[TERMINATION OF EMPLOYMENT CONTRACT]

Waiving a non-compete clause on time in case of termination of the contract by mutually agreed contractual termination

(Cass., soc. , 4 février 2015, 13-25451)

The collective bargaining agreement of the engineers and executives of the metalworking industry provides that a non-compete clause must be waived in the document that formalizes the mutually agreed contractual termination. Such provision is valid and any later waiver is null and void, holds the French supreme court.

Yet another case on the adequate timing for the employer to waive a non-compete clause (see NomoSocial Feb. 2015)! This case has two specificities: firstly, it concerns a case of mutually agreed contractual termination and, secondly, the employment relationship was governed by a collective bargaining agreement – CBA of the engineers and executives of the metalworking industry - providing that in such case, the waiver had to be mentioned in the termination document.

This configuration is rather unusual. Indeed, the timing of the waiver is commonly dealt with in the sole cases of resignation and dismissal (or redundancy): the date of the notice being the starting point of the period during which the employer can waive the clause.

Furthermore, as it is fairly common that neither the contract nor the collective bargaining agreement deal with the mutually agreed contractual termination, the French supreme court holds that the waiving period begins upon the effective termination date – one should remember that the effective termination date is roughly a month and a half after parties have signed the termination document (i.e.: after the cooling-off period and the validation period by the administration).

In the present case, the parties had entered into a mutually agreed contractual termination which became effective on May 3rd, 2011. The ex-employee was bound by a 3 years non-compete clause. This duration thus exceeded the 1 year (renewable once) maximum duration provided by the collective bargaining agreement.

It seems that the employer faced some difficulties – it was later put into compulsory liquidation – and tried to reduce the amount owed to the employee: on June 23rd, 2011 the ex-employer notified that it did not intend to "renew" the non-compete clause for the following years. This attempt to make the duration of the collective bargaining agreement prevail over the contract was meant to put an end to the non-compete duty after the first one-year period.

However, for the abovementioned reasons, the Court refused to consider valid this late waiver and nonetheless applied the 3 years duration to compute the indemnity owed to the employee.

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