

90-minutes webinar



Post-Termination Clauses: Enforceability and Best Drafting Practices

Speaker: Dr Clyde Bonnici
30th April, 2025

In collaboration with:



Agenda

1. General Principles;
2. Trade Secrets and Confidential Information;
3. Existing Customers and Connections;
4. Enticing Existing Employees;
5. Working for Competitors & Garden Leave;
6. Conclusion.



General Principles

- **Faith, Confidence, and Trust:**
 - During employment, the relationship between the employer and the employee is one of trust, confidence and faith.
 - Due to this acquired trust, confidence and faith, employment contracts often envisage conditions which regulate the activity of the employee **after** termination of employment, so that such trust, confidence and faith is not betrayed.
 - The Maltese Courts have held that the higher the position of the employee, the more protection the employer is to be afforded – **Attilio Vassallo Cesareo et vs Anthony Cilia Pisani (CA)** (3.3.2007).



General Principles

- **Post-Termination Clauses:**
 - While they have been the subject of continued debate, with respect to their strength and validity, these clauses are not necessarily considered to restrain commerce or the freedom of the parties to contract agreement.
 - Such clauses are not prohibited in the Maltese legal system, as long as certain rules established by case law are followed – **Delvetro Limited vs Kishore Kumar Neduru (FH) (26.9.2024)**.



General Principles

- **The law must strike a delicate balance:**
 - On the one hand, an employee has a right to earn his living, and knowledge and skills obtained in his former employment will undoubtedly enable him to continue to do so;
 - On the other hand, an employer is entitled to limited protection against an employee who may well be seeking to compete.
- **Four Types of Post-Termination Clauses:**
 - There are four legitimate interests in respect of which the employer is entitled to limited protection, namely:
 - a) Trade secrets and confidential information;
 - b) Existing customers and connections
 - c) Working for competitors;
 - d) Enticing existing employees. – **FirstUnited Insurance Brokers Limited vs Karl Farrugia Wismayer** (FH) (30.10.2010).



General Principles

- **Contract is law between the Parties:**
 - Article 992 of the Maltese Civil Code: contracts legally entered into shall have the force of law for the contracting parties.
 - Contractual terms must be respected since they reflect the will of the parties at the moment of signing of the contract. – **Mark Bugeja et vs Marvin Zammit** (COM) (15.1.2020).
 - Thus, when an express pact in a contract is violated, therefore, this constitutes a contractual default which carries compensation through payment of damages or penalties stipulated – **Attilio Vassallo Cesareo et vs Anthony Cilia Pisani** (CA) (3.3.2007).



General Principles

- **Challengeable under Public Policy:**
 - Case-law has taught us that in certain circumstances, post-employment restraints can be considered unenforceable since they are done in restraint of trade – **Delvetro Limited vs Kishore Kumar Neduru** (FH) (26.9.2024).
 - There is no specific provision of codified law in Malta about clauses in restraint of trade.
 - If clauses in restraint of trade may be impugned at all – and they certainly can in deserving cases – the heading under which an exercise of this sort may be attempted is Article 985 of the Civil Code, which provides that things which are impossible, or prohibited by law, or contrary to morality, or to public policy, may not be the subject of a contract. – **Joseph Xerri noe vs Brian Clarke** (Comm. Court) (31.7.1969).
 - Can be raised by the Court of its own motion – **Mark Bugeja et vs Geoffrey Camilleri** (CA) (13.2.2014).



General Principles

- **Strict Interpretation:**

- Such clauses are to be interpreted restrictively, in the interests of the employee – **Attilio Vassallo Cesareo et vs Anthony Cilia Pisani** (CA) (3.3.2007);

- **Presumption of illegality:**

- All restraints of trade, in the absence of justifying circumstances, are contrary to public policy and therefore void;
 - It is a question of law for the decision of the Court whether the special circumstances adduced do or do not justify the restraint; and if a restraint is not justified, the Court will, if necessary, take the point, since it relates to a matter of public policy, and the Court does not enforce agreements which are contrary to public policy;
 - A restraint can only be justified if it is reasonable (a) in the interests of the contracting parties, and (b) in the interests of the public;
 - The onus of showing that a restraint is reasonable between the parties rests upon the Employer. The onus of showing that, notwithstanding that a covenant is reasonable between the parties, it is nevertheless injurious to the public interest and therefore void, rests upon the Employee. – **Attilio Vassallo Cesareo et vs Anthony Cilia Pisani** (CA) (3.3.2007)

General Principles

- **Analysed on a Case-by-case basis:**
 - The Court must always consider the particular facts of every case, such that the restrictions in question are read in the context of these facts. The Court is to consider, amongst others:
 - The respective positions of the employee and the employer;
 - The nature and needs of the business, and the nature of the profession, art, or skill of the employee;
 - The salary of the employee;
 - The period of effective service;
 - The scope, duration, and entity of the restriction imposed and the effect this leaves on the parties, particularly on the employee. – **Delvetro Limited vs Kishore Kumar Neduru (FH)** (26.9.2024).



TRADE SECRETS AND CONFIDENTIAL INFORMATION

90-minutes webinar



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Case Law – Confidential Information

- **Alberta Fire and Security Equipment Ltd et vs Mark Mifsud (FH) (7.1.2014):**
 - The case related to a clause in the employment contract which obliged the employee to treat *'all information, documentation and materials obtained in the course of his employment (relating to the employer or to its subsidiary or associated companies) in strict confidence'*, and prohibiting him from taking actions to *'disclose or divulge any such information, documentation and materials to third parties'*, envisaging penalties in case of default.
 - The Court held that insofar as this clause also extended to companies allegedly associated with the employer, with whom the employee had no ties, such clause was contrary to public order.



Case Law – Confidential Information

- **Antonio Camilleri vs Salvatore Sicurella (CA) (26.5.2021):**
 - The employee allegedly breached a clause in his contract which provided that at all times, both during employment and after termination, the employee could not reveal:
 - *“any information and/or data, commercially sensitive or otherwise, as may pertain to the Employer and his activities and which may come to his knowledge in the course of his employment. The Employee shall similarly not make use of any such information and/or data for his own personal advantage or that of third parties.”*
 - This under a penalty of €2,000 of pre-liquidated damages.



Case Law – Confidential Information

- **Antonio Camilleri vs Salvatore Sicurella (CA) (26.5.2021):**
 - The Court held that a confidentiality clause is considered unreasonable where it:
 - Includes information that is not confidential and the employee can easily remember and use freely; and
 - Includes a restriction that is not limited by a definite period;
 - The clause in question precluded the disclosure of any sort of information, including therefore information that is not confidential or commercially sensitive.
 - Moreover, the clause was not limited in time and applied indefinitely.
 - Hence, the clause was considered unenforceable.



Case Law – Confidential Information

- **Key Drafting Takeaways:**
 - Confidentiality Clauses should not extend to companies allegedly associated with the employer, with whom the employee had no ties, such clause was contrary to public order.
 - They must be strictly limited to information which is confidential and of a commercially sensitive nature.
 - They must be limited in time and not indefinite.



EXISTING CUSTOMERS AND CONNECTIONS

90-minutes webinar



Case Law – Solicitation of Clients

- **FirstUnited Insurance Brokers Limited vs Karl Farrugia Wismayer (FH) (30.10.2010):**
 - Defendant was employed with the plaintiff company as a Development Manager, from which position he had resigned.
 - Plaintiff company alleged a breach of clause 13 of his employment contract, which stated the following:
 - *(a) Should the employment of the Employee be terminated for any reason by the Employer or the Employee, the Employee undertakes as of now that for a period of **twenty-four months** after the termination of his employment, he shall not for his account or for any other person, firm or company, solicit or interfere or endeavour to **entice away from the Employer** any person who may be employed with the Employer or **may be a client of the Employer**.*
 - *(b) In the event that a breach of sub-clause 12(a) above, the employee agrees that he will be liable for damages, which are being pre-agreed now by the parties, in the sum of **Lm 5000** (five thousand Maltese Liri) for every such breach.*

Case Law – Solicitation of Clients

- **FirstUnited Insurance Brokers Limited vs Karl Farrugia Wismayer (FH) (30.10.2010):**
 - The Court quoted English author Selwyn to the following effect:
 - *19.32 An employer is entitled to have a limited protection against an ex-employee dealing with existing customers for this is part of the goodwill which has been built up over the years. 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 (Marley Tile Co Ltd vs Johnson – 1982 IRLR 75, CA)*
 - *19.33 ... 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.*



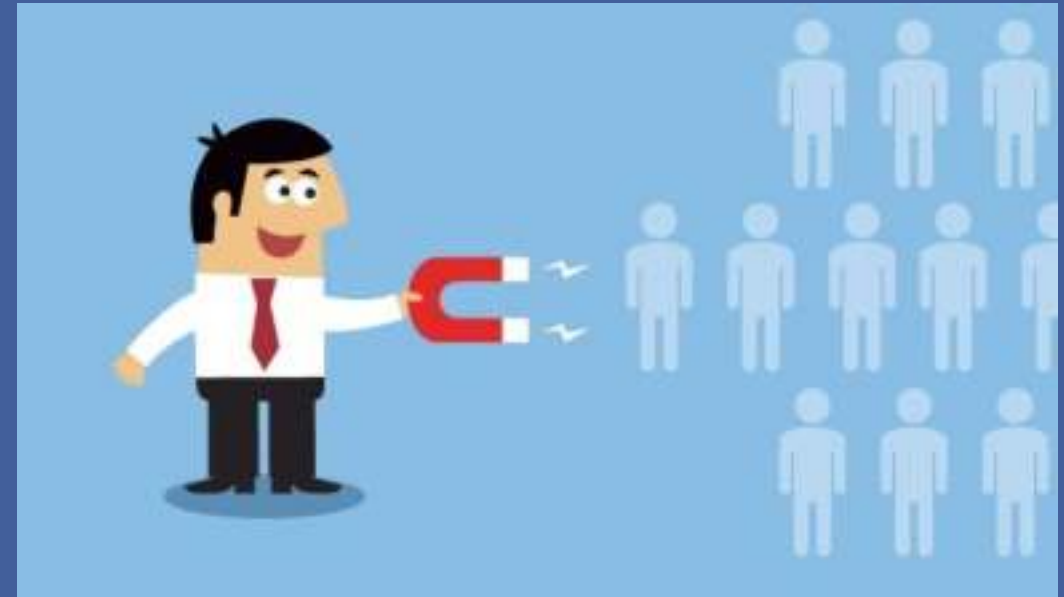
Case Law – Solicitation of Clients

- **FirstUnited Insurance Brokers Limited vs Karl Farrugia Wismayer (FH) (30.10.2010):**
 - The Court held that the clause, as drafted, was too wide.
 - The Employer was bound to ensure the effectiveness of this clause by being specific and correlating this clause to the clients with whom the employee had had a working relationship in the interests of the company.
 - Hence, insofar as the clause concerned solicitation of clients, the clause was deemed to be without effect.



Case Law – Solicitation of Clients

- Eurosupplies Limited vs Paul Tihn (CA) (30.06.2021):
 - The former employer attempted to enforce the following clause, obliging the employee to:
 - *“refrain, during the term of this employment or after the termination thereof, from soliciting, interfering with, or endeavour to entice away from the employer any person or firm who at any time during the period of employment were suppliers or clients of or in the habit of dealing with the employer.”*



Case Law – Solicitation of Clients

- **Eurosupplies Limited vs Paul Tihn (CA) (30.06.2021)**
 - The Court examined the enforceability of this clause, despite no defence to this effect being raised by the employee.
 - The Court considered that insofar as this clause concerned the period following the defendant's term of employment, said clause breached competition policy due to its lack of **temporal** and **geographical** limitation:
 - It is unlimited in time, such that it purports to remain applicable indefinitely and perpetually bar the employee from seeking to establish commercial relationships with the employer's clients or suppliers';
 - It is unlimited in geographic scope, and applies even where the business between the client / supplier and the employee is to be conducted in countries or areas other than the company's normal operations

Case Law – Solicitation of Clients

- Alliance Yachting Company Limited vs Matthew Gusman (CA) (14.10.2021):
 - The clause in question provided that:
 - *“The Employee shall not during the continuance of this agreement or for a period of two years after the termination of his employment hereunder for whatsoever reason, either on his own account, or for any other person, firm or company solicit or interfere with or endeavour to entice away from the Company any person, firm or Company who at any time during the period of two years immediately preceding the date of the termination of the employment were customers of or in the habit of dealing with the Company.”*



Case Law – Solicitation of Clients

- **Alliance Yachting Company Limited vs Matthew Gusman (CA) (14.10.2021):**
 - The Court held this clause to be unreasonably onerous.
 - By covering clients of the company going back two years before termination, it not only restricted solicitation of current clients of the company, but also clients that had not dealt with the company for up to two years.
 - Moreover, the clause applied not just to regular clients of the company, but to any client, including those that were only one-time clients.



Case Law – Solicitation of Clients

- **Cutrico Services Ltd vs Josef Penza (CA) (4.5.2022)**
 - The plaintiff company, the former employer of the defendant, alleged that the defendant breached clause 7 of his employment contract, which provided the following:
 - *“The employee shall not during the continuance of this agreement or for a period **of two years after the termination** of his employment hereunder for whatsoever reason, either on his own account, or for any other person, firm or company **solicit or interfere** with or endeavour to **entice away from the Company** any person, firm or Company who at any time during the period of **two years** immediately preceding the date of termination of his employment were **customers or in the habit of dealing with the Company**.*
 - *Should the employee be in breach of this clause, he shall be liable to a penalty equivalent to **one year’s salary** based on the higher or either his salary at the time or else his salary during the first year of full time employment with the company following the successful completion of his Air-condition and Refrigeration Certificate.”*
 - Quoting Selwyn once more, the court of first instance held that since the clause in question extends to clients whom the defendant did not know about or had any contact with throughout his employment, such a clause was too vague and contrary to the principle of fair competition, making it void.

Case Law – Solicitation of Clients

- **Cutrico Services Ltd vs Josef Penza (CA) (4.5.2022) :**
 - The Court of Appeal did not agree that this clause is null in its entirety. The clause in question was rather reasonable and limited in the following ways:
 - To a period of 2 years after termination;
 - To interference with clients or solicitation of same so that they no longer remain clients of plaintiff company;
 - To persons or entities who were clients or in the habit of dealing with the Company in the last 2 years of the employee's employment.
 - It was only the fact that this clause extends to clients with whom the employee had no professional relationship that is unreasonable.
 - Therefore, such clause was only null insofar as it extends to such clients. It was valid insofar as it concerned clients with whom the employee had a working relationship.



Case Law – Solicitation of Clients

- **Cutrico Services Ltd vs Josef Penza (CA) (4.5.2022):**
 - Having established the limits of the enforceability of the clause, the Court delved into the merits.
 - From the evidence, there resulted the following:
 - 7 months after his termination, the defendant contacted a supplier of his former employer, asking whether they would supply him on a wholesale basis;
 - 8 months after his termination, the defendant had performed work for a client whom he got to know while he was employed for the defendant company.



Case Law – Solicitation of Clients

- **Cutrico Services Ltd vs Josef Penza (CA) (4.5.2022):**
 - The Court observed that the clause in question prohibited 'soliciting' and 'interferences'.
 - The defendant's behaviour did not constitute soliciting, since both clients in question remained clients of the defendant company.
 - However, with regards to the second incident, the defendant's action did constitute an 'interference': defendant had performed work for the client, such that when the company sent its own employees to perform the work, 2 out of the 3 air-conditioners had already been serviced.



Case Law – Solicitation of Clients

- **Cutrico Services Ltd vs Josef Penza (CA) (4.5.2022):**
 - Notwithstanding the aforesaid, the Court of Appeal still decided against imposing the penalties on the defendant:
 - The contractual breach of the employee was too insignificant to give rise to the imposition of the penalties;
 - There was no proof that the company suffered damages as a result of the employee's actions;
 - The client had remained a client of the company;
 - The employee had referred the client to the company with respect to one of the air-conditions which he could not service.
 - There was no other incident where the employee performed work for a client of the company;
 - The employee accepted this particular task as a favour to the client, because of urgent circumstances, and not to steal him from the company.



Case Law – Solicitation of Clients

- **ZP Services Limited vs Gennaro Lanza (CCFH) (19.9.2022):**
 - Mr Lanza was employed by the plaintiff company on a definite term of two years as a Customer Service Agent.
 - Clause 6 of his employment contract provided that Lanza shall not, without the prior written consent of the employer, at any time after a period of 1 year following termination, directly or indirectly solicit, endeavour to solicit, or gain the custom of, canvass or interfere with any person who:
 - Was a customer / supplier of the Company as of the date of the termination;
 - Was a customer / supplier of the Company at any time within 1 year immediately preceding termination;
 - Was pursued as a prospective customer by or on behalf of the Company at any time within 1 year prior to termination, in respect of whom the Company had not decided to cease such pursuit.
 - In the event of a breach of any of such obligations, Mr Lanza bound himself to pay to the Company by way of damages a sum equivalent to 1 year of his salary.

Case Law – Solicitation of Clients

- **ZP Services Limited vs Gennaro Lanza (CCFH) (19.9.2022)**
 - The imposition of pre-liquidated damages does not require DIER's consent, as is the case with fines deducted from employee's wages.
 - Post-employment restraints of this sort are valid as long as:
 - They are reasonable in that their effect is limited to that which is strictly required for the safeguarding of the interests of the employer;
 - The clause is not open to an indefinite period; and
 - The amount of damages is not disproportionate or excessive.

Case Law – Solicitation of Clients

- **ZP Services Limited vs Gennaro Lanza (CCFH) (19.9.2022):**
 - The Court considered that insofar as the 1 year period post-employment was concerned, the clause was reasonable.
 - However, insofar as the clause extended even to clients of the employer whom the employee had never interacted with (including prospective clients), the clause was held to be unreasonable.
 - Moreover, given that the term of the employment was of two years, the sanction of one year's pay was also held to be unreasonable, especially when he was only employed for 4 months.
 - The Court therefore found that the clause was not enforceable.
 - Irrespective of how high the role of the employee, he is not a fiduciary of the company.



Case Law – Solicitation of Clients

- Key Drafting Takeaways:
 - Clauses preventing solicitation of clients should be:
 - Limited to clients with whom the employee had a working relationship;
 - Limited to frequent clients of the company, and not one-off clients;
 - Limited to 1 year before termination, but not 2 years;
 - Limited in time post-employment (2 years was held to be fair);
 - Limited in geographic scope.



ENTICING EXISTING EMPLOYEES

90-minutes webinar



Case Law – Solicitation of Employees

- **FirstUnited Insurance Brokers Limited vs Karl Farrugia Wismayer (FH) (30.10.2010)**
 - Defendant was employed with the plaintiff company as a Development Manager, from which position he had resigned.
 - Plaintiff company alleged a breach of clause 13 of his employment contract, which stated the following:
 - *(a) Should the employment of the Employee be terminated for any reason by the Employer or the Employee, the Employee undertakes as of now that for a period of **twenty-four months** after the termination of his employment, he shall not for his account or for any other person, firm or company, solicit or interfere or endeavour to **entice away from the Employer any person who may be employed with the Employer** or may be a client of the Employer.*
 - *(b) In the event that a breach of sub-clause 12(a) above, the employee agrees that he will be liable for damages, which are being pre-agreed now by the parties, in the sum of **Lm 5000** (five thousand Maltese Liri) for every such breach.*
 - The Court applied Selwyn's teachings and held that insofar as solicitation of employees is concerned, this clause **should not have legal effect.**

Case Law – Solicitation of Employees

- **FirstUnited Insurance Brokers Limited vs Karl Farrugia Wismayer (FH) (30.10.2010):**
 - *19.40 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**.*
 - Thus in “**Hanover Insurance Brokers Ltd vs Schapiro**” (1994 – IRLR 82, CA):
 - *The defendant entered into a restrictive covenant with his employers which provided inter alia that for a period of 12 months after leaving his employment he would not ... solicit or entice any employees of the company to the intent or effect that such employee terminates that employment`.*
 - *When defendant left his employment the employers sought an injunction to restrain him from acting in breach of the clause quoted.*
 - *It was held that **an employee has the right to work for any employer who is willing to employ him**. Thus **employees are not part of the assets of an employer like stock in trade or goodwill and customers**.*
 - *A restriction which is ought to prevent a person from poaching employees irrespective of their expertise, technical knowledge and/or juniority, and which could also apply to employees who were not in the particular employment when the defendant left was clearly a restriction against competition and therefore **void** (TCS Europe UK Ltd vs Massey – 1999 – IRLR 22).*

Case Law – Solicitation of Employees

- **Antonio Camilleri vs Salvatore Sicurella (CA) (26.5.2021):**
 - The employment contract envisaged a clause prohibited the employee from acting in the following way post-termination:
 - *“... endeavour to entice away from the Employer any person who was, at any time throughout the operation of this Contract, employed or engaged by the Employer.”*
 - The Court quoted **FirstUnited Insurance Brokers Limited vs Karl Farrugia Wismayer** to the effect that such clauses are unenforceable.
 - The Court held that such a clause was unreasonable and unenforceable, since an employer has no legitimate interest in precluding a departing employee from employing with him employees employed by the former employer.
 - The clause was only intended to restraining the freedom of the employees from finding better conditions offered by the former employee.

Case Law – Solicitation of Employees

- **Key Drafting Takeaways:**
 - Clauses prohibiting solicitation of employees have been held to be unenforceable and should therefore not be inserted.



WORKING FOR COMPETITORS & GARDEN LEAVE

90-minutes webinar



Case Law – Garden Leave

- **Attilio Vassallo Cesareo et vs Anthony Cilia Pisani (CA) (3.3.2007):**
 - The Employer sought to enforce against the Employee the following clause:
 - *“The Manager during the continuance of this agreement, or with five (5) years from the termination thereof for any reason, shall not without the consent in writing of the company either solely or jointly with, or as manager or agent for, any other person, company or persons directly or indirectly carry on or be engaged in the same line of business in which the company is engaged at that time or to divulge any secrets entrusted to him by virtue of this appointment. In default the Manager binds himself to pay the company by way of penalty which he accepts to sum of LM20,000.”*
 - When the employee left his employer, the timeframe was reduced from 5 years to 2 years.

Case Law – Garden Leave

- **Attilio Vassallo Cesareo et vs Anthony Cilia Pisani (CA) (3.3.2007):**
 - The Court held that the employer was justified in restraining the employee after termination, with the aim of safeguarding the monetary interests of the business.
 - However, the clause lacked adequate measures that safeguard the interests of the employee:
 - There was no quid pro quo, that is, payment to the employee for his sacrifice;
 - The reasonableness of such a clause, in a small country like Malta, is dubious: the employee would effectively have to leave Malta to carry on working.
 - The Court held that for such a clause to be considered reasonable, the employee was to be given compensation for the relative period.

Case Law – Garden Leave

- **Mark Bugeja et vs Geoffrey Camilleri (CA) (13.2.2014):**
 - Within two years from the termination of his employment as a senior auditor, the employee was engaged by MFSA, who was a client of the employee's former employer.
 - The enforceability of the following clause was challenged:
 - *The employee cannot take up employment, for a minimum period of two years after date of termination of employment with the Firm, with any person, firm or company who for two years prior to the termination of this Agreement were clients of the Firm.*
 - *In such case the parties agree that the Employees will pay the Firm by way of agreed damages the sum of two thousand Maltese Liri (Lm2000).*



Case Law – Garden Leave

- **Mark Bugeja et vs Geoffrey Camilleri (CA) (13.2.2014):**
 - The Court held there was nothing unreasonable with the clause in question, which was limited to what was strictly necessary, such that the employee had a very clear indication of his restraints when he signed the contract:
 - The restriction is limited to clients of the former employer, meaning that the employee is allowed to work with any other entity (even competitors) as long as they are not clients of his former employer;
 - The condition is further limited to a period of 2 years (which was considered to be a short period), and to entities who were clients of the former employer within 2 years before termination;
 - The amount of Lm2,000 as pre-liquidated damages was considered reasonable considering the employee's grade, salary, and level of trust.
 - The condition was held to reasonable even though the employee was not paid, and was restricted from employment in any capacity, and not solely with respect to his previous role.

Case Law – Garden Leave

- **Mark Bugeja et vs Mellyora Grech (CA) (27.5.2015):**
 - A clause identical to that in the previous case was brought before the Court:
 - *The employee cannot **take up employment**, for a minimum period of **two years** after date of termination of employment with the Firm, with any person, firm or company who for **two years prior to the termination** of this Agreement were **clients of the Firm**.*
 - *In such case the parties agree that the Employees will pay the Firm by way of agreed damages the sum of two thousand Maltese Liri (Lm2000).*
 - As with the previous case, this judgement concerned a senior auditor who resigned from Grant Thornton and, within two years from the termination of his employment, she employee was engaged by MFSA, who was a client of the employee's former employer.

Case Law – Garden Leave

- **Mark Bugeja et vs Mellyora Grech (CA) (27.5.2015):**
 - Once again, the Court found that this clause could not be considered as being in restraint of trade:
 - It was intended to discourage employees from finding employment with clients, which clients can also be competitors of the employer;
 - The reasoning behind this clause was to prevent employees from passing on sensitive information about his former employer to its clients;
 - The pre-liquidated damages of Lm2,000 was not such that eliminates entirely the employee's freedom to be engaged with an employer of his choice: the employee could still be engaged with a client of the employer if he so wished, subject to the payment of these damages;
 - Above all, the employee freely accepted the contractual terms, well-aware of the risk she was entering into when she accepted the restrictions imposed on her.



Case Law – Garden Leave

- **Mark Bugeja et vs Marvin Zammit (COM) (15.1.2020):**
 - Identical to the previous two cases.
 - Also found that the restriction from working with clients of the firm for a definite period was justified on the basis of the auditing firm's need to retain the auditors' independence when auditing its clients.



Case Law – Garden Leave

- Alliance Yachting Company Limited vs Matthew Gusman (CA) (14.10.2021):
 - Proceedings were brought against the employee for allegedly breaching the following non-compete clause:
 - *“The Employee shall not for a period of one year after the termination of his employment hereunder for any reason whatsoever be involved in or employed with any Company involved directly in any business which is in competition with any business of the Company.”*
 - *Should the employee be in breach of this clause, he shall be liable to a penalty equivalent to one year’s salary.”*



Case Law – Garden Leave

- **Alliance Yachting Company Limited vs Matthew Gusman (CA) (14.10.2021)**
 - The Court held that non-compete clauses have been considered legally permissible by the Courts, as long as they are reasonable, that is, that they are limited in time, in geography, and in scope.
 - The employee must be compensated for the restriction imposed on his working capacity.
 - Such clauses were to be interpreted in a strict manner, especially when considering that the right to work is a fundamental human rights recognised by the Maltese Constitution.

Case Law – Garden Leave

- **Alliance Yachting Company Limited vs Matthew Gusman (CA) (14.10.2021):**
 - The Court held that the clause in question was unreasonable, for the following reasons:
 - The non-compete had no geographical limitation to Malta;
 - It restricted the employee from being employed with a company who is a competitor not just of the primary business of the company, but with respect to ‘any business of the Company’, even if it is a secondary one. The Court considered this to be too wide and unreasonable;
 - The clause did not compensate the employee for the time for which his capacity to work is to be restrained.
 - Notably, this judgement also held that managers are fiduciaries of the employer.

Unreasonable!

Case Law – Garden Leave

- **Delvetro Limited vs Kishore Kumar Neduru (FH)**
(26.9.2024):
 - The contract of employment of the defendant, a former accounts officer of the plaintiff company, included a clause prohibiting him, for 2 years following termination, from being employed or offering services to the company's clients, with whom he had direct contact.
 - A breach of his condition envisaged a penalty of 30,000Eur as pre-liquidated damages.
 - The former employer sued for this amount, alleging that within the 2 years, defendant had become employed with a client.



Case Law – Garden Leave

- **Delvetro Limited vs Kishore Kumar Neduru (FH) (26.9.2024):**
 - The Court in this case considered the following to be reasonable:
 - The duration of two years;
 - The restriction on the employee not to be employed with a client with whom he had direct contact.
 - and the following to be unreasonable:
 - The prohibition of the employee from providing any service to the client of his former employer (and therefore even services that have nothing to do with his role as an account officer);
 - The lack of a definition of having ‘direct contact’;
 - The excessive amount of pre-liquidated damages, which amounted to over 4 times the employee’s annual salary.
 - For these reasons, the Court held the clause to be unenforceable.
 - The Court had no issue with the garden leave not being remunerated, presumably since it was limited to clients.

Case Law – Garden Leave

- **Key Drafting Takeaways:**
 - Garden leave must be paid to be enforceable, unless it restricts the employee from being employed with a client.
 - Must be limited in time, geography, and scope.
 - Must be limited to competitors of the main business of the company (as opposed to secondary businesses).
 - The competition that is precluded must be adequately defined (i.e. 'direct contact').
 - Must be restricted to work which the employee had been performing with his former employer.
 - Recommended drafting should admit possibility to waive.



Conclusion



- **Key Takeaways:**

- There is no codified Maltese law on post-employment restraints.
- Courts will examine their enforceability on a case-by-case basis when their enforcement is requested.
- Some clauses have been outright excluded as contrary to public policy (i.e. solicitation of employees).
- Other clauses are only valid if very carefully drafted (i.e. confidentiality, solicitation of clients, garden leave).
- Important to draft with enforcement in mind.

- **Questions & Discussion**



90-minutes webinar

