYNTHIA-PORTELLI/\)](https://www.gvzh.com.mt/about-us/lawyers/cynthia-portelli/)[DOWNLOAD VCARD > \(HTTPS://WWW.GVZH.COM.MT/APP/UPLOADS/2016/10/CYNTHIA-PORTELLI.VCF\)](https://www.gvzh.com.mt/app/uploads/2016/10/cynthia-portelli.vcf)