# Restrictive covenants governed by foreign law

*Duarte v Black & Decker Corporation* [2007] EWHC 2740 (QB); [2008] All ER (Comm) 401

By Mark Vinall

Employers frequently seek to protect their businesses by including non-compete, non-dealing or non-solicitation covenants in their employees' contracts. In English law, such covenants are subject to the doctrine of restraint of trade, and are enforceable only if they are no wider than reasonably necessary for the protection of the employer's legitimate business interests. But in today's globalised marketplace, the English courts may be asked to enforce restrictive covenants in contracts governed by a law other than English law, which may balance the competing interests of freedom of contract and freedom of trade in a different way. How should English courts deal with such contracts?

This problem was recently considered by Mr Justice Field in a case involving Mr Duarte, a senior manager at Black & Decker who had been "poached" by a competitor. He had had access to highly confidential information about product development. He had signed a long-term incentive plan ("LTIP") agreement which contained a two-year restriction against working for ten named competitors and their associated companies, which included Mr Duarte's new employer. The LTIP agreement was stated to be governed by the laws of the State of Maryland.

By s.2(1) of the Contracts (Applicable Law) Act 1990, the question of which law to apply to the restrictive covenants had to be determined in accordance with the Rome Convention 1980. Under article 3(1) of the Convention the parties' choice of Maryland law had to be given effect unless one of various specified exceptions applied. Mr Duarte relied on two exceptions: article 6 (which makes special provision for contracts of employment) and article 16 (public policy).

Article 6

Article 6 provides that, in a contract of employment, a choice of law cannot deprive the employee of the protection of the "mandatory rules" of the law of the country where he works. Although the LTIP agreement was a separate document, the judge held that it was to be regarded as a contract of employment for the purpose of article 6 (applying the reasoning in *Samengo-Turner v Marsh* [2007] EWCA Civ 773). However, the judge went on to decide that "mandatory rules" in article 6 referred only to "specific provisions such as those in the Employment Rights Act 1996 and the Factories Acts whose overriding purpose is to protect employees", and did not cover the English law of restraint of trade, which was part of the general law of contract. Article 6 did not therefore displace the parties' choice of Maryland law.

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Article 16

Article 16 allows a court to refuse to apply the law chosen by the parties "if such application is manifestly incompatible with the public policy ("ordre public") of the forum". The judge held that, since the doctrine of restraint of trade was an aspect of English public policy, article 16 did apply: "When Mr Duarte entered into the covenants, he was working in England under a contract of employment which…was governed by English law. The job he wishes to take up…is a job in England whose terms are also governed by English law. The public policy of this country…is therefore directly engaged if the covenants are enforced by an English court applying Maryland law when they would be unenforceable under English law. In other words, the result of the application of the specified law would be 'manifestly' incompatible with the public policy of the forum."

In the event, Mr Justice Field's conclusions on the Rome Convention did not affect the result of the case, since he held that the particular covenants would not have been enforceable even under Maryland law. However, his conclusion on article 16 of the Convention is of general application: the English courts will not enforce a restrictive covenant which is contrary to the English doctrine of restraint of trade even where there is an express choice of foreign law. The lesson for employers is that rolling out restrictive covenants in standard form to employees in a number of different countries is likely to be risky. The best way of producing a covenant which is likely to be enforceable in England is to have it drafted by specialist English lawyers.

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