A recent order of the Court of Milan has declared that the non competition covenant with option clause is null and void.

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1. The case

The Labour Division of the Court of Milan has recently issued an order in relation to a six-month covenant not to compete, the effectiveness of which had to be confirmed by the Company (in case of resignation) through the exercise of an option right. In particular, the option clause provided in the case of resignation of the employee, the covenant would have become effective had the Company confirmed effectiveness within fifteen days of the notice of resignation given by the employee.

Conversely, in the case of withdrawal from the employment relationship on the part of the employer, the covenant not to compete would have become effective automatically, with no need for any additional formality.

In point of fact, the employee gave notice of resignation to the Company, which opted for the effectiveness of the covenant within the time span provided for by the agreement. Given that the employee started working with a competitor, the Company filed a claim in court for precautionary purposes, seeking a declaration of the breach of the non competition covenant and the consequent injunction.

2. The order

The Court of Milan has found that the clause which entitled the employer to confirm the effectiveness of the covenant not to compete (this being a right to be exercised after withdrawal on the part of the employee) is null and void in that *«it determined uncertainty as to the duration of the related obligation undertaken by the employee»*. As a matter of fact, according to the Court, in circumstances such as that described above the employee would face a situation of uncertainty as to the decision that the employer will make in the case of resignation and would not be capable of predicting the duration of the covenant, and this would cause *«an actual restriction of one's choices in terms of working activities»*.

This having been said, the Court has concluded that the voidance of the option clause determines the voidance of the entire covenant not to compete and the consequent rejection of the application for injunction, which means that the employee has been authorized to continue to work for the competitor, there being no covenants to the contrary.

3. Case law in favour of, and case law against, the order of the Court of Milan

The order in question, even if open to criticism, is consistent with those court rulings which regard the option clause, in the form specified above, as an attempt made by the employer to elude the limits to the covenant not to compete set by sec. 2125 of the Italian Civil Code (in terms of subject matter, consideration, duration and territory) and thus make an agreement in breach of law.

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From this perspective, such court rulings regard the option clause (to be exercised after the termination of one's employment) as a tool intended to circumvent the strict limits imposed by legislation. Thus, the employee would become fully aware of the Company's intention to confirm the effectiveness of the non competition covenant only after the termination of employment and at the end of the contractually agreed term, and in the meantime he or she would remain bound by the covenant without obtaining any consideration.

Conversely, court rulings acknowledge the validity of the option clause according to which the intention to avoid confirming the effectiveness of the covenant not to compete shall be declared no later than the time of the notice of resignation. It is reckoned that the employee is thus in a position to assess the profitability of the covenant and of the new proposals for employment and know the duration of the obligation (and the consequent consideration) in advance.

However, there are also (non-recent) rulings which found the validity of the non competition covenant with option clause formulated as the one declared null and void in the order under examination. According to such rulings, through the exercise of the option right after the termination of employment the parties do not wish to achieve any purpose other than that provided for by law (i.e. they do not intend to circumvent the provisions of the Italian Civil Code); rather, they wish to reach the very purpose provided for by law, but with a choice to be made at a later time, so as to reflect interests that the employer would be able to assess only at the time of employment terminating.

4. Conclusions

This short outline demonstrates that employers, when having recourse to the tools intended to protect their competitiveness, such as the covenant not to compete, must pay particular attention to compliance with the strict limits imposed by legislation and case law, limits which, however, are often changed from time to time by court rulings.

Furthermore, the problem of resignation remains. As a matter of fact, according to the order in question, the option clause shall be valid upon condition that the non competition covenant becomes finally effective prior to termination of employment. But in the case of a notice of resignation given with immediate effectiveness of employment (for example, when the employee prefers to pay the indemnity *in lieu* of notice instead of working the notice period, which could happen in the very case in which the employee has an intention to go to work with a competitor), exercising the option prior to termination would be more unlikely.

Thus, in light of the order examined in this newsletter, drafting an option clause to be inserted in a covenant not to compete is a rather delicate task.

Considered the recent developments in case law, it is especially appropriate to review the covenants not to compete already in existence and those which are next to be signed in order to verify their validity.