

Contractor Doctor: Are restrictive covenants enforceable on overseas contracts?

Dear Contractor Doctor,

I am working for a client via a UK-based agency. I have a restrictive covenant in my contract, which refers to the laws of England and Wales, which prevents me from working direct.

However, I am working in Sweden, am a permanent resident and the client is based in Sweden.

Is the restrictive covenant enforceable?

Thanks

Davide

Contractor Doctor says:

The **restrictive covenant** may be as valid in preventing work other than through the agency in Sweden as in the UK, but, according to **Roger Sinclair** of contractor specialist law firm Egos, whether the agency will choose to enforce the restrictive covenant is a judgement call.

"Conflict of laws is a specialist area of the law," explains Sinclair. "But in general terms it is open to the parties to a contract to decide which law applies, as long as the contract or at least one of the parties to it has some connection with the legal jurisdiction chosen."

So, an agency based in England could reasonably put in the contract that the laws of England and Wales would apply, but might find it difficult to justify arbitrarily specifying the laws of, say, the Czech Republic, if neither the contract nor any of the parties had any connection with that jurisdiction.

European employment law can take precedence

"There is an added complication," continues Sinclair. "If the contractor has an employment contract with the agency, then the labour laws of EU countries generally specify that if the jurisdiction in which the work is carried out has more favourable laws for the employee, those more favourable laws will apply automatically."

So if Swedish employment laws favour the worker more than UK laws, and if the contract were one of employment, then any contractual dispute would probably be decided according to the laws of Sweden. "In cases where a contractor has an employment contract – ie a **contract of service**," advises Sinclair, "it may be worth checking with a local legal specialist."

However, for most **limited company contractors** this issue would not arise, as they have a purely business-to-business relationship with their agency or client, and the parties would be free to decide in their contract what law would apply in the event of a dispute.

Opt-out regulations

"As the agency is UK based, the **Conduct of Employment Agencies and Employment Businesses Regulations** will also apply, and the contractor should check whether or not they have validly opted out," says Sinclair. "If not, then for the agency to place a restriction on the contractor would be unlawful, and so the covenant would not apply."

However, a limited company contractor who has opted out of the agency regulations cannot use those grounds to claim the restrictive covenant is unlawful and does not apply to them. It would then be necessary to consider what the terms of the restriction actually were, whether what the contractor planned would actually be in breach of it, and (if so) and whether or not the restriction was enforceable under the principles governing restraint of trade.

Time, costs and logistics

But, as Sinclair points out, the real barrier to the agency taking action will be the time, the financial risks and the logistics of fighting a legal action with a contractor based in another country.

"The agency may have grounds to sue the contractor based in Sweden for breaking their restrictive covenant by going direct," continues Sinclair. "They could take action through the English courts, even though the contractor lived elsewhere."

If the contractor remained in Sweden then the chances of the agency seeing any financial recompense might be perceived as slim, although civil judgements obtained in one country can generally be enforced in another, by international conventions. The contractor may also experience difficulties if (s)he decides to return to the UK to work, if (s)he has a judgement against him/her.

And this last point is worth bearing in mind, because one of a contractor's greatest assets when seeking new contracts is his or her reputation; many clients insist on credit checks before accepting a contractor, and a judgement not satisfied promptly may appear on any such credit check – and may remain there even after it has been paid.

Taking a view – the client, contractor and agency

"The contractor also needs to consider whether the client will accept him/her working direct," says Sinclair. "Although sometimes the possibility of working direct is driven by the client, often a client will not want a direct relationship with a contractor, so the entire scenario is a non-starter."

The agency may not wish to engage in a lengthy and potentially costly litigation with no guarantee of a return, despite possibly being within their rights to take action if the contractor flouts the restrictive covenant. "But contracts can be enforced in most jurisdictions if the offended party has the will and deep enough pockets," says Sinclair.

"Plus," he concludes, "the contractor needs to consider whether the short term gain of working direct will ultimately benefit their contracting career in the longer term."

Good luck with your contracting!

Contractor Doctor

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