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Restrictive covenants in Sweden and Britain – a comparative analysis

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Summary

The purpose with this thesis is to analyse restrictive covenants in employment contracts and see how they are used in Sweden and in Britain. I aim to do a comparative analysis between the two jurisdictions to see how the use of such covenants differs and is similar. The study is confined to covenants, which concern circumstances after the term of employment. I will focus on the use of non-compete and non-solicitation covenants and I will only briefly mention how restrictions regarding secrecy and company secrets are regulated.

The subject of restraint of trade has been widely discussed for a long time. Employers, on the one hand, want to protect their company-specific knowledge and limit the competition while employees, on the other hand, want to have the freedom to work anywhere they want. I will analyse whether the principle of free trade and competition or the principle of freedom of contract usually is accorded the most consideration. An employee’s right to work wherever he pleases can be limited in both jurisdictions subject to this thesis. By looking at important Swedish and British cases on the matter, I will discuss the circumstances where restraint of trade can be accepted.

I will begin by describing the different legal systems; the common law system in Britain and the civil law system in Sweden. Furthermore, I will explain the doctrine of restraint of trade and look at how it has developed in Britain and Sweden respectively. Then I will look at how the doctrine of restraint of trade is legislated in the two jurisdictions and try to see what legal sources the courts usually apply when determining the validity of a restrictive covenant. Since I am describing the historical background behind the British legal system and the Swedish legal system, I will analyse the differences between how restrictive covenants are viewed – from a common law/civil law perspective.

In my analysis, I will focus on the protectable interests in Sweden and Britain and try to highlight the differences and similarities. I will also discuss how the scope of protection regarding a restrictive covenant is determined with regards to restriction in time, geographical restriction, scope of clients/customers, areas of business and employee consideration.

Lastly, I will list the most important factors to consider when drafting restrictive covenants in Sweden and Britain respectively.

Sammanfattning

Syftet med denna examensuppsats är att analysera konkurrensbegränsande klausuler i anställningsavtal och se hur dessa används i Sverige och i Storbritannien. Jag avser att göra en komparativ analys mellan de två jurisdiktionerna för att se hur användandet av sådana klausuler skiljer sig samt i vilken utsträckning användandet är lika. Studien är begränsad till klausuler som rör förhållanden efter anställningens upphörande. Jag kommer att fokusera på konkurrens- samt värvningsförbud och jag kommer enbart i korthet att beskriva hur begränsningar rörande sekretess och företagshemligheter regleras.

Klausuler i syfte att begränsa handeln har diskuterats under lång tid. Arbetsgivare, å ena sidan, vill skydda företagsspecifik information och begränsa konkurrensen, medan anställda, å andra sidan, har ett intresse av att vara fria att arbeta var de vill. Jag ämnar analysera huruvida principen om fri handel och konkurrens eller principen om avtalsfrihet vanligtvis tillerkänns mest beaktande av en domstol. En anställds rättighet att arbeta varhelst han vill kan begränsas i båda de jurisdiktioner som är föremål för denna examensuppsats. Genom att analysera viktiga svenska och brittiska rättsfall inom området ska jag diskutera under vilka förhållanden som konkurrensbegränsande klausuler i anställningsavtal kan accepteras.

Jag ska börja med att beskriva de olika rättssystemen; common law-systemet i Storbritannien och civil law-systemet i Sverige. Vidare ska jag utreda läran om begränsning av handeln och se hur utvecklingen har skett i Storbritannien respektive Sverige. Sedan ska jag titta på hur lagstiftningen rörande läran om handelsbegränsningar ser ut i de båda jurisdiktionerna och försöka se vilka rättskällor domstolarna vanligen tillämpar när de fastställer huruvida en konkurrensbegränsande klausul är giltig eller ej. Eftersom jag beskriver den historiska bakgrunden bakom Storbritanniens rättssystem samt Sveriges rättssystem ska jag även analysera skillnaderna mellan hur man ser på konkurrensbegränsande klausuler från ett common law/civil law perspektiv.

I min analys kommer jag att fokusera på vilka intressen man anser vara skyddsvärda i Storbritannien och Sverige och försöka belysa eventuella skillnader och likheter. Jag kommer också diskutera hur skyddsomfånget för en konkurrensbegränsande klausul fastställs med beaktande av begränsning i tid, geografisk begränsning, kund- och klientomfång, verksamhetsområde samt ersättning till den anställde.

Slutligen kommer jag att ta upp de viktigaste faktorerna att ta i beaktande vid utarbetandet av konkurrensbegränsande klausuler i Sverige respektive Storbritannien.

Preface

I would like to thank my parents for their continuous support throughout my education. I would also like to thank Advokatfirman Cederquist for allowing me to work on this thesis at their offices and for giving me access to their library and databases.

Last but not least, I would like to thank my supervisor Boel Flodgren for great feedback and support while writing this thesis.

Jonas Lindskog

Stockholm, June 2011

1 Introduction

1.1 Why the topic restrictive covenants?

In today's competitive business market employees are becoming an exceedingly valuable asset for employers. Consequently, it is in the employer's interests to ensure that the employees' skill and knowledge are at the highest level possible. This, in turn, means that employers usually spend considerable resources improving the workforce. Employees often receive training, education, and are allowed insight into company trade secrets in order to improve the company's business. By these measures, the collective knowledge and skill within the company are gradually increased.

There is, however, a risk involved for the employer in spending considerable amounts of resources on the employees. The employees may use the gained knowledge to their own benefit or for a competing business. An experienced employee with great qualifications and much knowledge is, of course, also wanted by competitors to the employer, creating a risk that the employer may lose the employee to a competitor that offer the employee more lucrative benefits. To protect the employer in a case like this, restrictive covenants are used. They have both a preventive and a protective function. They are preventive in the sense that an employee, who is precluded from competing with the employer for 12 months after the termination of his employment, might think twice before leaving his employer to take up work with a competitor. The covenants are also protective in the sense that they protect the employer's investment in the employees and they protect the employer in the event that the employees should leave the company and take up work for competing businesses. However, it should be noted – as we will see later on in this thesis – that restrictive covenants must not be used when the sole purpose is to keep the employee in his employment.

1.2 Problem and intention

The subject of restraint of trade has been discussed for centuries. Employers, on the one hand, want to protect their company-specific knowledge and limit the competition while employees, on the other hand, want to have the freedom to work anywhere they want. The debate has mainly been about whether the principle of free trade and competition or the principle of freedom of contract should be accorded the most consideration.

When I first started thinking about writing about restrictive covenants I knew that a comparative analysis between two different jurisdictions would be an interesting approach to the subject. I thought about making a comparison between two civil law countries, but finally I decided that an analysis of the legal situation in two very different jurisdictions would be

more interesting. Obviously more difficult, but I thought it would be more rewarding in the end. With this in mind, I decided to focus on the following questions:

- Why are restrictive covenants used?
- How are they regulated in Sweden?
- How are they regulated in Britain?
- How do the regulations differ from one another and how are they similar?
- Which solution is, in my opinion, the most effective one?

My intention with this thesis in not to make ground-breaking discoveries, but merely to try to present an answer to how restrictive covenants are regulated in the scope of my investigation and analyse how the legal situation ended up the way it is today. I intend to analyse how the problem with restrictive covenants has been addressed in two very different jurisdictions and come to a personal conclusion regarding which solution I think is the most effective one. Most of this thesis will be written de lege lata, but the analytical part will be written de lege ferenda.

1.3 Demarcation

Traditionally, one of the two major areas in which legal principles concerning the restraint of trade operate has been the area of employment contracts, the other being business transfer agreements. I will, in this thesis, focus on restraint of trade in employment relations and only briefly mention how it is used in business transfers. I have decided on this demarcation to be able to make an in-depth analysis and a thorough assessment of the legal situation regarding restraint of trade in employment relations in both Britain and Sweden.

1.4 Methodology

When writing this thesis, I have utilised the traditional legal method. This method focuses on the processing of legal sources and aims to determine the legal rules that exist or that should be established within the scope of investigation. Additionally, the method focuses on how these legal rules should be applied. Since my intention is to do an in-depth analysis, I have used a method in accordance with the doctrine of legal sources. This doctrine states the informative sources within legal science that can and may be utilised. Thus, the study within the traditional method of law is mainly based on legal sources such as legislation and other statutes, government bills, case law and academic literature. I have used other sources, such as journals and the internet, as well, especially to find British legal material. The reason for using the traditional legal method, is for me to gather enough information about this specific legal issue so that I am not only able to analyse and interpret the data, but also able to critically compare and study the relevant findings.

Additionally, as the goal with this thesis is to write a comprehensive comparative study, other methodological elements should be included as well. The legal system of each nation that is subject to study has to be observed, since the foreign legal system may differ significantly from the domestic legal system. This is a fundamental principle in legal comparative studies.[1] Moreover, the foreign legal system should be studied in its entirety for the author to be able to draw relevant conclusions from the gathered data. The social and historical background of the legal rules also plays an important part in the understanding of the legal system. For this reason, I will begin my analysis by describing the Swedish and British legal systems and present the legal procedures and legal sources governing the relevant subject in each of the two nations.

The information I have gathered to be able to write this thesis consists mainly of secondary data. Secondary data come in many different forms, including books, articles, reports, electronic databases and the internet. I have used databases at the university and the public libraries to find literature, and I have used legal databases on the internet to find case law. When I have studied the legal situation in Britain, case law has been my primary source of information. I have used journals, reports, articles and literature to help me interpret the court decisions. When I have studied the legal situation in Sweden, I have focused on the legislation and regulations in the relevant area of law and used case law, literature, articles and journals to help me understand how the law should be interpreted and applied.

I would like the reader to keep in mind that, since I have lived in Sweden my entire life, my knowledge of the Swedish legal system is far greater than my knowledge of the British legal system. Therefore, even though I have concluded comprehensive research in this particular area of law, I might have missed certain British legal sources and/or cases that are applicable and might add important data to my comparison. This I am well aware of, but hopefully I will nevertheless be able to make an extensive comparative analysis.

[1] Bogdan, 2003, p 19-22

2 Legal systems

2.1 Different legal systems

The legal systems in Britain and Sweden are historically different with Sweden using a civil law system and Britain using a common law system. In this Chapter I aim to briefly describe the historical differences between the legal systems and see how they have developed in the light of restraint of trade. Later on in this thesis, I will look at how the view on restraint of trade covenants differs or is similar between the different legal systems.

2.2 The civil law system

The legal system used in Sweden is the civil law system. This system has as its origin the written law and legal institutions in Rome. Its name derives from the *jus civile*, the civil law of the Roman Empire and the Roman Republic originating to as early as 27 B.C. As the Roman legal system developed through time, the judicial decisions – involving actions by two separate judicial officers – were never awarded any importance. Therefore, the Romans had, in principle, no case law: the decision of one court did not make a precedent binding if the point arose again.[2] It was in the sixth century when the Emperor Justinian commissioned the encyclopaedic work *Corpus Juris Civilis*, with the dictum *"non exemplis sed legibus judicandum est"* ("decisions should be rendered in accordance, not with examples, but with the law") that the limited value of individual decisions in the judicial process elevated the importance of the jurists and their written opinions. The *Corpus Juris Civilis* brought together legal treatises and principles of law reflecting different viewpoints and arguments, making it an essential building block for the civil law system known today by supplying many of its fundamental provisions. Today's civil codes, based on *Corpus Juris Civilis*, emphasise form, structure and the listing of both abstract and concrete principles of law within a unified whole. The reasoning process from the code provisions is deductive – you arrive at conclusions about specific situations by looking at general principles. The jurists within civil law systems analyse the basic code and legislation for the formulation of general theories and extract the principles of law contained within. Historically, this work has taken the form of treatises and commentaries that has become the doctrine used by judges in their deliberations concerning specific cases, lawyers for advice to their clients and legislators in the preparation of statutes and regulations. In civil law, doctrine is an inherent part of the system and is necessary for a systematic and analytical understanding of it. The doctrine itself is not a recognised source of law, but it has exercised a great influence in the development of law.[3]

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[2] Buckland, McNair, 1965, p 6

[3] Apple, 1995, p 3-6

To generalise, civil law is code-based and the judges are, historically, not supposed to interpret the law, instead they are to follow predetermined legal rules. However, even though the cases in ancient Rome were not binding precedents, a current of decisions in the same sense did in fact influence judges. This is exactly what has happened in Sweden, were Britain's doctrine of "case law" is rejected, but the "jurisprudence", i.e. the current of decisions is constantly cited in support of an argument, especially if the access to legislation or statutes is limited.[4] In Sweden, legislation is the primary legal source and judges use secondary legal sources, e.g. the legislator's preparatory work, doctrine and case law, to determine the outcome of a case.[5] Since the area of restraint of trade is hardly legislated at all in Sweden, judges have quite a lot of freedom to decide what is reasonable and civil law has developed tremendously since the days of *Corpus Juris Civilis*.[6] In the analysis, I will look at how this differs or is similar to the development of restraint of trade in the British common law system. Additionally, collective agreements are a common legal source in Swedish employment law and they are of paramount importance. The overwhelming majority of Swedish employees are in fact covered by collective agreements, including most employees in low- and middle-range managerial positions. This is due to the fact that the unionisation rate is high and most employees work for employers that are parties to collective agreements or members of organisations that have signed such agreements on their behalf.[7]

2.3 The common law system

While the *Corpus Juris Civilis* was being interpreted and applied in Italy, a new legal system was developing in Britain during the 13th century. Scholars and teachers trained in the Italian universities had carried Roman law early to Britain, although it proved dissatisfactory for the needs of the new legal system. The arrival and adoption of the jury trial as a mechanism for resolving disputes and the creation of royal courts to dispense justice throughout the kingdom and several trained judges to preside over and administer them resulted in a turning away from Roman law. Other characteristics of the new system gradually emerged over the centuries, i.e. the expansion of jury trials to more types of civil cases, reliance by judges on precedent, and inductive reasoning based on precedent to create the substance of the law.[8]

The common law system is overwhelmingly case oriented, almost to the complete exclusion of juristic writings, which are rarely consulted by practicing lawyers and seldom cited in judicial opinions. Legal writings consist mostly of references to cases and whatever principles or trends in the law can be extracted from case law. However, British courts do not go so far

[4] Buckland, McNair, 1965, p 7-8
[5] Apple, 1995, p 1
[6] Wennström, 2009/10, p 67-68
[7] Fahlbeck, 1997, p 24
[8] Apple, p 33-34

as to refuse all help in a difficult case from the writings of one known to have, or to have had, profound knowledge of the matter in hand. Although, recourse is not often had to this kind of writing, and it is always done with a clear recognition of the fact that, however sound the proposition may be, they are “not authority”.[9] This legal system is dependent on a hierarchical court structure, where decisions of higher courts are binding on lower ones, and requires an accurate law report system so that previous decisions can be found and applied in relevant cases. As we will see later on in this thesis, decisions made by the courts in the 19th century are still applied by today’s courts.[10]

2.4 Differences in the two systems

As mentioned earlier, the codification process derived from *Corpus Juris Civilis* is a distinguishing characteristic of the two legal systems. Civil law countries have comprehensive codes, which cover countless legal topics, sometimes treating separately private law, criminal law and commercial law. While common law countries have statutes in those areas, sometimes collected into codes, they have been derived more from an ad hoc process over many years. Moreover, codes of common law countries are the statutory embodiment of rules developed through the judicial decision-making process.[11]

I would like to mention two additional distinctions between the two legal systems: the role of judicial decisions in the making of the law, and the manner of legal reasoning.[12] In civil law systems, the role and influence of judicial precedent could be important whereas in the common law countries, precedent has been elevated to a position of unqualified dominance. Judges in the civil law systems look to code provisions to resolve a case, while common law judges look to casebooks to find the solution to an issue in a case. Comprehensive legal codes forming general frameworks of private, commercial, and criminal law such as exist in the civil law systems also affect methods of legal reasoning. In the civil law tradition, the reasoning process is deductive, proceeding from stated general principles or rules of law contained in the legal codes to a specific solution. In areas of law where statute law is limited and where case law may be handled loosely, the writer of law is likely to have more influence and legal writings may become a more important source of law.[13] In common law countries the process is the reverse – judges apply inductive reasoning, deriving general principles or rules of law from precedent or a series of specific decisions and extracting an applicable rule, which is then applied to a particular case.

To summarise, the biggest historical difference between the two systems is that a civil law system usually requires the explicit expression of the law in

[9] Buckland, McNair, 1965, p 10-11
[10] Apple, 1995, p 35-36
[11] Apple, 1995, p 36
[12] Apple, 1995, p 36
[13] Buckland, McNair, 1965, p 11

statutory codes, whereas a common law system allows the development of legal principles through cases and judgements.

3 The doctrine of restraint of trade

3.1 Why restraint of trade?

The purpose of all restraint of trade covenants is to provide protection against competition and thus secure one's position on the market. A restraint of trade is a negative commitment, since it does not entail an obligation to perform a task, but rather an obligation to refrain from performing that particular task.[14] Such a commitment would be acceptable pursuant to the general principle of freedom of contract; however, it is not in accordance with the principle of free competition. Free competition is desirable from a public perspective, since it serves in the interests of the consumers. From an individual's point of view, free competition is a matter of, unreservedly, being able to offer one's labour on the market. From a company's viewpoint, however, competition is a driving force towards greater effectiveness, while at the same time being a distressing factor the company tries to eliminate. In a market economy there is a natural desire to seek protection from competition. By using covenants implying restraints of trade, companies can efficiently protect themselves from competition.[15]

One can clearly discern the motives and interests that tend to give rise to stipulations concerning restraint of trade. Firstly, employers are interested in maintaining the clientele. This motive is common in service companies, such as computer companies, consultancy firms, and auditing firms. Secondly, employers want to protect the company's trade secrets and company-specific knowledge. Thirdly, employers want to keep qualified and educated staff members, key employees, within the company or at least prevent them from taking up work with competitors.[16]

The freedom to conclude agreements containing restraint of trade covenants is inevitably in conflict with the interests of maintaining free competition. Should the use of restrictive covenants be limited in order to maintain free competition? Alternatively, must society tolerate restraints of trade, as long as they are not too far-reaching? These questions will be discussed later on; I will begin by discussing the history of the restraint of trade doctrine.

[14] Adlercreutz, Flodgren, 1992, p 13-14
[15] Brearley, Bloch, 1999, p 1-2 and Brait, 1980, p 420-421
[16] Adlercreutz, Flodgren, 1992, p 15-16

3.2 History in Britain

3.2.1 Reasonable restraint of trade

Restraint of trade is a debated subject in today's business world, although it is by no means a new occurrence. Restraint of trade covenants can be traced back to the 16th century, although at that time such restraints were more often than not regarded void because of their tendency to create monopolies. In Britain, agreements containing covenants in restraint of trade were deemed void.[17] A legal principle was developed called ”The Rule of Reason”, which meant that cooperation, with the purpose of limiting the competition, was unlawful, if the restraint of trade was unreasonable from a general viewpoint. The principle made it difficult for employees to cooperate during salary negotiations, because if they negotiated collectively, it was considered a criminal conspiracy in restraint of trade. In the case *Colgate v Bacheler* from 1596 it was stated that any agreement to prohibit or restrain anyone, to use a lawful trade at any time or at any place should be rendered void, because the agreement would be against the benefit of the Commonwealth.[18]

However, this far-reaching restriction of the freedom of contract principle could not be maintained forever, therefore more liberal principles came in force during the latter part of the 17th century. By this time, restrictive covenants were allowed in certain contexts. In the frequently cited case of *Mitchel v Reynolds*[19], decided in 1711, the court considered the validity of a non-competition agreement arising from the lease of a bake house. The defendant had assigned to the plaintiff a lease of five years and had given a bond not to compete with the plaintiff in the parish for the term of the lease. The defendant then breached the condition and the plaintiff commenced an action to recover the bond. The court recognised a presumption that all restraints of trade were invalid, but held that the presumption had been overcome. The court made a distinction between “general” restraints and “partial” restraints. “General” restraints restricted competition throughout Britain and were void, whereas “partial” restraints were limited to particular places or persons and thus valid. The court stated; “What does it signify to a tradesman in London what another does at Newcastle?” A “partial” restraint, such as that before the court, is limited to a particular place and can be upheld if there is ”good and adequate consideration”. Therefore, the court upheld the restraint because it was reasonable.[20] The case established the modern framework for the analysis of the enforceability of restrictive covenants. [21]

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[17] Freedland, 2003, p 178
[18] Palmgren, 1939, p 82
[19] As reported in England Law Reports retrieved from Westlaw International (E.R. 347)
[20] Reece, 1991, p 3-4
[21] Palmgren, 1939, p 83-84

In 1867, Sir William Erle wrote a memorandum called *The Law Relating to Trade Unions*, in which he wrote; “Restraint of trade, according to a general principle of the common law, is unlawful. I say “a general principle,” because the term “restraint of trade” is of very wide extension, [...] and the unlawfulness depends on the degree of restraint resulting from the circumstances”.[22] Furthermore, Sir Erle stated that every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable obstruction.[23]

During nearly two centuries, the *Mitchel* case remained the fundamental authority in the matter of restrictive covenants. It was not until the House of Lords decision in the case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*[24] from 1894, that the precedent of *Mitchel v Reynolds* holding all nationwide restraints as inevitably void was definitely rejected and abandoned by the courts. In *Nordenfelt* the “blue pencil test” was defined as a method for deciding whether contractual obligations can be partially enforced when the obligation as drafted in the contract has an element of illegality. The Swede Thorsten Nordenfelt had sold his business to Hiram Stevens Maxim and the parties had agreed that Nordenfelt would not make guns or ammunition anywhere in the world, and would not compete with Maxim in any way for a period of 25 years. The House of Lords held that the provision prohibiting Nordenfelt from making guns or ammunition was reasonable, but the provision prohibiting competition ‘in any way’ was unenforceable as an unreasonable restraint of trade. The question on severability was whether the reasonable restriction could be enforced, even though it was in the same contract as an unreasonable restriction. The court used the test of whether striking out the words containing the unreasonable restriction with a blue pencil would leave behind a contractual obligation that made sense. In this case, the unreasonable restraint was severable and the court enforced the amended agreement that Nordenfelt “would not make guns or ammunition anywhere in the world, for a period of 25 years”. The court stated that the general rule is that all restraints of trade in themselves are contrary to public policy and therefore void. There are exceptions however; restraints of trade may be justified by the special circumstances of a particular case. Such a justification is at hand if the restriction is reasonable, if it provides adequate protection to the party in whose favour it is imposed, and if it is in no way injurious to the public. In the *Nordenfelt* case, the court abandoned the old “general” and “partial” restraints doctrine and held that a restrictive covenant could be found valid, even though it was not limited to certain places or persons, as long as the covenant, as a whole, was reasonable. Furthermore, Lord Macnaghten emphasised that there is more freedom of contract between buyer and seller than between master and servant. In the case of a business transfer, the restraint of trade covenants are, usually, a prerequisite for the entire transaction. The same is not true for employment

[22] Erle, 1869, p 5
[23] Erle, 1869, p 5-6
[24] As reported in Law Reports Appeal Cases retrieved from Westlaw International (A.C. 535)

contracts. However, the circumstances regarding an employment contract could be enough to justify the restraint of trade covenant in a particular case. The *Nordenfelt* case developed the doctrine of restraint of trade a considerable amount and the case is often cited, even today.[25]

3.2.2 Further development

I would also like to mention two cases that were important for the development of the restraint of trade doctrine in Britain. The first is of *Mason v Provident Clothing and Supply Co Ltd*[26] from 1913 where a canvasser for a clothing and supply company agreed to be bound by a non-compete covenant for three years after the termination of the employment. The covenant had a geographical restriction of 25 miles outside London. The court found the covenant to be ”out of all measure wider than anything that can reasonably be required for the protection of the respondents in their business, and therefore the covenant is void in law and will not be enforced by the Courts”. Lord Moulton continued: “It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business”.

The second case is of *Herbert Morris, Ltd v Saxelby*[27] from 1916 where a young man, after he had finished school, had started working for a company that were the leading manufacturers of hoisting machinery in Britain. The man was bound by a non-compete restrictive covenant during a period of seven years after ceasing to be employed by the company. The court held that the covenant was wider than was required for the protection of the plaintiff company and was not enforceable. Lord Shaw stated that “Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge – these may not be given away by a servant; they are his master’s property, and there is no rule of public interest which prevents a transfer of them against the master’s will being restrained. On the other hand, a man’s aptitudes, his skill, his dexterity, his manual or mental ability – all those things which in sound philosophical language are not objective, but subjective – they may and they ought not to be relinquished by a servant; they are not his master’s property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his power is advantageous to every citizen, and may be highly so for the country at large”. The court highlighted the difference between interests that an employer can protect with restrictive covenants and interests that an employer cannot protect. The idea is that a restraint of trade covenant is

[25] Adlercreutz, Flodgren, 1992, p 28 and Palmgren, 1939, p 85-88
[26] As reported in Law Reports Appeal Cases retrieved from Westlaw International (A.C. 724)
[27] As reported in Law Reports Appeal Cases retrieved from Westlaw International (A.C. 688)

justified when the employee, through the employment relationship and not through his personal skill, has gained knowledge about the employer's company and his clients. In this case, the court found that there were no trade secrets involved and the covenant sought to cripple the employer's rivals in trade by the denial to them of a supply of skilled labour. Therefore, the court regarded the case to be an audacious claim and the company's appeal was dismissed.[28]

One conclusion to be drawn from the *Saxelby* case is that a restrictive covenant, with the sole purpose of limiting competition – in this case by keeping the employee away from other employment – is still rendered void according to British law. Adjustment of such a covenant would not occur. If the covenant is valid, however, but the restriction goes too far based on what is reasonable, the court may, in special circumstances, adjust the restriction to make it reasonable. Lord Moulton stated in the *Mason* case that "I do not doubt that the court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable". However, this should, according to Lord Moulton, only be done in cases where the unreasonable part is clearly severable, and not a part of the main purport of the covenant. It is not the court's responsibility to carve out the reasonable part of a void covenant so that the employer can have the maximum of what he might validly have required.[29]

3.3 History in Sweden

3.3.1 A general rule

When a governmental committee, in the beginning of the 20th century, prepared their legislative proposal for a law of contract, there were plenty of references to German and British law. Even though all the foreign legislation referenced to in the committee's report concerned restrictive covenants in employment contracts, Sweden implemented a general rule regarding restrictive covenants in Section 38 of the Contracts Act that came into force in 1916. The committee found that it was necessary for unreasonable restrictive covenants to be found unenforceable; therefore, the aforesaid rule was implemented to prevent the abuse of freedom of contract in the area of contract law.[30] In the preparatory work for the Contracts Act, it is emphasised that the reasonableness of a restrictive covenant shall be determined by considering the conflicting interests of; on the one hand, the entitled party's right to be protected against competition, and on the other hand the obliged party's right to freedom. The purpose of the rule was that every case should be settled by looking at the circumstances in that

[28] Adlercreutz, Flodgren, 1992, p 29
[29] As reported in Law Reports Appeal Cases retrieved from Westlaw International (A.C. 724)
[30] Palmgren, 1939, p 113

particular case.[31] The restrictive covenant should then be deemed reasonable or unreasonable, depending on the circumstances. If a covenant was deemed unreasonable, it could be adjusted in the part that was unreasonable instead of being considered unenforceable in full.[32]

Section 38 of the Contracts Act maintained its original form over numerous decades. The courts' application of the rule was rather cautious and it was not until 1969 that something happened, which changed the general attitude towards restraints of trade. By this time, restrictive covenants were more of a common occurrence in employment contracts, which lead to a collective agreement between SAF and the trade unions SIF, SALF and CF. Following this collective agreement, Section 38 of the Contracts Act was revised in 1976 to take the form it has today: "Where, in order to prevent competition, one party has stipulated that the other party shall not engage in a certain type of business or shall not take up employment with a person conducting such a business, such an undertaking shall not binding on the person giving it to the extent that the undertaking is more extensive than may be considered reasonable."[33]

The purpose of the new Section 38 was, inter alia, to extend the possibility of adjusting the undertaking, or to render the undertaking void. In the preparatory work for the new Section 38 it was highlighted that, when determining the enforceability of restrictive covenants in employment contracts, guidance can be found in collective agreements, although the conditions can vary considerably. It should be noted that, a few years after the implementation of Section 38, there were discussions concerning the implementation of a specialised article regarding restraints of trade with the enactment of the Trade Secrets Protection Act, but ultimately it was decided against such an article.[34] Moreover, two decades later, a government investigation resulted in a proposal to implement such a specialised article in the Employment Protection Act, but the proposal's criteria for making a restraint of trade covenant valid, was deemed not comprehensive enough.[35]

3.3.2 The 1969 collective agreement

During the employment, an employee is prevented from disclosing trade secrets, due to the duty of loyalty towards the employer. Nevertheless, after the termination of the employment there is no such protection for the employer. Occasionally, an employer might require a duty of loyalty and duty of confidentiality from an employee, for a limited time, even after the termination of the employment, because of the fact that the company has developed protectable trade secrets. In situations like this, the parties find it justified with a restrictive covenant. The purpose of the collective agreement

[31] Smitt, 2004, p 95
[32] Almén, 1916, p 149-152 and Palmgren, 1939, p 113-116
[33] 38 § Avtalslagen translated into English by Zeteo (http://www.nj.se/cms/pub/zeteo-startsida)
[34] SOU 1983:52 p 314
[35] Ds 2002:56 p 492

of 1969 was to limit the usage of restrictive covenants, but also to stipulate the content of such covenants. In the introduction to the agreement, the parties report on the history behind it and the conflict of interests the agreement is supposed to "deal with". The parties agree that companies, which are in the business of important development work leading to specific knowledge of the company and the company's business, are concerned about such knowledge staying within the company. However, the collective agreement contains strict regulations regarding such covenants.[36]

The agreement stipulates that covenants in restraint of trade can only be invoked into the agreement on the employer's initiative. The types of businesses that may utilise restraint of trade are those that are dependent on product or method development and thus acquire particular manufacturing trade secrets or therewith equivalent company specific knowledge, which, if disclosed to competitors, would cause the company significant detriment. Even though the agreement uses the phrase "product and method development", the scope of application is not limited to the technological part of industry.[37] The collective agreement of 1969 has been in force for several decades and with time, it has acquired status as an important legal source, covering all aspects of business and trade. As we will discover later, the stipulations in the agreement have been applied in all kinds of businesses, ranging from airlines to IT companies.

The agreement stipulates the categories of employees that may have restrictive covenants in their employment contracts. For an employee to be bound by a restrictive covenant the employee has to meet two criteria. Firstly, the employee has to "during the employment, gain knowledge of manufacturing trade secrets or therewith equivalent company-specific knowledge", and secondly the employee has to "by education or experience be able to make use of this knowledge". These restrictions limits the use of restrictive covenants to employees in higher positions within a company. For instance, an assistant who, for the most part, only does routine work and takes notice of company trade secrets while working, cannot be bound by a restrictive covenant since an assistant normally will not be able to make use of that knowledge in another employment.[38] However, in the case of salespersons, accountants and other categories of employees, which are not automatically excluded from the use of restrictive covenants, an assessment has to be made in the individual case. The decisive factor in such an assessment is whether the employee may pose a risk to the employer, in terms of competition, or not, after the termination of the employment.[39]

As mentioned earlier, restraint of trade covenants are intended to protect manufacturing trade secrets or therewith equivalent company specific knowledge. Knowledge must have been acquired through the company's own efforts or through agreements with other parties. It must be the result of

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[36] Adlercreutz, Flodgren, 1992, p 55-59
[37] Smitt, 2004, p 93-94
[38] Fahlbeck, 2004, p 108-109
[39] Adlercreutz, Flodgren, 1992, p 58

development work, with the purpose of increasing the competitiveness of the company. According to the collective agreement, the employer has no legal rights to prevent an employee from using general working knowledge in the employee's working life. The employee has the right to use such knowledge, even if it means competing with the former employer. A restraint of trade covenant, in accordance with the agreement, can thus only be used to prevent the employee from using company specific knowledge and trade secrets, which the employee has acquired during the employment.[40]

Furthermore, the agreement states that, when determining whether a restrictive covenant should be implemented in an employment contract or not, both the employer's and the employee's specific needs have to be considered. A subjective view pertaining to the circumstances in each case is necessary, considering the employer's interest in protection and the employee's interest in being able to work without restraint. The commitment time for restraints of trade is limited to the estimated useful lifetime of the company specific knowledge. However, the commitment time should normally not exceed 24 months. If the estimated useful lifetime of the company specific knowledge is short, the commitment time should not exceed 12 months.[41] The agreement also states that restraint of trade cannot be enforced when the employer terminates the employment, except when the termination is a consequence of the employee's breach of the contractual duties. Similarly, restraints of trade cannot be enforced if the employee terminates the employment because of the employer's breach of the employment contract. Additionally, for a restraint of trade to be valid, the employer must compensate the employee during the commitment time of the restrictive covenant. Such compensation should amount to the difference between the employee's salary with the former employer and the employee's new, lower salary. This compensation does not have to exceed 60 per cent of the employee's former salary. If the employee breaches the restraint of trade covenant intentionally or through gross negligence, the liquidated damages amount to six months' salary.[42]

3.4 Modern restraints of trade

In today's modern business market, there are five types of restrictive covenants commonly used in the employer – employee relationship[43]:

A. setting up a business in competition with the employer;
B. working for a competitor of the employer;
C. interfering with the suppliers of, or supplies to, the employer;
D. canvassing, enticing, inducing, soliciting or dealing with the customers of the employer; and

[40] Smitt, 2004, p 93-95 and Adlercreutz, Flodgren, 1992, p 57-60
[41] Adlercreutz, Flodgren, 1992, p 60
[42] Smitt, 2004, 94
[43] Cabrelli, ELB, 2004, p 2

E. canvassing, enticing, inducing, soliciting or poaching the employees of the employer.[44]

Such restrictive covenants are examined thoroughly by the courts to ensure that they go no further than is reasonably necessary to protect the interest of the employer, which the law recognises as legitimate. If such a covenant is too wide, it is unenforceable as being in unreasonable restraint of trade. The same types of covenants exist in both Sweden and Britain.

3.4.1 In Britain

In Britain, there is no general act dealing with restrictive covenants in employment contracts. The Competition Act of 1998, amended by the Enterprise Act of 2002 outlaws many restrictive practices, particularly in relation to cartels, mergers and other restrictive practices between businesses and other trading parties, but it does not deal with employment contracts.[45]

Judicial attempts have been made to define the restraint of trade doctrine. One example is a definition made by Lord Justice Diplock in *Petrofina Ltd. v Martin*[46] from 1965: "A contract in restraint of trade is one in which a party (the covenantor) agrees with the other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses". As mentioned in Chapter 3.1, this definition implies, in the employer and employee relationship, a negative covenant preventing the employee from working for a third party rather than a positive obligation to work only for the one employer.[47]

As we could see in the *Nordenfelt* case in Chapter 3.2.1 a restrictive covenant in an employment contract in Britain is prima facie void as being in unreasonable restraint of trade, unless the employer can prove that he has a legitimate business interest to protect, and also that the covenant is reasonable in the interest of both parties and the public at large. Whether an employer's interests are regarded as being sufficient to require protection depends on the circumstances of each case and in particular, the type of business the employer is in. The trade secrets and information can be treated as a protectable proprietary interest if they are of a sufficiently high degree of confidentiality to warrant protection after termination of employment. In determining whether a trade secret is confidential, or is such that an employee is free to use it elsewhere, the court will take into account all the circumstances of the case. These circumstances include the nature of the employment, the nature of the information itself, whether the employer explained the confidentiality of the information and whether the relevant

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[44] Cabrelli, ELB, 2004, p 2-3
[45] Colin, 2006, p 2
[46] As reported in Weekly Law Reports retrieved from Westlaw International (W.L.R. 318)
[47] Stratton, 1997, p 108

information can easily be isolated from other information, which the employee is free to use or disclose.

In the *Saxelby* case, Lord Parker defined a legitimate business interest as "some proprietary right, whether in the nature of a trade connection or in the nature of trade secrets, for the protection of which such restraint is reasonably necessary". The business interests recognised as legitimate include confidential information, customer connections, relationships with suppliers, and the stability of the employer's workforce.[48]

Once it has been determined that the interest which the employer is attempting to protect is a legitimate one, it must be asked whether the covenant itself goes any further than is reasonably necessary to protect the interest involved.[49] The general rule is that restrictive covenants in an employment contract will be enforced if (1) it is necessary to protect a legitimate business interest of the employer; (2) it is reasonably limited in time, space and scope; and (3) it is conformable to the public interest. While reasonable restrictive covenants may be enforced by the courts, such agreements are reviewed carefully and are strictly interpreted against the employer. There are two main reasons for this. Firstly, employment contracts are usually drafted by the employer and restrictive covenants are usually included in the employer's standardised form employment contract. Secondly, restrictive covenants are often the result of unequal bargaining power and the employee is not very likely to give attention to the hardship he may later suffer through loss of his livelihood. Consequently, it is important to consider the circumstances underlying the agreement and the termination of the employment relationship when determining the enforceability of restrictive covenants in employment contracts.[50] An important factor to consider, when determining the reasonableness of a particular restraint, is the status or position of the employee involved and his connection with or relevance to the interest that the employer is seeking to protect. For example, a covenant will most certainly be upheld when the employee involved obtains such personal knowledge of and influence over his employer's customers, or knowledge of his employer's trade secrets as would enable him to take advantage of his employer's trade connections or utilise information confidentially obtained. However, if the employee is not in a position to acquire any such influence or knowledge, any attempted restraint will be considered anti-competitive and contrary to the public interest.[51]

Another important consideration in deciding whether a restraint is reasonable as between the parties is the geographical extent of the restraint, its duration and the scope of the activities it prohibits.[52] While each case is unique and thus must be decided on its own facts, certain general principles

[48] Cabrelli, ELB, 2004, p 5-6
[49] Cabrelli, ILJ, 2004, p 168
[50] Moffat, 2010, p 5-6
[51] Brait, 1980, p 428-429
[52] Brait, 1980, p 428

have been applied by the courts in deciding what is reasonable. For example, when determining the reasonableness of time limitations the type of interest has to be considered. When the purpose of the restrictive covenant is to protect the employer against the loss of customers, the reasonableness of the time restriction depends on the position formerly occupied by the employee. In the case of deliverymen, for instance, who visit customers regularly and whose services are very simple, only shorter limitations would be considered reasonable. In other situations, where the employee occupies a position of authority, where the service involves substantial skill or where the business is such that it takes time to train a successor and for the successor to get to know the customers, a longer time limit would be allowed. In cases of professional employees where the service relationship is complex and the employee acquires a very intimate and personal knowledge of the customers' needs and affairs, courts have approved time limitations of up to five years.[53]

Where a business is localised, a restraint will usually be held reasonable where it includes only the area from which the clientele of the business is drawn. Even if a restriction is limited to the area in which the employee carried on his activities, it should be declared unreasonable on the grounds that it affords more than adequate protection for the proprietary interests of the employer. It has also been held that where the employer's business operated over a large territory, any restraint on a former employee must be confined to the area in which he actually operated or had personal connections. It is excessive to preclude an employee from dealing with potential customers or persons unconnected with the employer's business before or during the time of the employment. In all cases where a restrictive covenant is designed to protect the employer against a loss of customers, it should only prohibit the employee from doing business or soliciting customers with whom he dealt or at most the employer's actual customers.[54] The general rule is that the geographical extent of a restriction, to be reasonable, must be confined to the area or territory in which the employee was active during the employment.[55]

To determine the reasonableness of a restrictive covenant undertaken by an employee, the courts also consider the scope of activities prohibited to the employee. Typically, a restraint should be confined to the business activities carried on by the employee during the time of his employment. It would be unreasonable to attempt to restrain the employee who works in a particular department from engaging or being interested in any business similar to that carried on by the employer. It is not generally appropriate for a covenant to refrain the employee from working in any capacity, since it is unlikely that the former employee, finding himself in a different type of job, will be able to utilise any of his former employer's protectable interests.[56]

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[53] Marcoux, 1969, p 274-275
[54] Stratton, 1997, p 118-119
[55] Brooks, 2001, p 347-348
[56] Brait, 1980, p 428-430

3.4.2 In Sweden

In Sweden restrictive covenants are usually separated into two types of covenants; non-competition and non-solicitation covenants. Generally, trade secrets and secrecy are regulated in separate covenants, as there are certain Acts governing the use of such covenants.[57] Non-competition covenants prohibit the employee from setting up a business in competition with the employer and from working for a competitor of the employer, whereas non-solicitation covenants prohibit the employee from canvassing, enticing, inducing, soliciting or dealing/poaching with the employer's customers/employees.

The courts usually apply the 1969 collective agreement as a general guideline when determining whether a restrictive covenant is reasonable or not. This fact persists, even though the collective agreement explicitly states that it is only applicable in cases where the concerned employees are members of the trade unions bound by the agreement. The same applies to the companies that use restrictive covenants in their employment contracts. The 1969 collective agreement is only applicable to the types of businesses that are dependent on product or method development, but the courts nevertheless apply the agreement as a guideline when determining the validity of a restrictive covenant used by a company, whose scope of activity is not covered by the agreement. Therefore, the collective agreement has had a normative effect and has come to be seen as a prototype for the regulation regarding restrictive covenants. In the bill to the 1976 changes to the Contracts Act the legislator states that the collective agreement should serve as guidance when applying the new possibilities for adjustment in Section 38. Furthermore, the legislator states that the principles that have been expressed in the collective agreement should be taken into account in respect of restrictive covenants in employment contracts outside the area covered by the agreement. In addition, guidance should be sought in collective agreements to illustrate, inter alia, the general opinion regarding what is reasonable in terms of the length of a restraint of trade.[58] Thus, the collective agreement of 1969 has acquired the status of a legal source in Sweden.[59]

When applying Section 38 of the Contracts Act, the reasonableness of a restrictive covenant has to be determined by the courts. If the collective agreement of 1969 is not directly applicable, the assessment of whether a covenant is reasonable or not is done in light of the provisions stipulated in the agreement. Primarily, regarding the balancing of interests between the employer and the employee, the question of whether a restraint of trade should be inserted into the employment contract or not, should be considered in each particular case. The question should be determined by considering the employer's interest meriting protection on the one hand, and the employee's interest in free use of its labour on the other. Moreover, the

[57] The Act on Trade Secrets (1990:409) and The Secrecy Act (1980:100)
[58] Proposition 1975/76:81 p 148-153
[59] Adlercreutz, Flodgren, 1992, p 65-66

restraint of trade has to be limited in time. The commitment period should be limited to the estimated useful life of the employer's knowledge meriting protection, but should not exceed 24 months.[60]

For a restrictive covenant to be accepted by a Swedish court, some form of remuneration has to be presented to the employee by the employer. According to the 1969 collective agreement, the employer is obliged to compensate the employee for the detriment caused by the restraint, during the term of the restriction. This compensation should amount to 60 per cent of the employee's salary with the former employer. If the collective agreement is not applicable, the courts still require some form of compensation to be presented to the employee for a restrictive covenant to be enforceable. Such compensation could be economic compensation during employment, economic compensation during the term of the restriction, or particularly advantageous employment benefits. The important factor here is that the compensation is explicitly attributable to the detriment caused by the restraint.

Regarding the categories of employees who may have to accept a restrictive covenant in their employment contract, guidance can, once again, be sought in the 1969 collective agreement. As we could see in Chapter 3.3.2, the employee has to ”during the employment, gain knowledge of manufacturing trade secrets or therewith equivalent company-specific knowledge”, and to ”by education or experience be able to make use of this knowledge”. These restrictions limit the use of restrictive covenants to employees in higher positions within a company and are important factors to consider by the courts. If such factors were not considered, there would be a risk of restrictive covenants being abused by employers to keep all the employees in service. Hence, the courts consider the status or position of the employee involved and his connection with or relevance to the interest that the employer is seeking to protect. For example, a covenant will probably be upheld when the employee obtains such personal knowledge of and influence over his employer's customers, or knowledge of his employer's trade secrets as would enable him to take advantage of his employer's trade connections or utilise information confidentially obtained.

Moreover, employment contracts in Sweden usually contain covenants regarding confidentiality and protection of company trade secrets. These restrictions will be discussed in the following Chapter.

3.5 Duty of loyalty

Depending on the jurisdiction, there are certain restraints on an employee's activities without the existence of a restrictive covenant. In Sweden, employees have a far-reaching duty to be loyal to their employer, including the duty to look after the employer's interests and to perform work in a

[60] Adlercreutz, Flodgren, 1992, p 62

careful and diligent way.[61] The duty of loyalty is an obligation for the employee that follows from the employment contract. It does not have to be stated in the agreement; according to the Swedish legal view, the parties in a contractual relationship have a general obligation to be loyal towards each other. The duty of loyalty has not been legislated in Sweden – it exists as a general principle of law. [62] According to the Swedish Labour Court (Sw. Arbetsdomstolen), it follows from an employment relationship that an employee should be loyal towards his employer.[63] An employee may not take measures that are likely to harm or hamper the employer's business. The Swedish Labour Court has also stated that an employee is required to put the employer's interests before his own and to avoid situations where he can get into a clash of duties.[64] In addition, the employee shall not intentionally act in a way that is detrimental to the employer during the course of employment, which means that an employee is not even allowed to use his own skill, knowledge and experience to compete with the employer during the employment.[65] There are particularly strict demands for loyalty concerning senior executives since they are in a certain position of trust within a company.[66] Also included in the duty of loyalty in Sweden is a duty of confidentiality, a duty to act with integrity (i.e. by not accepting bribes), a duty of care and diligence, and a duty to perform adequately while working.[67]

Furthermore, it should be noted that it is illegal to disclose company trade secrets during the employment according to the Swedish Act on Trade Secrets. If exceptional reasons are at hand, it is also illegal to disclose trade secrets after the termination of the employment.[68] The duty of loyalty only protects trade secrets during the employment, but the Act on Trade Secrets provides extended protection in this regard.[69] The protection given by the Act on Trade Secrets in not enough, however, to replace the need for restrictive covenants in situations where employers have an extensive need for confidentiality, due to the limited scope of application of Section 7, second paragraph in the aforesaid Act.[70]

In Britain there is, during the employment, an implied obligation of faithful service, which means that the employee must not do anything in or out of working time, which will damage his employer's business. This implied term is not regarded as being a restraint on competition.[71] There are endless references in the case law to implied terms, duties or obligations owed by employees to employing entities and having to do with adherence to the

[61] Schmidt, 1994, p 257-258
[62] Nicander, 1995/1996, p 31
[63] AD 1993:18
[64] Bylund, Elmér, Viklund, Öhman, 2011, p 136-137 and AD 1993:18
[65] Fahlbeck, 2004, p 94-95
[66] AD 1982:110
[67] Schmidt, 1994, p 259-262
[68] The Trade Secrets Act, Section 7 second paragraph
[69] Sandgren, 1998/99, p 670-671 and AD 1998:80
[70] Fahlbeck, 2004, p 105-106
[71] Freedland, 2003, p 171

employing entity and its interests. However, the terminology used varies enormously as between "fidelity", "loyalty", "good faith", "faithfulness", and "confidence" or "confidentiality". These terms are sometimes regarded as synonymous, but at other times as distinct. Behind that fog of terminologies, the shadowy outline of a normative structure can be discerned. During employment, two sets of implied obligations operate cumulatively and in conjunction with each other. One set of implied obligations applies to protect the intangible assets of the employer, in particular the employer's intellectual property. This set of obligations is focused upon the notion of the employer's "trade secrets" and other confidential information. While the employment relationship continues, that set of obligations is overlaid with a set of broader implied obligations upon employees, more directly derived from the contract of employment, to advert to the interests of the employer, and not to compete with those interests or act negatively in relation to them. Therefore, the words "fidelity", "loyalty", or "good faith" is frequently used. However, once the employment relationship has ended, the employer's claim to that broader kind of adherence is seen to fall away and the broader set of implied obligations ceases to apply. So within the law of implied obligations associated with the contract of employment, a balance is struck between loyalty and freedom of economic activity which hinges upon the termination of employment.[72]

After the duty of fidelity has come to an end when the contract of employment ceases, the only restrictions on competition by the ex-employee (in the absence of express restrictive covenants) are (1) a restriction to disclose trade secrets or confidential information gained in the course of his employment, and (2) a limited duty not to compete with the employer.[73] An employee has a general obligation of good faith not to use confidential information gained in his service to his master's disadvantage.[74] It is however important to distinguish trade secrets or confidential information from the employee's own expertise. Furthermore, the employee may not take or make extracts from the employer's documents or copies of them with a view to competing with his employer after the end of his employment. In addition, the employee may not deliberately memorise his employer's confidential information for the purpose of using such information after the termination of employment.[75]

[72] Freedland, 2003, p 173-174
[73] Brearley, Bloch, 1999, p 142
[74] Batt, p 238
[75] Brearley, Bloch, 1999, p 142

4 British case law

4.1 Early judgements

Gledhow Autoparts v Delaney (Court of Appeal) 1965[76]: The case concerned a commercial traveller who was employed by a company. The employment contract contained a covenant providing that for three years from the termination of his employment, he should not solicit or seek to obtain orders from any company within the districts in which he had operated during the course of his employment with the company. During his employment, he was required to call at garages in various districts in southern Britain, there were, however, many garages in these districts that were never customers of the company and at which the employee might never have called at all. After leaving the employment, he continued to solicit orders on his own account from garages in the districts in which he had worked for the company. An injunction was granted to restrain him from doing so.

The court referred to the *Mason* case of 1913 and held that the injunction should not have been granted, as the condition was invalid as being in unreasonable restraint of trade. The court stated that the restraint would have been enforceable if it had included not only customers but also potential customers on whom the employee had called in the course of his employment. However, the fact that the restraint included garages at which the employee might never have called was unreasonable according to the court. In addition, the geographical scope of the restraint was too wide. The employee was denied the right to trade in a very large area, consisting of at least fourteen counties. Nevertheless, the court held that the area operated in itself would not matter if the restriction had been to customers who the employee had visited. The covenant was found to be a protection against competition, and the appeal was allowed and the covenant was held unreasonable.

Esso Petroleum Company Ltd v Harper's Garage Ltd (House of Lords) 1967[77]: The case did not regard the employee-employer relationship; however, it does contain a few important aspects to consider when dealing with restraint of trade covenants, thus I find that the case deserves to be mentioned here. The appellants, suppliers of motor fuel to dealers, entered into two sales agreements with the respondents in relation to two garages owned by the respondents. Under the agreements, the appellants agreed to sell and the respondent agreed to buy from the appellants for a period of four years and five months at the appellant's wholesale schedule prices. When a low-priced petrol came on the market, the respondents deemed the sales agreements null and void by reason of the removal of the resale price

[76] As reported in Weekly Law Reports retrieved from Westlaw International (W.L.R. 1366)
[77] As reported in Weekly Law Reports retrieved from Westlaw International (W.L.R. 871)

maintenance covenant. The appellants sought injunctions restraining the respondents from buying or selling motor fuels other than those of the appellants at the two garages. Lord Pearce stated that the main issue is whether the agreements are to be regarded as agreements in restraint of trade so as to be exposed to the tests of reasonableness stated in the *Nordenfelt* case. Is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable? Lord Wilberforce held that the rules relating to restraint of trade is bound to be a compromise, as are all rules imposed for freedom's sake. The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason. There are likely to be certain sensitive areas as to which the law will require in every case the test of reasonableness to be passed: such an area has long been and still is that of contracts between employer and employee as regards the period after the employment has ceased. The court continued to discuss whether the doctrine of restraint of trade was applicable in this particular area of trade. In conclusion, one of the agreements was found to be void, but the other one was held to be valid.

In this case, the court maintained the view that a covenant in restraint of trade, whether express or implied, cannot be enforced unless it is reasonable as a matter of both private and public interests.[78]

Home Counties Dairies v Skilton (Court of Appeal) 1970[79]: The case concerned a milk roundsman who had a restrictive covenant in his employment contract which prohibited him from, during the period of one year, either on his own account or employed by another company, serving or selling milk or dairy products to any person with whom the milk roundsman had had dealings during the last six months of his employment. The restriction only applied to customers of the employer and customers whom the employee had served. The milk roundsman entered into employment with another dairy company and started to operate in the area covered by the former employer. The Court of Appeal held that the covenant merely afforded the protection to which the employer was entitled and was hence enforceable. The court emphasised that the employer was entitled to protect his customer connection against the employee who may by virtue of his personality acquire influence over customers with whom his employment brings him into contact.[80] Therefore, the covenant was reasonably necessary for the protection of the employer's trade connections.

4.2 Modern case law

Office Angels v Rainer-Thomas (Court of Appeal) 1991[81]: Two employees worked for an employment agency as the manager and temporary consultant respectively. Their employment contracts contained

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[78] Stratton, 1997, p 108
[79] As reported in Weekly Law Reports retrieved from Westlaw International (W.L.R. 526)
[80] Brearley, Bloch, 1999, p 146
[81] As reported in Industrial Relations Law Reports retrieved from Westlaw International (I.R.L.R 214)

restrictive covenants preventing them for a period of six months after the termination of their employment from soliciting the company's customers or being employed within 1,000 metres of the branch at which they had worked. After the termination of their employment, the employees commenced work at another agency within the restricted radius and there was evidence that they had dealings with the company's customers. The company applied for injunctions. The High Court judge held that the company had a right to protect its goodwill but that the restriction against all of the company's customers was too wide and therefore the judge refused to order an injunction enforcing the non-solicitation covenant. The judge further held that the non-competition covenant restricting the employees from working within a 1,000-metre radius of their former office was reasonable and therefore granted an injunction enforcing this restriction. The employees appealed the judgement claiming that the restrictive covenant should be deemed invalid.

The Court of Appeal stated that a covenant, which prohibits wholly the carrying on of business within a specified area for a specified time, must be approached with caution by the court since it amounts to a covenant against competition. The employer has to show that there is some asset or advantage in the business which can properly be regarded as the company's property and which it would be unjust to allow the employee to appropriate. The restriction must be no greater than is necessary to protect the employer's legitimate interests. The court stated that looking at the matter broadly, a restriction which precludes the employees from opening an office of an employment agency anywhere in an area of about 1.2 square miles, including most of the city of London, is not an appropriate form of covenant for the protection of the company's connection with its clients and is wider than is necessary for such protection. The court held that the restriction placed a disproportionately severe restriction on the employees' right to compete with the company after leaving their employment and went further than was reasonable in the interests of the parties. The appeal was allowed and the injunction discharged.

Dentmaster v Kent (Court of Appeal) 1997[82]: The case concerned an employee who worked as a dent repair technician for a company. His employment contract contained both a non-competition covenant and a non-solicitation covenant valid for a period of 12 months. The time period was later amended to six months by the company. Although both covenants operated only during the restraint period, they differed in extent. The non-competition covenant was restricted to the employee's particular area and left him free to carry on a competing business elsewhere; whereas the non-solicitation covenant operated throughout England and prohibited the canvassing of business from anyone who was a customer of the company during the previous 12 months and was also someone with whom the employee had done business. The employee terminated his employment and

[82] As reported in Industrial Relations Law Reports retrieved from Westlaw International (I.R.L.R 636)

the company sought undertakings from him not to breach his post-engagement covenants, including specifically the non-competition and non-solicitation covenants, but the employee claimed that the post-employment obligations were unenforceable against him. The company applied for an interlocutory injunction against the former employee to enforce the non-solicitation covenant. No interlocutory relief was sought in relation to the non-competition covenant.

The judge did not grant an interlocutory injunction on the grounds that the non-solicitation covenant was unreasonable regarding the scope of customers. The Court of Appeal, however, did not agree with the judge and granted the injunction. The court held that the employee, canvassing apart, was free to trade as he pleased with his skill since the covenant restricted the solicitation of customers only. The case referred to the *Office Angels* case and the fact that, in this case, the prohibited class of canvassees was restricted to customers with whom the defendant had been in personal contact in the past. This powerful limitation was an important factor when applying the reasonable prototype for a non-solicitation covenant given by Sir Christopher Slade in the *Office Angels* case.

Axiom Business Computers Ltd v Frederick (Outer House of the Court of Sessions) 2003[83]: The case concerned the former sales director of a company, whose employment contract imposed post-termination of employment provisions precluding her from working for a competitor of the employer and soliciting the employer's customers. The former sales director was involved in client relations and management, including sales and maintenance on behalf of the company. The company's business involved the sale of computer time recording and billing software systems and hardware to law firms. They also provided ongoing computer training and maintenance support.

The company dismissed the sales director on the basis of gross misconduct and an injunction was granted in favour of the employer. The employment contract contained two types of restrictive covenants; a non-competition covenant, and a non-solicitation covenant. The non-competition covenant proscribed the employee from seeking or accepting employment with any of the employer's competitors in the field of computer systems for a period of 12 months after the termination of her employment. The court held the covenant to be unenforceable for the following reasons.

- There was no territorial restriction. The restriction was worldwide in scope, which was unreasonable.
- With reference to the *Saxelby* case from 1916, the court held that post-termination restraints are only warranted where they are essential to protect the trade secrets or the customer base of the employer. Lord Bracadale noted that in a number of cases covenants restricting the solicitation of customers had been upheld as

[83] Green's Weekly Digest 2003 37-1021

enforceable while at the same time, a covenant restricting competition had been held to be invalid, which shows that non-competition covenants are treated more strictly than non-solicitation covenants. In this case, however, Lord Bracadale held that the protection sought by the non-competition covenant was already afforded by the existence of two other covenants in the employee's agreement, which provided protection for the employer with respect to the preservation of trade secrets and solicitation of customers.
- The scope of the market specified, "the field of computer systems", was held to be too wide.[84]

The non-solicitation covenant proscribed the employee from entering into agreements with customers of the employer for a period of 18 months subsequent to the date of termination of her employment in relation to the provision of software and hardware goods, services, systems and/or facilities in which the employer dealt. Customers were defined broadly to include those persons with whom the employer had entered into agreements and with whom the employee, on behalf of the employer, had already dealt, regardless of whether those dealings resulted in the conclusion of a contract. Traditionally, in Britain, it was thought that covenants with such a broad definition of customers would be held to be unenforceable unless it was made clear that persons who were not customers of the employer at the date of termination were not included. However, the court found the covenant in this case to be enforceable. The court held that there was no need to include a contractual provision to the effect that the covenant only applied to persons who were customers during the course of her employment or during a period of time prior to the termination of the employee's employment. The court also held that it is legitimate for an employer to protect its interests in relation to negotiations. This means that, where an employee has made initial contact and commenced negotiations or discussions with prospective customers with a view to establishing long-term arrangements or business, the employer will be entitled to protection with regard to such prospective customers.[85]

Allan Janes LLP v Johal (High Court of Justice) 2006[86]: The claimant, a firm of solicitors, sought an injunction against the defendant to enforce restrictive covenants that had been contained in her contract of employment. The defendant had been employed by the claimant as an assistant solicitor. When the defendant left and set up a partnership, the claimant claimed that she was in breach of covenants restraining her for one year from working in the same fields of practice within a six mile radius of the company's offices and from acting for any person who had been a client of the company in the year before she left the firm. The court held that restrictive covenants in an

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[84] Cabrelli, ILJ, 2004, http://www.law.ed.ac.uk/file_download/publications/0_1029_postterminationcovenantsinthespotlightag.pdf (retrieved May 2011)
[85] Cabrelli, ILJ, 2004, p 3-4
[86] As reported by the High Court of England and Wales retrieved from Westlaw International (EWHC 286)

employment contract should only be enforces if they go no further than reasonably necessary to protect the employer's legitimate interests. The restriction against practising within the six mile area, which was not limited to the clients of the claimant, was wider than was necessary to protect the claimant's legitimate interests. Having regard to the size of the population within that area, the radial restriction would serve mainly to protect the claimant from competition for the business of a very large number of business persons who were not, or had ceased to be, clients of the company. However, the non-dealing covenant in regard to the claimant's recent clients was reasonable for the protection of its legitimate interests. Although the restriction was significantly widened by not being limited to those clients with whom the defendant had had personal contact in the year before she left, the width of the clause was not fatal to its reasonableness (reference was made to the *Office Angels* case). When the employment contract was made both parties had hoped that the defendant would eventually become a partner and so it had been within the contemplation of the parties that she would be introduced widely to a large proportion of the firm's clients, which was important to consider when determining the reasonableness of the restriction.

Dunedin Independent Plc v Welsh (Outer House of the Court of Sessions) 2006[87]: The case regarded a financial adviser who was employed by a company as a director. A non-solicitation covenant of the employment contract precluded the employee from, during the employment and for the period of 12 months from the termination of the employment, enticing or soliciting away from the company customers or clients of the company with whom the employee has dealt at any time during the 12 months immediately prior to the date of termination. The agreement also contained a non-competition covenant, which provided that the employee would not during the employment and for the period of 12 months from the termination date have business dealings or accept business from any clients of the company, with whom the employee had dealt at any time during the 12 months immediately prior to the termination date.

The director left the employment after a year and the uncontested evidence was that certain clients of the company had followed the director and transferred their business to him. The company obtained an injunction against the employee and also sought damages based on alleged losses in respect of specific clients. Those losses were based on the contention that had the employee not sought out such clients (in breach of the non-solicitation covenant) or acted for them (in breach of the non-competition covenant) for the duration of the restraint, those clients would have remained with the company. The question for determination was whether the company's losses were the result of the alleged breaches of contract or not.

[87] http://www.scotcourts.gov.uk/opinions/2006CSOH174.html (retrieved May 2011)

The employee admitted that he had dealing with and accepted business from clients of the company, but the court's opinion was that to establish a breach the company would need to adduce evidence not merely of the employee contacting clients, but of enticing or soliciting clients. The company failed to do so. This shows that even evidence that the client subsequently took the business to the director will not alone be enough. Regarding the non-competition covenant, the court decided that it was wider than was necessary to protect a legitimate trade interest. The covenant referred to the former employee accepting business from and having business dealings with clients. The court stated that the company did not have a legitimate interest to prevent the defender using a former customer or client as a recruitment consultant or as a printer, whether or not the defender continued in any way in the financial industry or not. Furthermore, the covenant was held to be wider than is reasonably necessary to safeguard the company's interests in their clients' goodwill, future business and trade connections.[88]

Having established that the clients would not in any case have stayed with the company, the court observed that had a breach of either covenant been established, no damages could be claimed because no loss would have been caused by the breach. It would not be enough merely to show that there had been a breach by the defender or wither or both restrictive provisions and that the clients had left. The pursuers would have to establish a causal link and show that if the director had either not sought out clients or declined to act for them for the restrictive period, the client would have remained with the company.[89]

Thomas v Farr Plc (Court of Appeal) 2007[90]: The case regarded the managing director of a company active within the general insurance market. To protect the company's confidential information, the director's employment contract contained various covenants regarding non-solicitation and restraining him from competing with the company for a period of 12 months after his employment ended. Following a dispute with the company that led to his resignation, the director was offered a position by another company who wished to enter the insurance market in competition with the director's former employer. In order to take up this post the director sought a declaration that the non-competition covenant was an unreasonable restraint of trade and therefore unenforceable. He also contended that the covenant was too wide and that it should last for a maximum of six months and not 12.

The Court of Appeal held that the director was an interested party to all major operational and strategic decisions affecting the company and that he was responsible for all of the company's existing business. He would be able to recall many matters at a considerably detailed level such as the business plan for the company's future development, which would be valuable information for a competitor to possess. A non-solicitation

[88] Huntley, 2007, p 247-248
[89] Cabrelli, 2007, p 6
[90] http://www.bailii.org/ew/cases/EWCA/Civ/2007/118.html (retrieved May 2011)

covenant was not sufficient to protect the company against the unauthorised use of this information because the information that the director possessed was not client-specific but of a broader range concerning the operation and development of the company as a business. Considering the high, strategic level of the director's job, it was felt that 12 months was a reasonable period for this covenant to last. Since the director was not prohibited from working in insurance generally, merely in the market within which the company operated, the court held that the non-competition covenant was valid.[91]

[91] Richards-Bray, 2007, p 76-79

5 Swedish case law

5.1 Early judgements

Prior to the revision of the Contracts Act in 1976, many judgements from the Supreme Court were based on a contractual analysis.[92] Assessments were often made in each individual case regarding the application of Section 38 in the Contracts Act and account was taken to the entitled party's need for protection and to the obliged party's right to earn a living. According to the court's judgements, this right could be upheld by economic compensation from the employer to the employee during the term of a non-competition clause. The Supreme Court did not, however, want to decide whether it is appropriate to uphold restrictive covenants from a societal perspective. The only social aspect that was mentioned was the employee's possibility to earn a living. The national economic aspect was never considered and the Supreme Court held that it had to be regulated by law. I will discuss this further in Chapter 6.1.1.

Through the implementation of the Act on Trial of Labour Disputes in 1974, the Swedish Labour Court is the highest instance in all employment disputes. In this chapter, I will report on cases that have been important in the development of restrictive covenants in Sweden. In this thesis I will focus on modern cases, which apply the Contracts Act as the wording is today. However, one case deserves mentioning before we proceed to post 1976 judgements.

AD 1977:167: This case concerned an engineer, who held a managerial position at a consultancy company. The term of validity of the restraint of trade was two years, it was limited to a specific geographical region and the damages amounted to 12 months' salary. The employee accepted employment at a similar company in the same city and was thus in breach of the restrictive covenant. In its ruling, the Labour Court stated that the consideration regarding the validity of the covenant should be made in light of the labour market's view on restraints of trade. The 1969 collective agreement was not applicable on this specific restrictive covenant, since there was no company-specific knowledge. The Labour Court held that, even though the validity of a restrictive covenant outside of the 1969 collective agreement's area of application should be viewed highly restrictive, it should not be ruled out.[93] Therefore, the court held the covenant valid on the grounds that it had a geographical and temporal limitation and the fact that consultancy companies are particularly sensitive to competition from a former key employee. This judgement expressed a relatively strict view of restraints of trade. However, it should be remembered that the Labour Court applied the Contracts Act in its old

[92] Inter alia NJA 1957 p 279
[93] See also Zethraeus, 2001 for more discussion regarding this.

wording, where the conditions to not apply a certain covenant were more stringent.

5.2 Post 1976 judgements

AD 1984:20: This case concerned an engineer who worked as a seller within the field of heating technology. The employment contract contained a restrictive covenant which forbade the employee to work in the field of heating technology for a year after the termination of the employment. The employee was guaranteed the same income position after the termination of the employment, provided that he complied with the restraint. The company was bound by the 1969 collective agreement, but the employee was not a member of a trade union, therefore the agreement was not applicable in respect of the employee. The Labour Court held that the 1969 collective agreement also should be applied in cases where only the employer is bound by the agreement. Otherwise, an employer would be able to use restrictive covenants to a greater extent against non-organised employees compared to organised employees. Furthermore, the court stated that employees' personal skill, personal knowledge and personal experience should not be included in the expression ”trade secret meriting protection” in the collective agreement. The court found that the employee had acquired special knowledge within a certain area, and that the company could not keep this knowledge secret as a trade secret. According to the Labour Court, the employee's work was not within the field of application of the collective agreement, and therefore the covenant was held to be in unreasonable restraint of trade. The covenant was held unenforceable.

AD 1985:138: The case regarded a seller at a company, which sold computer records. The seller was employed on probation and the employment contract contained a restrictive covenant with a commitment period of 12 months and a penalty for non-compliance amounting to 10 times the average monthly salary from the employer. The Labour Court found that the employee's position at the company had not been particularly high and nothing in the case indicated that the employee had had access to trade secrets. The employment was also deemed exceptionally insecure, since the employee was not guaranteed a permanent employment. The covenant was therefore held to be void.

AD 1991:38: The case concerned a pilot employed with the military, whose employment contract contained a restrictive covenant. The covenant prohibited the pilot from leaving his employment for a duration of 10 years, and from working as a pilot for another company for three years after the termination of the employment. The pilot would receive compensation amounting to SEK 3,000 per month for staying on with the military for 10 years. In the event that he would leave his employment prematurely, he was obliged to pay to the employer, the remaining amount of the compensation that he would have received, had he not left his employment. After a year, the pilot left his employment with the military and took up employment as a

pilot with a commercial airline. The State demanded that the pilot should pay damages amounting to SEK 700,000.

The Labour Court stated that, according to the collective agreement of 1969 and the guidelines for the reasonability assessment in the 1976 changes to the Contracts Act, a restrictive covenant should be held void if its sole purpose is to retain employees with certain knowledge and certain competence in their employments. In this case, the pilot has received a lot of training and was compensated for the inconvenience staying on with the military caused him. In addition, reference was made to the guidelines in the 1969 agreement, which states that a standard compensation amounting to six months' salary should be enough protection for a restrictive covenant. The pilot was obliged to pay damages amounting to SEK 36,000 (the same amount of compensation he had received for staying on with the military) for being in breach of the restrictive covenant.

AD 1992:9: In this case, the Labour Court reviewed a restrictive covenant, which limited an auditor's ability to be active in his profession for a period of three years after the termination of the employment. The covenant was geographically restricted to a part of the company's region. The auditor was permitted to work for any clients within the area, except for clients who already were with the company when the auditor started working there. Should the auditor be in violation of the covenant, he was obliged to compensate the employer, with a sum amounting to 50 per cent of what he earned from the ”forbidden clients”. The court held that the minor infringement in the employee's freedom of trade should be weighed against the employer's interest in keeping their clients. Additionally, the facts that the employee had a secure employment and a relatively high salary were taken into account. The court also stated that a non-solicitation clause such as this, should not be deemed void on the sole ground that it is outside the field of application of the 1969 agreement. Therefore, the covenant was held to be enforceable.

AD 1992:99: The case regarded a company in the computer consultancy field, which arranged on-the-job training for different companies. The employee was an engineer who worked as a teacher in different courses, which the company arranged. As in AD 1992:9, the relevant covenant was a non-solicitation undertaking but the circumstances were different in this case. The covenant restricted the employee from, privately or for another company, undertaking education assignments for the company's clients for a period of two years after the termination of the employment. The purpose of the restriction was the same as in AD 1992:9 – to protect the company from competition regarding the company's clients – but the employee's employment had been short, without security and with a low salary, which led the Labour Court to the conclusion that the covenant was unenforceable in accordance with Section 38 in the Contracts Act.

AD 1993:40: The case concerned an employee who held a position as a manager within a company. The restrictive covenant was part of a special

leave agreement, which was agreed upon when the employee left the employment. The restraint restricted the employee from, within a year and a half after the termination of the employment, engaging in any competitive actions against the company. The damages amounted to GBP 19,000, which was the same amount that the employee was awarded as leave pay. After the termination of the employment, the employee was engaged in an exclusive commercial deal with a company, with whom the previous employer had business dealings. The Labour Court stated that the employee's possibilities to find employment were not restricted by the restraint. The purpose of the restraint was to protect the company from former employees snatching commercial deals from business clients. Additionally, the court adduced that the employee was an experienced businessperson who had held a high position and that he intentionally breached the restraint, thus the court saw no reason to amend or declare the restraint void.

AD 1994:65: In this case, the relevant covenant was a non-compete covenant, which prohibited an employee from competing with the former employer during a period of three years after the termination of the employment. The restraint was geographically limited to the local court's domicile area. The Labour Court referred to AD 1992:99 and held that even though the validity of a restrictive covenant, which is outside of the 1969 collective agreement's area of application, should be viewed highly restrictively, it should not be ruled out. In this case, the covenant went far beyond what was reasonably necessary to restrict the employee from soliciting clients from the former employer. In addition, the employee's salary was not particularly high and she did not have any managerial responsibilities. The court also mentioned doctrine referring to the Competition Act that the weighing between the interests of the parties should be in accordance with a desirable competition in the business world. After taking all factors into consideration, the court held that the covenant went further than was reasonably necessary to protect the interests of the employer and therefore it was void.

AD 2001:91: The case regarded a salesperson who worked for a company in the connection technology industry. The employee was bound by a restrictive covenant, which prohibited him from having any dealings with companies, which had been clients to the company or with which the company had exclusive resale agreements. The commitment period of the covenant was 12 months after the termination of employment. Once again, the Labour Court referred to AD 1992:99 and stated that a covenant, which is outside of the 1969 collective agreement's area of application, can be enforceable in special circumstances. The court found that the purpose of the covenant was to protect the company's exclusive resale agreements and not primarily to protect the company's trade secrets. In addition, if the covenant would be enforceable the court held that it would be nearly impossible for the employee to find employment within the business area he had worked all his working life. The salesperson did not receive a particularly high salary or other benefits that would compensate for the

limitations the covenant entailed. The restraint was held to be unenforceable.

AD 2002:115: In this case, the covenant in question was a non-solicitation undertaking by an employee at an accountancy firm. By accepting the covenant, the employee agreed not to, for two years after the termination of the employment as an employee of a competing company or self-employed, solicit clients from the former employer. After the termination of the employment, the employee was associated with clients' transitions to a competitive business, which led the company to claim that she was in breach of the employment contract and the restrictive covenant. The Labour Court held that the purpose of the covenant was to protect the company from being actively deprived of clients. The court stated that an accountancy firm must have a legitimate interest in such protection. The covenant constituted merely a minor infringement in the employee's ability to find new employment. Therefore, the court held that the covenant was enforceable, but adjusted the penalty fee from SEK 247,760 to SEK 80,000.

AD 2009:63: The case concerned three employees who worked in the IT industry. The first employee worked with product development, the second with hardware development for the company's applications, and the third with purchases and deliveries. They all left their employments and formed another company, which was active in the same line of business as their former employer. The company then claimed that the employees were in breach of their restrictive covenants in their employment contracts. The Labour Court held that the company had a legitimate interest in restricting the first employee with a non-compete covenant since he had worked with product development. However, the covenant restricted the employee from competing with the company during a period of 12 months, not only in Sweden, but within a vast geographical area, which included many other countries. In addition, the employee was prohibited from finding employment within the business area he had worked all his working life. The court also noted that neither his salary nor his other employment conditions reflected the infringement that the covenant meant to him.

Regarding the second and third employees, the court held that the company's interest in restricting them with non-compete covenants was limited. The covenants covered a vast geographical area, including countries outside of Sweden, and had commitment periods of 6 and 12 months, respectively for the two employees. They did not receive additional economic compensation for the limitation the covenants caused. The covenants were held to be unenforceable for all the three employees.

AD 2010:27: The case regarded a consultant active in the IT industry. The consultant's monthly salary amounted to SEK 35,000 and his employment contract contained a restrictive covenant restricting him from taking up business with any of the employer's customers or other companies with whom the employer had business dealings. The covenant was not limited in time as it was written in the employment contract, but the company limited

the covenant to be valid for two after the termination of the employment. After three years with the company, the employee resigned, started his own IT consultancy firm and contacted his former employer's customers offering his services. The Labour Court deemed the restrictive covenant reasonable, since the employer had a legitimate interest in being protected from losing customers and it meant a minor infringement in the employee's ability to pursue his career. It was, according to the Labour Court, impossible to estimate the economic caused by the consultant's actions and the court assessed the damages to SEK 210,000.

AD 2010:53: The employee was a salesperson who sold financial services to clients. The employment contract contained a provision, which restricted the employee, for a period of 60 months after the termination of employment, from soliciting existing clients to the employer, if the employee should take up work with a competitor. The Labour Court stated that a restrictive covenant must not be more extensive than may be considered reasonable. The court continued and stated that in general, practice is characterised by a highly restrictive view of restrictive covenants in employment contracts. However, in this case the company was considered to have a legitimate interest in being protected from the deprivation of clients. The court stated that the fact that a client in this line of business may engage other companies should be taken into consideration when determining the validity of the restrictive covenant. In this respect, the company's business is different from the line of business of an accounting firm where clients usually work with the same company for a long period of time.

The court found that the covenant entailed a significant detriment for the employee. The restraint included 8,000 persons, who were clients to the company when the employee left her employment. Her ability to continue to work as a salesperson of financial services was held to be very limited. In addition, the commitment period of five years was considerably longer than what had been accepted in practice. The employee's salary was high, but the court found no indication that her salary had been determined with reference to the restrictions the covenant meant to her. Consequently, the court's general assessment of the covenant's reasonableness resulted in the covenant being deemed void.

6 Analysis

6.1 Protectable interests

6.1.1 Public interest

It is often said in British law that a covenant in restraint of trade must not be unreasonable with regard to the public interest. However, except in the case of a monopoly, a restraint, which is reasonably necessary to protect the legitimate interests of the ex-employer, will very rarely be regarded as unreasonable with regard to the public interest. The fact is that once it is established that a covenant is reasonable as between the parties, the court will normally not look further. It is for this reason that in some of the recent decisions on the subject, reference to the public interest requirement is absent.[94] If we look at earlier judgements, like the *Esso Petroleum* case from 1967, Lord Pearce asks "is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?"[95] The court maintained the view that a covenant in restraint of trade cannot be enforced unless it is reasonable as a matter of both private and public interests. However, the public interest has been given less consideration in recent judgements, which may indicate a transition towards a more "private" view on restraint of trade.

Regarding the Swedish legal situation, I have found very few cases were reference to the public interest is made. In older cases, the Supreme Court often discuss what is "commonly used" on the labour market or if the restraint of trade is "justified" from a competition perspective[96]. It is not until quite recently that the Labour Court has discussed restrictive covenants from a public perspective. For instance, in the case AD 1994:65 the court mentioned that the weighing between the interests of the parties should be in accordance with a desirable competition in the business world. This could indicate that the Swedish courts are taking the public interest into consideration more now, when determining the validity of a restraint of trade.

6.1.2 Interests of the employee

In British law, regard must be had to the interests of the ex-employee, see for example the *Saxelby* case where the interests of the covenantee are equated with the public interest. It would, however, be an extremely unusual case where, while the protection offered by the restraint went no further than was necessary to protect the legitimate interests of the ex-employer, the restraint was nonetheless to be struck down as being unreasonable having

[94] Brearley, Bloch, 1999, p 143-144
[95] See Chapter 4.1
[96] See, for instance, NJA 1957 p 279 and NJA 1948 p 69

regard to the interests of the ex-employee. This is of course not to say that the interests of the ex-employee are irrelevant: when it comes to deciding whether or not to grant an injunction, the effect of enforcement of the covenant on the ex-employee is of fundamental importance. An important factor to consider is whether the ex-employee is able to continue working without the covenant entailing significant detriment for him.[97]

6.1.3 Legitimate interests of the ex-employer

As mentioned earlier in this thesis, there are two principal types of business interests which the employer is entitled to seek to protect:

1. His trade connections or goodwill; and
2. His business secrets or confidential information.

Restrictive covenants are upheld on the basis that the employee might obtain such personal knowledge of and influence over the customers of his employer or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentially obtained. As we could see in the *Home Counties Dairies* case, the employer was entitled to protect his customer connection against the employee, who may by virtue of his personality, acquire influence over customers, with whom his employment brings him into contact. Where trade connection is relied on to justify a covenant in restraint of trade, the ex-employer must accordingly show the existence of the trade connection of the ex-employer and his customers. The ex-employer must also show that the ex-employee is likely to be able to take advantage of his ex-employer's trade connection – by means of the ex-employee's personal knowledge of and influence over customers or suppliers (restricted by a non-solicitation covenant).[98]

Confidential information and business connections are not the only interests, which the law will recognise in Britain. As we could see in the *Office Angels* case, the Court of Appeal recognised an employment agent's connection with its pool of temporary workers as a protectable interest.[99]

In Sweden, the legitimate interests of the ex-employer are set out in the 1969 collective agreement. These interests have, however, been broadened by the Labour Court to include clients and customers in a wider sense and different kinds of businesses, not only those dependent on product or method development .[100] I will discuss this more thoroughly in Chapter 6.2.3 and 6.2.4. Furthermore, the legitimate interests of the ex-employer should always be weighed against the ex-employee's right to freedom of trade.

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[97] See, for instance, AD 2010:53
[98] Brearley, Bloch, 1999, p 144-145
[99] See Section 4.2
[100] See, for instance, AD 2002:115

6.1.4 Reasonable protection of legitimate interests

For any covenant in restraint of trade to be treated as reasonable in the interests of the parties, it must afford no more than adequate protection to the party in whose favour it is imposed according to the *Saxelby* case. In Britain, it is for the court to decide as a matter of law whether a contract is in restraint of trade and, if so, whether it is reasonable. Nevertheless, which type of covenant is appropriate? As we have seen in the different cases referred, it depends on the individual case and the legitimate interests meriting protection. For instance, in the *Mason* case the non-competition covenant was out of all measure wider than anything that could reasonably be required for the protection of the employer, while a non-solicitation covenant would have been more appropriate.[101] In the *Office Angels* case Sir Christopher Slade stated that in considering the reasonableness of a covenant such as the one in question, the court was entitled to consider whether or not a covenant of a narrower nature would have suffices for the covenantee's protection. In that case, the area covenant was struck down since a properly drafted non-solicitation covenant would have provided sufficient protection to the employer.[102]

The test of reasonableness is always done by Swedish courts when determining the validity of a restrictive covenant.[103] This is protected by the existence of Section 38 in the Contracts Act and the purpose is to try to limit the misuse of restrictive covenants. As we will see in Chapter 6.2, an employer can formulate a restraint of trade in different ways to make it more reasonable.

6.1.5 The aspect of common law and civil law

From what I have discovered, the courts in Britain and Sweden view restrictive covenants very similarly. Both jurisdictions press the importance of freedom of trade, but also understand the need for restraint of trade and accept it – as long as it is reasonable. Since the legislation on restrictive covenants is virtually non-existent in Sweden[104], Swedish courts have had to develop their own standpoint, much as the courts in Britain do. I do, however, think that it is in accordance with the "Swedish model" that the Labour Court uses the 1969 collective agreement as a guideline for determining the validity of restrictive covenant. Since the collective agreement has officially been recognised as a source of law[105], one could argue that the reasonableness of restraint of trade in Sweden has been determined in a manner more "attributable" to civil law.

[101] See Section 3.2.2
[102] See Section 4.2
[103] Adlercreutz, Flodgren, 1992, p 119-120 and see also, for instance, AD 2009:63 and AD 2010:53 where the covenants failed the test of reasonableness.
[104] With this I am referring to Section 38 of the Contracts Act.
[105] Adlercreutz, Flodgren, 1992, p 66-67

6.2 Scope of protection

In this Chapter, I will analyse the different limitations used in restrictive covenants. I will focus on the cases listed in Chapter 4 and Chapter 5 and see how the restraints of trade are limited as regards to time, geography and scope of clients/customers. I will also look at if there are certain areas of business where restrictive covenants are more commonly accepted and if employee consideration is required for a restraint to be held valid.

6.2.1 Restriction in time and a brief overview

Regarding the British judgements we can see in the *Gledhow Autoparts* case from 1965 that a covenant providing that an employee for three years from the termination of his employment, should not solicit or seek to obtain orders from any company within the districts in which he had operated, was not held to be invalid. In this case, the covenant was unreasonable on the grounds that it included customers who the employee had never visited. In the *Home Counties Dairies* case, a milk roundsman was bound by a restrictive covenant prohibiting him from, during a period of one year, serving or selling milk or dairy products to any person with whom the milk roundsman had had dealings during the last six months of his employment. The covenant was held to be reasonable. In the *Office Angels* case, a restrictive covenant preventing two employees from competing and soliciting customers for six months after the termination of their employment was held to be void, but not on the grounds that the restriction in time was unreasonable. In this case, the non-solicitation covenant included all the company's customers, which was unreasonable. The non-compete covenant was excessively wide, since it included most of the city of London and was therefore unreasonable. In the *Dentmaster* case, a dent repair technician was bound by a non-solicitation covenant prohibiting him from soliciting customers with whom he had had dealing during the previous 12 months of his employment. The covenant was valid for a period of 12 months, but was later amended to six months by the company. The covenant was held to be valid by the Court of Appeal. The *Axiom* case regarded a covenant precluding a former sales director from working for a competitor of the employer for a period of 12 months after the termination of her employment and soliciting the employer's customers for a period of 18 months after the termination of her employment. The non-compete restriction was held to be unenforceable, whereas the non-solicitation restriction was deemed valid. The non-compete restriction was, however, held to be unenforceable because of the fact that it was wider than reasonably necessary. In the *Allan Janes* case a non-compete and a non-solicitation restriction valid for 12 months after the termination of the employee's employment, was deemed valid by the court. The same restriction in time was accepted in the *Dunedin* case, but the covenant was held to be void on the grounds that it was wider than reasonably necessary to safeguard the company's interests. In the *Farr Plc* case, the court held

that 12 months was a reasonable period for the restrictive covenant to last, considering the high, strategic level of the director's work.

In Sweden, the AD 1977:167 case concerned an engineer who was bound by a restraint valid for two years after the termination of the employment. The covenant was held to be valid, with one reason being the fact that the restraint had a temporal limitation. In the AD 1984:20 case, an engineer was bound by a restraint valid for one year, but it was deemed void because of the fact that the employee had not acquired special knowledge meriting protection. In the AD 1985:138 case, a salesman was bound by a restrictive covenant with a commitment period of 12 months, but the covenant was deemed void on the grounds that the employee's employment was exceptionally insecure. In the AD 1991:38 case, a pilot was prohibited from working for a competitor for three years after the termination of his employment. The Labour Court did not discuss the time restriction, and the covenant was held to be valid. The cases 1992:9 and 1992:99 contained restrictions valid for three and two years respectively. The first one was held to be unenforceable on the grounds that the employee had a secure employment, whereas the second one was deemed void on the grounds that the employee's employment had been short and without security. In AD 1993:40, a restrictive covenant with a commitment period of 18 months was deemed valid. In AD 1994:65 a covenant prohibiting an employee from competing with the former employer during a period of three years was deemed invalid, but not because of the time restriction. The covenant went far beyond what was reasonably necessary to protect the employer's interests with regards to the scope of clients included in the restraint. In the case AD 2001:91 a salesperson was bound by a restrictive covenant with a commitment period of 12 months. The time restriction was only briefly mentioned by the court and the fact that it would be nearly impossible for the employee to find employment within the business area he had worked all his working life for 12 months after the termination of his former employment caused the covenant to be held unenforceable. In AD 2002:115, a restrictive covenant valid for two years was held valid. The case AD 2009:63 concerned three different employees bound by restrictive covenants with commitment periods between 6 and 12 months. The covenants were held to be unenforceable for all three employees with regards to the vast geographical area covered by the restraint and the time restriction was not discussed further by the court. In AD 2010:27, a covenant valid for a period of two years was deemed valid but in AD 2010:53 a commitment period of five years was held to be considerably longer than reasonably necessary.

To summarise, restrictive covenants in Britain usually have commitment periods of around 12 months. Non-solicitation covenants protecting customer connection could have a longer commitment period. This will normally be the time, which it would take a replacement employee to establish a relationship with customers such that the influence of the ex-employee will have been removed.[106] This of course depends substantially

[106] Brearley, Bloch, 1999, p 155

on the nature of the business and in particular the degree of customer loyalty. As regards the non-compete covenants, different considerations may apply according to whether the covenant is geographically limited or not. If the geographical limitation is strict, a longer commitment period may be tolerated.[107] These time restrictions are about the same as the restrictions stated in the 1969 collective agreement used as general guidelines in Sweden. According to the collective agreement, a time limitation of 12 months is usually sufficient to allow adequate protection for the employer, given that the life expectancy of the knowledge meriting protection is relatively short. The commitment period should normally not have to exceed 24 months.[108]

It should be noted, however, that the Swedish Labour Court not always adhere to the time restrictions set out in the 1969 collective agreement. In the case AD 1993:218, a person active in the funeral industry was bound by a restrictive covenant, which prohibited him from competing with the former employer during a period of five years after the termination of the employment. The Labour Court deemed the covenant valid, but the case was not referred indicating that the case was not intended to set a precedent.[109]

6.2.2 Geographical restriction

Restrictive covenants can be geographically limited in different ways. For instance, in the *Gledhow Autopart* case from 1965 the restraint of trade consisted of at least 14 counties. The court found, however, that the area itself would not matter if the restriction had been to customers who the employee had visited. In the *Office Angels* case, the restrictive covenant prevented the employees from working within a 1,000-metre radius of their former office. Since this area included most of the city of London, the court held that the restraint was not an appropriate form of covenant for the protection of the company’s interests. If the area had not included so many clients, it could perhaps have been accepted. In the *Dentmaster* case, a non-solicitation covenant which operated throughout England was accepted by the court. The court held that the employee was free to trade as he pleased with his skill since the covenant only prohibited the solicitation of customers with whom he employee had been in personal contact with during his employment. In the *Axiom* case, a non-competition covenant was held unreasonable because of the fact that it had no territorial restriction. In the *Allan Janes* case, a restriction against practising within a six mile area of the former employer’s offices was wider than was necessary to protect the former employer’s legitimate interests, since the restriction was not limited to the clients of the former employee.

In Sweden, geographical restrictions to restrictive covenants are not as common as they are in Britain. However, there are a few cases where the restraints have been geographically limited. In AD 1977:167, the restraint

[107] Brait, 1980, 417-420 and Brearley, Bloch, 1999, p 156
[108] Adlercreutz, Flodgren, 1992, p 60
[109] Adlercreutz, 1994, p 533-534

was limited to a specific geographical region, the Skåne province, which contributed to the court's decision that the covenant was valid. In AD 1992:9, the restrictive covenant was geographically restricted to a part of the company's region, which led to that the covenant only posed a minor infringement in the employee's freedom of trade. The covenant was deemed valid. The case AD 1994:65 regarded a non-competition covenant geographically limited to local court of the company's domicile area. This was not enough though, and the covenant was held to be void. In AD 2009:63, the restrictive covenants in question covered a vast geographical area, including countries outside of Sweden and were held to be unenforceable.

As we can see from the listed cases, a geographical restriction is not necessary for a restrictive covenant to be deemed valid. It does, however, contribute to a more reasonable infringement in the employee's freedom of trade. Restrictive covenants must not be more extensive than is reasonably necessary, and a geographical limitation is a good way for an employer to make sure that the general assessment of a covenant's reasonableness will result in the covenant being deemed valid – both in Britain and in Sweden. Quite a few of the British cases mentioned here had some kind of a geographical restriction. The employer has to make sure though that the limitation does not include too many potential customers of the employee's. A geographical limitation preventing the former employee from working within a 1,000-metre radius of his former employee may be reasonable in a smaller town, but it could be unreasonable in a larger city. The wider the area the more difficult it will be to justify it as no more than necessary to protect the ex-employer's legitimate interests.[110]

Area and duration are closely related – if the period is short, a wider area may be tolerated. Conversely, if the area is small, a longer period may be permitted. Normally if no area is specified the area will be taken to be worldwide.[111]

6.2.3 Scope of clients/customers

As with a temporal and geographical limitation, limiting a restrictive covenant to only include clients and/or customers with whom the former employee has had dealings is a great way of ensuring that the covenant is reasonable. As we have seen in the cases referred in this thesis, the scope of clients and/or customers included in the restrictive covenants is, more often than not, unreasonably wide. In the *Gledhow* case, the covenant was found to be a protection against competition and therefore unreasonably, since it included not only customers of the employee, but also customers with whom the employee had never been in contact. In the *Home Counties Dairies* case, the restrictive covenant only applied to customers whom the employee had served. The restraint was held to be reasonably necessary for

[110] Brearley, Bloch, 1999, p 160
[111] Brearley, Bloch, 1999, p 160-161

the protection of the employer’s trade connection and therefore valid. The *Dentmaster* case regarded a covenant prohibiting the employee from having business dealings with anyone who was a customer of the company during the previous 12 months and was also someone with whom the employee had done business during his employment. The covenant was held to be valid by the Court of Appeal. In the *Axiom* case, the definition of customers was broadened to include both persons with whom the employer had entered into agreements and with whom the employee, on behalf of the employer, had already dealt, regardless of whether those dealings resulted in the conclusion of a contract. In the *Allan Janes* case, the former employee was restricted from practising within a big area, which was not limited to the clients of the employee. The restraint included a very large number of business persons who were not, or had ceased to be, clients of the company and the restraint would serve mainly to protect the company from competition. Although the covenant was not limited to those clients with whom the employee had had personal contact, it was held to be valid by the court. Exceptional circumstances were at hand and it had been within the contemplation of the parties that the employee would be introduced widely to a large proportion of the firm’s clients. The *Dunedin* case concerned a restraint of trade restricting a former employee from accepting business from and having business dealings with clients of the company. The covenant was held to be wider than reasonably necessary to safeguard the company’s interests.

In Sweden, non-solicitation covenants have become increasingly more common during the last 30-40 years. This is because of the fact that the 1969 collective agreement only is applicable on businesses that are dependent on product or method development and thus acquire particular manufacturing trade secrets or therewith equivalent business specific knowledge, which, if disclosed to competitors, would cause the business significant detriment. Clients and customers have become an increasingly valuable asset to companies and are therefore meriting protection. As we can see in the case AD 1992:9 an auditor was permitted to work for any clients within a specified area after the termination of his employment, except for clients who already were with the company when the auditor started working there. The covenant was held to be enforceable. In the case AD 1992:99, a covenant restricted an employee from, privately or for another company, working with company clients after the termination of his employment. The restriction was wider than reasonably necessary and held unenforceable. A similar case is AD 2001:91 where an employee was bound by a restrictive undertaking, which prohibited him from having any dealings with companies, which had been clients to the company or with which the company had exclusive resale agreements. The restraint was held to be too wide and therefore unenforceable. The case AD 2002:115 concerned a non-solicitation undertaking by an employee at an accountancy firm. The employee agreed not to solicit clients from the former employer. The Labour Court held that the covenant constituted merely a minor infringement in the employee’s ability to find new employment and accepted the covenant. The purpose of the covenant was to protect the company from being actively deprived of clients, which was a legitimate

interest meriting protection. In AD 2010:27, a consultant active in the IT industry was restricted from taking up business with any of the employer's customers or other companies with whom the employer had business dealings. The court held that the employer had a legitimate interest in being protected from losing customers and it meant merely a minor infringement in the employee's ability to pursue his career. The covenant was held to be reasonable. Lastly, in the case AD 2010:53 a salesperson was prohibited from soliciting existing clients to the employer. The restraint included a large number of clients, which meant that her ability to continue to work as salesperson was very limited. The covenant was deemed void.

From what we have seen, non-solicitation covenants are usually accepted in Britain as long as they are limited to the clients/customers with whom the employee has had dealings. Nonetheless, the validity of a non-solicitation covenant depends on the nature of the business and the nature of the employment.[112] The loyalty of the customers or clients to the ex-employer is an important factor to consider. For instance, the fragile relationship between an insurance broker and a client and the relatively mild solicitation required to deprive an insurance broker of valuable business should be taken into consideration when determining the insurance broker's need for protection. Another important factor to consider is whether the employment was such that the employee could gain influence over customers and/or had access to confidential information concerning customers.[113] A non-solicitation covenant should go no further than is necessary to protect the ex-employer's customer connection or confidential information. Accordingly, a non-solicitation covenant should ordinarily be limited to customers with whom the ex-employee actually dealt during a specified period or to those customers of whose identity or special requirements the ex-employee has knowledge by virtue of his access to confidential information or trade secrets of the ex-employer.[114] As I mentioned earlier, non-solicitation covenants are becoming more popular as the customer/client base becomes an increasingly valuable asset to companies.[115] In Sweden the general viewpoint is that, the scope of clients or customers does not have to be limited to clients or customers with whom the ex-employee has had dealings as long as the covenant does not severely limit the ex-employees ability to continue to work within the same area of business. Other factors are also taken into consideration, for instance if the employee is compensated for the detriment caused by the restriction or if the employee held a high position within the company.[116]

6.2.4 Areas of business

As we have seen, restrictive covenants are used in many different types of businesses. In Britain, restrictive covenants may be used as long as the

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[112] Brearley, Bloch, 1999, p 164
[113] Brait, 1980, p 425-426 and Brooks, 2001, p 354-356
[114] Brearley, Bloch, 1999, p 164-165
[115] Adlercreutz, Flodgren, 1992, p 100
[116] Adlercreutz, Flodgren, 1992, p 60-62 and Smitt, 2004, 99-101

employer has a genuine interest requiring protection – either confidential information or goodwill. This requirement is absolute: in its absence, the covenant fails totally.[117] There are no other requirements as regards to what kind of business in which the employee has to be involved. However, the employee should only be restrained from carrying out the sort of business in which he was engaged as an employee. Furthermore, the ex-employee should not be prevented from carrying out too wide a range of activities where all his expertise and experience lies in a restricted field.[118] The employee must be left with some reasonable means of earning a living.[119]

Regarding the legal situation in Sweden, I have already described the kind of businesses covered by the 1969 collective agreement.[120] From what we can see in recent case law in Sweden, other businesses not covered by the collective agreement are allowed to utilise restrictive covenants. For instance, an auditor was bound by a restrictive covenant in AD 2002:115 and an IT-consultant was bound by a restrictive covenant in AD 2010:27. A conclusion that can be drawn is that the employer has to have a legitimate interest meriting protection by a restrictive covenant. As we have seen in recent case law, such a legitimate interest has existed in "knowledge companies", such as accountancy firms and consultancy firms.[121]

6.2.5 Employee consideration

An employer seeking to enforce a restrictive covenant in Britain must be able to show that he gave the employee consideration for it. Where covenants are included as part of the offer of employment there is no difficulty: the consideration is the employer's promise to employ on the terms offered. Where, however, covenants are introduced after employment has begun and there is no obvious consideration for them, such as a pay rise or single bonus payment to which the employee is not otherwise entitled, the position is more difficult. There is not much case law on the subject so the legal situation is uncertain. According to Brearley and Bloch, it is always advisable for an employer to provide specific consideration for the introduction of covenants.[122]

In Sweden, employee consideration can be a great way for a company to ensure that their protectable interests remain protected. According to the collective agreement of 1969, the former employer has to pay consideration to the employee during the commitment time of the restrictive covenant. Such compensation should amount to the difference between the employee's salary with the former employer and the employee's new, lower salary. However, this compensation must at least amount to 60 per cent of the employee's former salary. When dealing with covenants, on which the 1969

[117] Brooks, 2001, p 347
[118] See the *Saxelby* case in Chapter 3.2.2
[119] Brearley, Bloch, 1999, p 153
[120] See Chapter 3.3.2
[121] Smitt, 2004, p 98
[122] Brearley, Bloch, 1999, p 157

collective agreement is not applicable, an employee consideration is not mandatory. Nevertheless, it is an important factor for the court to consider when determining the validity of a restrictive covenant as we could see in, inter alia, AD 2009:63 and 2010:53.[123]

[123] See Chapter 5.2 for other cases where the Labour Court took employee consideration into respect when determining the validity of a restrictive covenant.

7 Conclusion

To conclude this thesis, I would like to list the most important factors to consider when drafting restrictive covenants in Sweden and in Britain. To start off, you have to establish whether the interest that you want to protect is a legitimate one. Interests that the employer is entitled to seek to protect could be, for instance, trade connections or business secrets. Once the protectable interest has been established, the interests of the ex-employer should always be weighed against the ex-employee's right to freedom of trade. Furthermore, the protection should always be reasonable. For any covenant in restraint of trade to be treated as reasonable in the interests of the parties, it must afford no more than adequate protection in whose favour it is imposed. This can be done in a number of ways, but generally, the restrictive covenant should be limited in time, space, and the employee should receive some kind of compensation for the inconvenience caused by the restriction. Furthermore, restrictive covenants should only be used towards employees who may pose a risk to the employer, in terms of competition, after the termination of the employment. When determining such a risk in Sweden, an assessment has to be made in the individual case, but as a guideline, the employee has to work for a "knowledge company", such as an accountancy firm or a consultancy firm, or a company that is dependent on product or method development. In Britain, restrictive covenants may be used as long as the employer has a genuine interest requiring protection – either confidential information or goodwill. There are no other requirements as regards to what kind of business in which the employee has to be involved.

Although a difference lies in the legal systems in Britain and Sweden and the judicial procedure, the reasoning behind the regulation and the usage of restrictive covenants are very similar in the two countries. I would not say that one country has handled the problem better than the other has – the Swedish solution with using a collective agreement as a legal source is a fitting solution for the Swedish model.[124] Likewise, I think that the British development through many judicial decisions is perfectly in line with the British common law system. However, it is still very interesting to see how two countries with different legal systems, can arrive at the same conclusion using two different methods.

Lastly, I would like to stress the fact that the most important factor to consider is, in my opinion, reasonableness. The view on restrictive covenants has, in both jurisdictions, gone from being highly restrictive to being more permissible.[125] As long as the ex-employer can show that the interest he is seeking protection for is a legitimate one, he will be granted such protection as long as the restriction imposed on the ex-employee is reasonable. By limiting the restrictive covenant in, inter alia, time and space,

[124] See Chapter 6.1.5
[125] Zethraeus, 2001, p 408

the ex-employer can make the covenant more reasonable for the ex-employee and thus be granted protection.

As this study has shown, the regulations and usage of restrictive covenants in Sweden and Britain are governed by fairness and reasonableness rather than complex legal rules, despite differences in legal systems between the two countries.

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