

International enforcement of restrictive covenants – a UK perspective

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Agenda

- UK law on restrictive covenants
- Samengo-Turner and others v J&H Marsh & McLennan
- Duarte v Black & Decker
- What have we learned?

A possible scenario

- Danish company hires a Danish national to work in Denmark
- Employment contract with non-solicitation of clients clause
- Contract governed by Danish law and Danish courts have jurisdiction
- Employee relocated to UK, contract not amended
- Two years later employee resigns, stays in the UK and starts to solicit ex-employer's clients in contravention of his employment contract
- Danish company wants to take action
- What happens next? Where would Danish company sue and under what law?
- What is the likely outcome?

UK law – a few basics

- Restrictions on an employee's activities after termination will be void and contrary to public policy, unless:
 - the employer has a legitimate proprietary interest to protect
 - the protection sought is no more than is reasonable in the circumstances
- No requirement to make payment

Protectable legitimate interests

- Trade connections (with suppliers or customers)
- Trade secrets and other confidential information
- Stability of the employer's workforce

Common types of restrictive covenants

- Non-compete
- Non-solicitation of clients
- Non-dealing with clients
- Non-solicitation or non-employment of employees

Non-competition covenants

- Protects confidential information and trade connections
- Harder to enforce
- Would other forms of restraint suffice?
- Non-solicitation clauses difficult to police
- Duration of restraint

Non-solicitation of clients

- Hard to police
- Only apply to existing/prospective customers
- Need employee/customer contact/influence
- Duration of restraint

Non-dealing with clients

- Seeks to address problems with non-solicitation clauses
- Irrelevant whether client initiated contact – i.e. there is no need for solicitation
- Otherwise, similar considerations to non-solicitation clause

Non-solicitation of employees

- Protects employer's investment in recruiting and training its workforce
- Typically limit to employees of certain seniority or class
- Again, problems of proof

Non-employment of employees

- Conflicting decisions regarding enforceability
- Offensive to public policy
- Has ex-employee acquired knowledge of remuneration, employment terms, skills etc of colleagues?

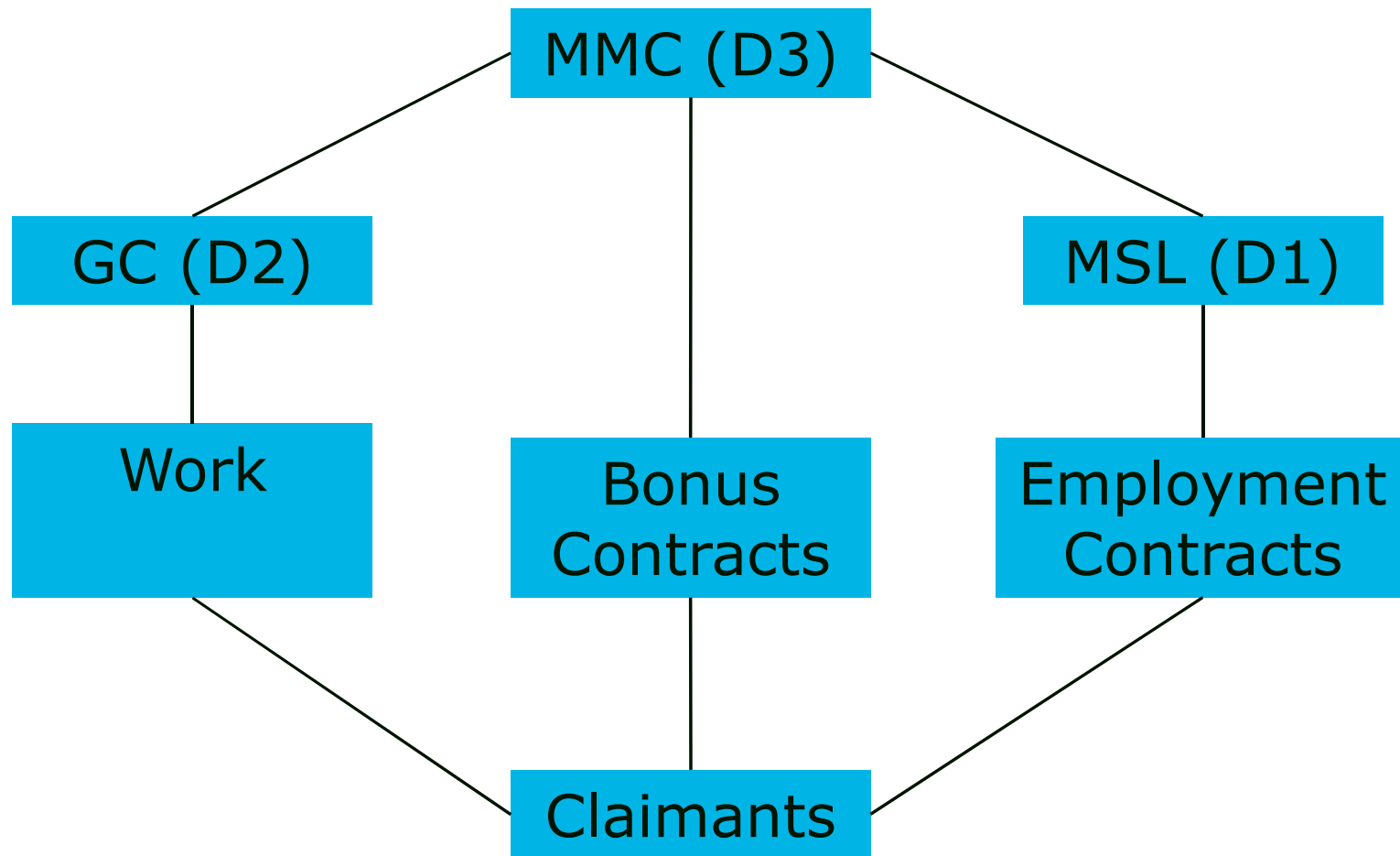
Recent trends

- In favour of employers – courts demonstrating a willingness to enforce – clauses still need to be tightly drafted
- Status and behaviour of the employee relevant?

Samengo-Turner: the facts

- Samengo-Turner & Ors v J&H Marsh & McLennan (Services) Ltd & Ors
- Reinsurance brokers employed under contract of employment by English subsidiary (MSL) of NY-based group of companies (MMC, GC), worked for GC in London
- Bonus contract:
 - Administered by MMC in NY
 - Repayment clause if employee engaged in detrimental activity
 - Cooperation clause: provide info to determine compliance with duties
 - NY law and jurisdiction clauses
- Employees gave notice of termination to join a competitor

Samengo-Turner: the facts



Samengo-Turner

- New York litigation:
 - NY companies (MMC,GC) sued employees under bonus contracts to enforce repayment and cooperation provisions
 - NY court made orders and rejected employees' jurisdiction challenge
- UK anti-suit litigation:
 - Employees sued MM companies based on section 5 of Brussels I Regulation
 - Court of Appeal granted final anti-suit injunction

Samengo-Turner: the key anti-suit questions

- Did the matter relate to individual contracts of employment (Art 18)?
- Were the NY proceedings brought by the employer (Art 20)?
- What was the effect of the NY jurisdiction clause (Art 21)?
- Should an anti-suit injunction be granted?

Duarte v Black & Decker Corporation

- Senior employee of B&D Europe, subsidiary of large corporation based in Maryland, US
- Based in England, contract of employment governed by English law
- B&D's Long-Term Incentive (LTIP):
 - Separate contract
 - Maryland law clause
 - 2 year restriction covenants – mustn't:
 - Accept employment with 10 named competitors
 - Poach B&D's employees
- Duarte received offer from 1 of the 10 competitors
- Duarte issued proceedings in UK for declaration of unenforceability of covenants

Duarte: key issues

- Was the LTIP a contract of employment?
- Is English law of restraint of trade a “mandatory rule” within meaning of Article 6 of Rome Convention?
- Was Maryland law manifestly incompatible with public policy of English law of restraint of trade (Article 16)?

Samengo-Turner and Duarte conclusions

- Jurisdiction
 - Employee domiciled in a MS has a right to be sued only where he is domiciled – can be enforced by anti-suit injunction against employer who commences proceedings in a non-MS
- Applicable law
 - Proceedings brought by employer in the UK to enforce restrictive covenants expressly governed by foreign law will be subject to English law of restraint of trade
- Any thoughts on the earlier scenario?

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