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The prohibition to compete … too much of a good thing, or not?

With a decision of 23 January 2015, the Court of Cassation has settled a decades-old discussion. Non-compete clauses are used in a wide range of agreements, from the transfer of international companies, through work for hire, licencing, distribution and franchise to management contracts for small independents. Taking the case that gave rise to the decision, the transfer of a company can serve as an example. In such situations it is commonly and logically stipulated that the seller cannot just go off and start competing with the company that he just sold. This regularly leads to disputes if (the buyer believes that) he is nevertheless doing precisely that.

When drafting such clause, two questions are invariably posed: how long does the obligation apply and where (and for what) can the buyer invoke it? These are questions about the duration and the territorial and material scope. Independent of what the parties wish to agree on, it is crucial that they be ´reasonable´ on both points. After all, every non-compete clause limits entrepreneurial freedom, as it is established in Article II.2 of the Economic Law Code and elsewhere. This freedom is – and already has been ever since the Decree D´Allarde of 1791 – a fundamental value in our legal system and therefore of public order. A clause that goes too far in terms of limiting it is therefore held to be invalid.

The Court of Cassation confirmed this vision, making reference to the specific labour-law legislation, in a decision of 3 February 1971. However, the Court there added that it is not possible to simply mitigate the invalid clause. It is this decision that caused a great deal of uncertainty in the ensuing decades. The drafting of a non-compete clause became a delicate balancing act and a game of all or nothing, whereby one attempted to formulate the non-compete clause as broadly as possible, while running the risk that the entire clause would be ruled unenforceable.

In practice, lawyers have tried to resolve this by incorporating so-called mitigation and/or severability clauses. Such clauses provide that if (a part of) a clause is found to be invalid, the parties shall instead be bound by the maximum that is authorised by the law. Various legal authorities declared that they favoured this practice and believed that, in principle, such clauses must be given effect. However, in each case they formulated the caveat that the Court of Cassation appeared to proceed from the opposite point of view.

This important concession has now been rendered superfluous. The Court of Cassation has pronounced on a Cassation appeal against a ruling of the Court of Appeal in Ghent. The latter court

had refused to mitigate a non-compete clause having a term of seventeen (!) years. Instead the clause was deemed not written. For this the court based itself on the absolute invalidity, such as this was applied in the Cassation decision of 3 February 1971.

The Court of Cassation rejected this interpretation. In its analysis, the Court gives the intention of parties the central role. The Court states firstly that the judge can limit the invalidity of a clause to the part that is in conflict with the law "on condition that the continued existence of the partially annulled agreement or clause corresponds to the intention of the parties". In a next step, the Court cites the severability clause recorded in the agreement. With these elements it comes to the conclusion that the appeal court judges should have given consequence to "the plaintiffs' request to limit the invalidity of the non-compete clause to what went beyond the allowable duration".

With this, the earlier uncertainty appears to have been eliminated. A non-compete clause that goes beyond what is reasonable and is consequently invalid can be saved with a mitigation clause. The judge will in that case have to take into account the intention of parties such as this appears from the contract and mitigate the clause instead of invalidating it in toto. Whether this decision can be extended to apply to cases where there are specific legal provisions (e.g. the labour law), and how the competition law fits in with all this, remains to be seen. For cases where the more general provision applies, however, this ruling already offers major relief.

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