

The prohibition of competition in employment relationship in Cameroon

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*“Who can bad-mouth human rights? It is [...] beyond attack”*²

Abstract

The study aims to analyze one of the apparent inconsistencies that are found in the employment law in Cameroon. The right of free competition is tantamount to a free market society especially in the era of globalization. It appears prima facie that in Cameroon the lawmaker has limited this right in the area of employment law, the reason being the protection of employers' businesses that constitute a source of tax income in the fragile economic environment and an opportunity for job seekers. However, a close look at the provisions of Labour code shows that the law does favour on the one hand the employee right to compete on condition not to constitute a threat on the business of his current or former employer. On the other hand, the employer has to compensate his employee in case of legal non-compete clause and cannot compel him to respect illicit contractual non-compete clauses. If one of the parties to the employment contract develops such an unscrupulous behaviour, he will feel the harshness of the law. This research reveals the wish of the Cameroon lawmaker to adapt its legislation to social and economic realities.

Keywords: employment law; competition; prohibition; non compete clause; employment relationship; human rights.

JEL Classification: K31

1. Introduction

Employment law can be defined as the body of rules that govern the individual and collective relationship between the employers and the employees. On the ethical view, employment contract is a link between a fundamental value, the liberty and a necessity, the authority, relation that lead to the triumph of authority over the liberty.³ This means that employment relationships are basically

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² Mark Mazower, *The strange triumph of human rights, 1933-1950*, „The Historical Journal”, 47, 2 (2004), p. 379.

³ The necessity to survive and to save his family urges the “Free man” to put his liberty under the authority of the employer by becoming a worker (subordinate).

unequal.⁴ For this reason and from the beginning, employment law used to be a protected law because of interest that it showed to the weaker party (employee) of the contract. In effect, through the intervention of State,⁵ the classical concept of freedom known in contract matters lost its true significance in this area for the purpose of protection.

The right to work as an unconditional one is a fundamental human right⁶ embodied in the 1996 revised Cameroonian constitution and all international instruments ratified by Cameroon⁷ such as the Universal Declaration of Human Rights,⁸ the African Charter on Human and Peoples' Rights,⁹ etc. The preamble of the Cameroonian constitution of 18 January 1996 proclaimed that everybody has the right and duty to work and the State must try as possible to provide a work to all citizens within working age and must help to conserve it once obtained.¹⁰ But the protection of the right to work and the liberty of free competition will be useless if there is no balance between this protection and the safeguard of the company (asset of the employer)¹¹ in order to guarantee a viable economic environment.¹² Article 31 of Labour Code falls under the scope of this objective. This Article provides that

“(1) The worker shall devote all his gainful activity to the undertaking, save as otherwise stipulated in the contract; provided that he may, unless otherwise agreed, undertake outside his working hours any gainful activity which

⁴ Pierre Cuche, *Du rapport de dépendance, élément constitutif du contrat de travail*, « Revue critique » 1913.423; *La définition du salarié et le critérium de la dépendance économique*, « Dalloz Hebdomadaire » 1932.103.

⁵ This intervention can be observed through legislative enactments and administrative decisions. Among of these, one can mention the Law No. 92/007 of 14 August 1992 establishing Labour Code and many others Decrees and Orders laid down in the same purpose.

⁶ According to the positivistic approach, if labour rights are incorporated in human rights documents, they are human rights. See Virginia Mantouvalou, *Are Labour Rights Human Rights?* UCL Labour Rights Institute On-line Working Papers- LRI WP X/2012 at 1; “European Labour Law Journal”, 2012.

⁷ According to Article 45 of the 1996 revised Constitution, all duly ratified treaties take priority over local laws.

⁸ Article 23 UDHR of 10 December 1948 provides everyone has the right to work and that everyone should work in a job freely chosen; that everyone should receive equal pay for equal work; that everyone should get decent remuneration for work performed, which should guarantee a dignified life for herself and her family.

⁹ Article 15 provides “Every individual shall have the right to work under equitable and satisfactory conditions...”

¹⁰ This can justify the harshness of dismissal procedure laid down in Articles 34 and 40 of Cameroon Labour Code. For this purpose, Jean Marie Tchakoua, *La démission et le licenciement : une histoire de vrais faux jumeaux*, « Juridis Périodique » No. 70, Avril-Mai-Juin 2007, pp. 87-95.

¹¹ It is worthy to note that the constitution also in its preamble protects property rights. The protection was reinforced by some provisions of Labour code especially Articles 31, 32(k), 40, 42(2) concerning respectively the protection of business interests, the technical lay-off, dismissal for economic reasons and revision of working conditions etc. In France for example, Article 7 of Allarde Decree of 2 and 17 March 1791 establishes the principle of the liberty of work and of commerce.

¹² According to Jean Jaures, the first of Human rights is the individual freedom, the property freedom, the freedom of thought, the freedom of work.

is not liable to compete with the undertaking or prejudicial to due performance of the agreed services.

(2) However, it may be stipulated by agreement between the parties that in the event of a breach of contract, the worker shall not engage, on his own account or on the account of another person, in any activity liable to compete with the employer in either of the following cases: (a) if the contract is broken by the worker and the employer has defrayed the travel expenses from the worker's place of residence to the place of work; (b) if the contract is broken in consequence of serious offence committed by the worker.

(3) Any such prohibition shall not apply outside a radius of 50 kilometers from the workplace and its duration shall not exceed one year."

Simply, this provision brought in the question of prohibition of competition in employment relationship in Cameroon. Nevertheless, one worry about this can be to ask ourselves if the idea of competition can be accepted within a relation where one exercises the activity in the perspective to survive and the other to manage a property. In other words, what equilibrium the lawmaker can establish between the protection of a person and the protection of a property? In reality, according to Article 31 the protection of the worker's liberty is the principle and the restriction of liberty because of property the exception. The liberty of work includes the right to work or not. The employment period is the one in which the worker abandons his rights under the authority of the employer, but the former can resign during that period or stay until termination of its contract to recover the liberty to work. However, the issue is that Article 31 of Cameroon Labour Code prevents the worker from working in its own account or for a competitor during and upon termination of employment agreement.

Referred to this paper as the prohibition of competition, Non-competition obligation derived from employment contract or from a written clause ancillary to it. Under this obligation, the employee agrees to refrain from engaging in any activity which is directly in competition with that of the employer during and/or upon termination of contract when termination arises in consequence of resignation or of dismissal for gross misconduct. Apart from the fair impression one gets from a superficial thought on Article 31, a genuine analysis will appear to show that the prohibition of competition within employment relationship constitutes in a narrow sense a violation of human rights which aims at facilitating the equilibrium between the right to work and the protection of property. To prevent vile abuses, judges must intervene to construe such prohibition in order to assure an equitable protection.

This article seeks to examine the practice of prohibition of competition in employment area in Cameroon and adopts an analytical approach in interpreting the provision in question.

For the purpose of suitability, the article has been broken in three parts which each connected to the central axis of the protection of the right to work and gain his/her life in Cameroon. These parts are the multifarious nature of the

prohibition (2), the consequences of prohibition vis-à-vis the worker (3) and the necessity of judge's control (4).

2. Multifarious nature of the prohibition

Free competition is the basis of the modern economy and an agreement that limits it is questionable. Nevertheless, the law in general continues to regulate such agreements to refrain from competition.¹³

In Cameroon, the prohibition of competition in employment area comes according to Article 31 of Labour Code either from the employment contract itself through the unwritten duty of fidelity or to non-competition clause ancillary or not to employment contract. To well understand the nature of this prohibition, it will be suitable to distinguish implied prohibition during employment relationship to express prohibition which enters into force after termination of employment relationship. But to become enforceable, the prohibition must respect certain conditions.

2.1. The implied prohibition: non-competition obligation during employment relationship

During employment relationship, a worker must carry out his work in an honest and responsible manner. This requires the worker to serve his employer with good faith and fidelity.¹⁴ As provide for by Article 31 (1), the duty of fidelity imposed to the worker to “*devote all his gainful activity to the undertaking, save as otherwise stipulated in the contract; provided that he may, unless otherwise agreed, undertakes outside his working hours any gainful activity which is not liable to compete with the undertaking or prejudicial to due performance of the agreed services.*” In accordance with this provision, the worker during employment relationship “renounces” to his liberty and tags on the contract's terms, save as otherwise agreed by the employer. There is an implied obligation of faithful service. This implied term is regarded as being a restraint on competition when there is no possibility for employees to use their spare-time.¹⁵

¹³ Although the OHADA legislator proclaims on his Draft Bill of Uniform Act on Labour law the liberty to compete and to work freely, he has organized its restriction in Article 16. The revised European Labour Charter of May 3, 1996 (sign in Strasbourg - France) provides the obligation to protect the right to employee to gain his life by free undertakings.

¹⁴ Every contract imposes an obligation of good faith in its performance or enforcement. See Michael Akomaye Yanou, *Labour law Principles and Practice in Cameroon*, Redef 2009 at 53; Roy Goode, *The concept of Good faith in English law*, Rome 1992; Allan E. Farnsworth, *The concept of good faith in American law*, 1993 at 2. In contract law in general, refers to Articles 1134 and 1135 of Cameroonian Civil Code. In OHADA law, see the CCJA case, No. 063/2008, 30-12-2008: *SICPRO v. Sté GITMA devenue GETMA Côte d'Ivoire*, “Recueil de Jurisprudence” No. 12, Juillet-Décembre 2008, p. 145, Ohadata J-10-43, Ohadata J-09-272 which reinforces this rule.

¹⁵ The use of this time can help employees who are underpaid to complete their monthly salary. It is important to note that the Guaranteed Minimum Salary (SMIG) is 36270 F.cfa (about 61 euro) in Cameroon, one of the lowest amounts in the Sub Saharan Africa countries.

Under this duty, the worker should work in a way that does not undermine the interest of the employer,¹⁶ especially to work for competitors or to use his spare time to work in such a way that can compromise the company trade secrets during employment. The duty of fidelity includes the duty to account for secret profits, the duty to disclose misdeed, the non-disclosure of employer's confidential information, the restriction of working in competition with employer during the relationship, etc. The purpose of Article 31(1) is clear in the sense that during working hours the worker has no right to do anything else unconnected to the service, even for his own personal benefit.¹⁷ The employer is protected from employees who use their spare time to act in competition with him. As Professor Yanou opines, the Cameroonian position in this province of law is not different from what obtains in Anglo-Nigerian courts.¹⁸ In effect, some English case principle has been followed in Cameroon concerning the prohibition of competition during employment agreement.

The rule in *Sinclair v. Neighbour*¹⁹ concerning the "conduct incompatible with employment" was applied in *Othou Missendi Jean v. Sococao*²⁰ in which the Supreme Court held that the involvement of a worker in theft of the employer's property amount to a breach of confidence justifying the worker's dismissal. Recently, the same rule was upheld in *Catholic Education Secretary v. Atem Mary Musono*²¹ and in *Victor Oyebog v. C.D.C.*²². However, the employer is bound to establish loss of confidence that is a vague concept as it was held in *Société Shell Cameroon v. Kemayou*²³ and that may not justify dismissal as the courts decide in *Socaret v. Sopchendjou*²⁴ and in *Tonye Jean Baptiste v. Société Atlantic Agri-tech*.²⁵

The rule concerning the duty to disclose misconduct laid down in *Sybron Corporation v. Rochem Ltd*²⁶ can be compared to the Cameroonian case *Omong Etienne v. Cameroon Airlines*²⁷ in which a worker who was engaged in fraudulent

¹⁶ In *Sanders v. Perry* (1967), the court restrained the act of a solicitor employed by another as an assistant which made an agreement with an important client of the latter to work for him was considered as a breach of the employee's duty of fidelity.

¹⁷ It seems then that an invention done by the worker during this time would belong to the employer for example.

¹⁸ Yanou, *op. cit.* at 55.

¹⁹ (1967) 2QB 279.

²⁰ Appeal No.83 of 7/6/1972. This position viewing loss of confidence as autonomous ground of dismissal was upheld in the case of *Boulangerie Pâtisserie Provinciale de Mbouda v. Dadjo Paul*, Arrêt No. 13/Soc of 07 December 2006, obs. in "Juridis périodique" No. 77, 2009.

²¹ Suit No. CASWP/L.1/04-05.

²² Suit No. CASWP/L.10/2004.

²³ Appeal No. 79/S/04-05 of 12/5/2005. For further explanation, see Yanou, *op. cit.* at 55.

²⁴ See CS. Arrêt No. 33/3 of 10 March 1994, *Socaret v. Sopchendjou*, Obs. Jean Marie Tchakoua in "Juridis périodique", 1995.

²⁵ See Wouri High Court, Judgment No. 269/Soc of 22 July 2011, Affaire *Tonye Jean Baptiste v. Société Atlantic Agri-tech*, Obs. Hervé Magloire Moneboulou Minkada, "Juridis Périodique" No. 97, Janv- Fév- Mars 2014, pp. 33-41.

²⁶ CA, cited [1983] 2 All ER 706, [1984] Ch 112.

²⁷ Suit No. HCH/1.15/2000-2001, unreported.

performance was lawfully dismissed. To constitute a breach of contract, there must be some abuse of confidence by the worker. Moreover, if an employee uses information confidential to his employer, he may be liable in damage and restrain by injunction when this is not conflict with employee's individual skill and experience acquired in course of employment.²⁸ In some situations, the duty of fidelity follows the employee even after the termination of the contract of employment. This is an exception because most often the prohibition after employment is the consequence of an autonomous or an ancillary clause.

2.2. The express prohibition: non-competition obligation after employment relationship

In principle, after termination of employment contract the employee is free to enter into a new relationship with another employer, even a competitor of his former employer. The liberty to work gives rise to the right to negotiate his contract and to choose freely his activity, rights that lead to free competition. Contrary to professional prohibition²⁹ that aims at preserving general interest, non-competition clause protects private interests.³⁰ As a consequence, parties are free to stipulate such clauses in their contract in the event of breach of contract. Hence, the worker is gone but not forgotten³¹ because he/she can be recalled to be liable by duties.

Non-compete clauses are very important in the consumerist context.³² By signing such clauses, the employer prevents workers from leaving his/her business and setting up competing operations.³³ Nowadays, many employers in order to protect themselves against damaging competition and misuse of confidential

²⁸ See the English case *Printers and Finishers Ltd v. Holloway* ((1965)1 WLR).

²⁹ These professional prohibitions can result from the condition to access to an employment (like the minimum age to work, the requirement of diploma or authorization, etc.) or from sanctions like prohibition to exercise or to hold plurality of offices.

³⁰ Jeffrey F. Beatty and Susan S. Samuelson, *Introduction to Business Law*, 3rd Edition, Cengage Advantage Books, 2010, pp. 150 to 152 ; Grégoire Jogue, *La clause de non concurrence en droit du travail camerounais*, « Annales de la FSJP de l'Université de Dschang », tome 1, vol. 2, p. 137. Ernest Aly Thiaw, *La clause de non concurrence en droit du travail sénégalais*, Université Gaston Berger de Saint Louis, Maîtrise 2009. Yves Serra, *La clause de non concurrence en matière commerciale, sociale et civile (Droit interne et communautaire)*, Dalloz Affaire, 1991 ; L'obligation de non-concurrence en droit du travail, in *Dix ans de droit de l'entreprise*, Litec, 1978. Jacqueline Amiel-Donat, *Les clauses de non concurrence en droit du travail*, Edition Litec, 1988 ; P. Bronnert, *Les clauses de non-concurrence dans le contrat de travail*, Th. Lyon, 1974 ; Abdel A. Al-Sanhoury, *Les restrictions contractuelles à la liberté individuelle du travail*, Paris, 1925 ; Blaise, *La clause de non-concurrence dans le contrat de travail*, BS Lefebvre. 1983.451.622.

³¹ Ajay Agrawal, Ian Cockburn and John McHale, *Gone but not forgotten: Labor Flows, Knowledge Spillovers, and Enduring Social Relationships*, "Journal of Economic Geography", No. 6 (2006), 571-591; François Petit, *L'après-contrat de travail*, "Droit social" 1995.589.

³² See Ius Laboris (Global Human Resources Lawyers), *Non-Compete Clauses - An International Guide*, p. 350

³³ See R. Lemestre, *Le droit du travail de l'Afrique francophone*, Edicef AUPELF, p. 235.

information call their senior or salespersons to establish an express restrictive covenant. In effect, it is common for people in middle and upper-level management positions to agree not to work for competitors or not to start competing businesses for a specified period after termination.³⁴

Non-competition clauses are distinct to unwritten duty of faithful and fidelity during employment contract and distinct from unfair competition³⁵ because the latter that is prohibited during employment and after termination can exist, unless the existence of competition is lawful but means to exercise illicit or unlawful.³⁶ Actions concerning unfair competition and non-competition obligation after employment are in principle civil actions.

Contrary to other countries in which this restriction of liberty is widely open,³⁷ in Cameroon a non-compete clause can be accepted only in two cases according to Article 31 (2) of Labour Code. This paragraph provides that "*it may be stipulated by agreement between the parties that in the event of a breach of contract, the worker shall not engage, on his own account or on the account of another person, in any activity liable to compete with the employer in either of the following cases: (a) if the contract is broken by the worker and the employer has defrayed the travel expenses from the worker's place of residence to the place of work; (b) if the contract is broken in consequence of serious offence committed by the worker.*" Besides, the community legislator has followed this domestic position. In fact, through his Article 16 (3), the OHADA draft bill of Uniform Act on Labour law adopts this restriction. Apart from these two situations, other restrictions on future employment are unenforceable.

This covenant or clause comes into effect on the date of termination. In the absence of notice, the non-competition clause shall apply as of the day the employee actually ceases to be employed by his former employer. Significantly, the termination of employment without notice cannot give rise to the violation of this clause. In case of transfer of undertakings, any non-competition clause, which binds the employee to the initial employer, will be taken over by the new employer,³⁸ who must pay out any relevant compensation. In essence, the

³⁴ In England, employees who had considerable control and sensitive responsibility may be viewed as fiduciaries (fiduciary duty). See Mark J. Garmaise, *The Ties that truly bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, "Journal of Law, Economics and Organization", 2010.

³⁵ André Brun, *L'évolution du régime de la concurrence irrégulière dans les rapports de travail*, Mélanges Roubier, T.2.557 ; Henri Godinot, *La concurrence déloyale ou illicite*, Th. Nancy, 1932.

³⁶ Illicit means can come from counterfeit of products, non-poaching of employees i. e. recruitment of personnel or soliciting colleagues currently working for his former employer, divulgation of company savoir-faire, disrupting the organization, or creating sales problems or confusion in clients' minds, etc.

³⁷ In France for example, there is no provision organizing the non-competition clause because the Labour code is silent on the issue. Judges are those who progressively establish the legal status of this clause in subsequent cases. The profound analysis of those cases shows that the parties are free to agree on the clause at any time during or after employment relationship.

³⁸ See Article 42 (1) a) of Labour code.

prohibition of competition to be enforceable must respect all the conditions laid down by regulations and must be reasonable based on the facts of each case.

2.3. Requisites to enforceability of the prohibition of competition

Non-competition obligations are legal so long as the specified period of restraint is not excessive in duration and the geographic restriction is reasonable.³⁹ Apart from these two conditions, provide for by Article 31 (2) about resignation and gross misconduct, the restriction must be necessary to protect a legitimate business interest and must be accepted by the employee, otherwise the prohibition is void. The prohibition of competition is limited in its geographical scope, its duration, to the nature of business activity of the former employer. These conditions flow from Article 31 (3) of Labour Code which provides that “*any such prohibition shall not apply outside a radius of 50 kilometers from the workplace and its duration shall not exceed one year.*”⁴⁰ Judges who decided that the prohibition aims at protecting mostly⁴¹ legitimate interest completed these conditions. In detailed paragraphs, we are going to discuss on each of these conditions.

The prohibition must be necessary to protect legitimate business interest i.e. the proprietary interest of the employer. The non-competition clause must be reasonable that is not any greater than necessary for the protection of the employer’s business interests and serve that interest.⁴² This is because the value of a business frequently depends on the goodwill between key employees and customers. To enhance this value a business will invest its key employees with training, experience, customer lists, trade secrets⁴³ and other valuable information. It can be devastating when a key employee quits, or is fired and goes into business

³⁹ In England, in *Nordenfelt v. Maxim Nordenfelt, etc., Co. (1893) A.C. 535*, the House of Lords held that “*the real test for determining the validity of agreements in restraint of trade was, whether the restraint imposed was reasonable, for good consideration, not prejudicial to the interests of the public, and not more onerous than necessary for the protection of the party imposing the restraint*”. See also *Mitchel v. Reynolds*: 1 PW. 181.

⁴⁰ See also Article 16 (3) of OHADA Draft Bill on Labour law.

⁴¹ Yves Serra, *Hiérarchie des conditions de validité de la clause de non concurrence en droit du travail*, « Dalloz » 2002, No. 43, jur, 3229 ; Danielle Corrignan-Carsin, *Validité de la clause de non-concurrence et protection des intérêts légitimes de l’entreprise*, « Droit social » 1992. 967.

⁴² One of the fundamental objectives of Cameroonian Labour law is the safeguard of the company. A good social environment contributes to maintain peace and political stability. In France, see *Arrêt Godissart*, Cass. Soc., 14 May 1992, D. 1992, somm. p. 350, note Yves Serra; “*Revue de Jurisprudence Sociale*” 1992, No. 735; “*Droit Social*” 1992, p. 967, note Danielle Corrignan-Carsin.

⁴³ It would include such things as price lists and systems of work, which are specific to the company. In England, for example there is some blurring of the distinction between trade secrets, which are automatically protected, and trade connection, which is only protected if there is an express covenant. The question of what constituted trade secret or similar is a question of degree as it was decided in *PSM International PLC v. Whitehouse, CA*, cited [1992] IRLR 279; see also *Thomas v. Farr Plc and Another*, [2007] EWCA Civ 118. In our context, trade secrets need to be protected by specific covenant because of the complex nature of competition.

to compete with his or her former employer. Hence, the prohibition helps to protect goodwill, stability of the workforce and the proprietary or quasi-proprietary interest in his trade secrets and his business connections. The need to protect the employer business comes not from the nature of activity entrusted to the worker, but from the risk that can generate the use of objective knowledge (employer's secrets) by the competitor.⁴⁴ However, legitimate interests do not include preventing competition.⁴⁵ Conclusively the imposition of non-competition clause on the worker upon termination of employment is relevant when the work entrusted to the employee allows him to be acquainted with company's clients, to access to business secrets or to have confidential information.⁴⁶ Legitimate interest can be seen as the consideration of the non-compete obligation of the employee.

Nevertheless, there is no legitimate interest:

- if the contract involves an employee who already had subjective knowledge i.e the skills when he arrived, or merely developed general skills on the work; or
- if the contract includes customer lists that can be derived from public sources; or
- if the prohibition is contrary to public interest; and
- if the new employment or business of the worker concerns an unknown sector from employer business.

The prohibition must be limited in a geographical scope. The geographical reach of the prohibition must be proportionate with the working area of the employer. Article 31 (3) of Labour Code requires "*a radius of 50 kilometers from the workers workplace.*" The objective of this provision is to limit the scope of application of the prohibition so that it cannot be able to deny the employee the right to work. However, there are two arguments that can render irrelevant nowadays in Cameroon the geographical restriction.

The first argument is the informal character of employment in Cameroon. Most companies are not well organize in order to require employees to respect such prohibition and those organize are not treating employees in a way that they can be able to survive with their salary.⁴⁷

The second argument is the internet environment. Within a global economy, the place of doing business is no more important because the cyberspace constitutes an open market. Consequently, when the geographical restriction can be

⁴⁴ Roch David Gnahoui, *Intérêt de l'entreprise et des droits des salariés*, Ohadata D-04-31, p. 10.

⁴⁵ See *Brunswick Floors, Inc. v. Guest*, Court of Appeals of Georgia, 1988. 506 S.E 2d 670 quoted by Gaylord A. Jentz., Roger Leroy Miller, Franc B. Cross, *West's Business Law*, Alternate Edition, Eighth Edition, 2002 at 240.

⁴⁶ See *King v. Head Start Family Hair Salons, Inc.*, 886 So. 2d 769, Supreme Court of Alabama, 2004.

⁴⁷ According to the government 2013 report on economy, more than 85% companies involve in informal sector.

the worldwide in scope, it will be difficult in our country to enforce such prohibition although the country has set out rules on cyber torts and cybercrime.⁴⁸

The prohibition must be limited in duration. According to Article 31(3), the reasonable duration for prohibition is one year from the date of termination of employment contract.

The prohibition is valid unless the termination of the employment contract arises by resignation and the employer has defrayed the travel expenses from the worker's place of residence to the place of work; or in consequence of serious offence committed by the worker. If any one of these conditions is not met,⁴⁹ the prohibition shall be considered as null and void, and employees shall be free from their obligation under this prohibition. This means that the employer has to show a lower standard of reasonableness of the prohibition. By contrast, the rationale that considered the prohibition of competition as human rights violation will be reinforced.

3. Contractual prohibition a human rights violation?

Contrary to some schools of thought⁵⁰ which view labour rights as human rights with skepticism and suspicion, the right to work is a human right according to positivists. Non-competition clause forces employees to relinquish freedom to use information, and generalized skills they have acquired during employment. One question can be raised up by knowing what the likelihood of grievous harm to the employee is if the clause is enforced. What is the real nature of prohibition if its validity is submitted only to termination by resignation or in consequence of serious offence committed by the worker?⁵¹ It seems that it is a means to undermine the right to resign.⁵²

This prohibition restrains the economic mobility and personal freedom of employees. Consequently, it is clear that contractual prohibition attempts to the individual liberty to enter into a contract and the public interest in freedom of trade.

3.1. Violation of individual rights

The right to work is a socio economic right that helps to achieve civil rights and includes the right to resign. It is included in civil rights statements such as the Universal Declaration of Human Rights, the African Charter on Human and

⁴⁸ See Law No. 2010/012 of 21 December 2010 relating to Cybersecurity and Cybercriminality in Cameroon.

⁴⁹ These conditions are cumulative. See Cass. Soc., June 10, 2002, No. 97-45.387: *Juris-Data* No. 2002-015270.

⁵⁰ See the instrumental and the normative approaches. For discussion on these approaches, see Virginia Mantouvalou, *op. cit.*

⁵¹ In France for example, this prohibition clause is valid even in case of dismissal for economic reasons.

⁵² Resign, as Professor Tchakoua opines, appears as a win back of the entire humanity of the worker. See Jean Marie Tchakoua, *op. cit.* at 92.

Peoples' Rights, the preamble of the Cameroonian constitution of 18 January 1996. However, it is a civil right that has not received the respect it should have. In Cameroon for example, the intervention of the State within the employment relationship is too restricted. Future parties freely negotiate terms of their contract. Thus, unscrupulous employers abuse inexperienced and needy workers. Contractual or express prohibition of competition devalues the individual and importance of work. The issue of ongoing advantage the company has against the employee can become abusive due to the worker's limited options. In fact, he/she is always in need of a job with good wages, means to survive. Consequently, the right to work must prevail to the right to enter into an agreement. Besides, it is atypical a civil right is protected by prohibiting it.⁵³

3.2 Violation of free competition

Non-competition clauses have potentially negative impact on competition in the marketplace. They restrain the free flow of ideas and information.⁵⁴ Therefore, enforcement of such clauses may be injurious to the public by rendering worthless employee skills developed or acquired during employment. For this reason, courts have generally been reluctant to limit an employee's freedom based on such provisions because of the impediment to free competition. Besides, requiring employees to sign a non-competition agreement can set the employer-employee relationship off on a bad start, in that the agreement may impart a feeling of distrust between the two parties. It can even reduce the work performance because of motivational reason.

It is trivial that in economic competition reduces prices and monopolies are deemed so damaging to the public at large. This reduction of prices due to competition serves to increase wages for workers because when there is competition for the employee's services then companies can compete for the worker by increasing wages. Non-competition clauses serve to lower wages and thus diminish the economy growth. To preserve the right of work, the prohibition of competition must be strictly restricted.

In spite of these facts, non-competition agreements not need to be simply outlawed; the intervention of judge can bring more clarity and equity to its practice.

4. Judge's control: a solution?

The legality of non-competition obligation always requires the intervention of judges. Because the agreement involves the very livelihood of the worker, a court scrutinizes the agreement more closely. Courts will interpret clauses liberally

⁵³ For example, is the right of free movement protected by banning movement? Is the right to speak free protected by banning speech? etc.

⁵⁴ L. Laurent, *La clause de non-concurrence: une enclave commerciale dans le droit du travail*, "Gazette du Palais" 1974, I, p. 71; Hebert Grubel and Anthony D. Scott, *The International Flow of Human Capital*, "American Economic Review", 56 (1996), 268-274.

in order to give effect to obvious intention of parties. The question that begs for answer here is to know which court(s) have jurisdiction over legal matters relating to non-competition clause in labour contracts (Labour Courts or Civil and Commercial Courts)? What will happen if a covenant not to compete is held to be unreasonable, will the court modify the clause or annul it? What are the remedies that courts can and do grant when an employee has violated his/her covenant not to compete? Within these questions, the judges search for an equilibrium between the competing interests that are the protection of employer's proprietary interest, the employee's interest in freedom (liberty to work freely), and the public's interest in promoting the free flow of trade.

Concerning the first question,⁵⁵ the nature of the court will depend on the quality of parties to litigation. According to the amount of demand contained in the claim,⁵⁶ the Court can be: either the competent Court of first instance (Magistrate court) or the competent High court in labour matters if the clause is considered as a part of employment contract according to the rule '*Accessorium sequitur principale*'; or the same courts competent in civil and commercial matters if the clause is considered as an autonomous clause.

For other questions, the appreciation of the legality can lead to sanctions and/or to allocation of compensation in several types.

4.1. Sanctions for illicit and excessive clauses

The control of proportionality by judge can lead to unavoidable sanctions depending on the level of imbalance. For illicit clause, the sanction should be the relative nullity and to excessive clause the rebate.

a) The contractual prohibition is illicit when it fails to be necessary to the protection of legitimate interest, to be limited to a geographical and temporal scope, and to have compensation. Consequently, the judge will annul it. In case of imbalance between the liberty to work and the proprietary right, the prohibition of competition is null.⁵⁷ Several reasons can lead to the nullity of the clause.

The prohibition is null if the employer imposed it unilaterally to the employee or extend its geographical or temporal significance.⁵⁸ In addition, the clause that establishes an insufficient compensation is null and void.⁵⁹

⁵⁵ Let's us mention that in Cameroon Labour actions commenced free of charge, neither the registry of the relevant court nor the labour inspectorate may demand payment for initiating labour proceedings for the settlement of labour disputes.

⁵⁶ Materially, according to law of 29th December 2006 organizing judicial courts, when the amount is less than or equal to 10 000000 F.cfa, the Magistrate Court (Court of first instance) is competent and when it is greater than 10 millions, the High Court is competent.

⁵⁷ Cass. Soc., 19 November 1996, *Dr. Soc.* 1997, p. 75, note Gérard Couturier. See Jacqueline Amiel-Donat, *Illicéité d'une clause de non-concurrence : un exemple de résistance à la loi*, « Dalloz » 1983.235. Bernard Teyssie, *Réflexion sur les conséquences de la nullité d'une clause d'un contrat*, « Dalloz » 1976.281.

⁵⁸ Cass. Soc., 12 February 2002.

⁵⁹ Cass. Soc., 15 May 2006.

The nullity will apply to clause that restrains the worker involving in an activity since several years.⁶⁰ The prohibition that prevents a worker to have a job in conformity with her professional seniority was held null and void.⁶¹ Concerning the nullity of prohibition, the worker is the only party that can claim it because his/her interest is in question.⁶² The nullity on ground of illegality takes out the worker from his contractual liability but does not lead to the nullity of employment contract. Nevertheless, if the prohibition is only excessive, the judge can only refund it.

b) The judicial refund is possible only if the worker infringes the prohibition of competition and this prohibition is necessary for the protection of proprietary interest of employer. Thus, in front of excessive prohibition like the one which exceeds the geographical scope or the duration provided by Article 31(3), the judge instead of annulling the clause can refund it in order to maintain its validity.

It was held in France⁶³ that the judge could reduce the scope of the prohibition by specifying the worker's duties. The reduction of excessive clause permits to save the proprietary right of the employer because he has the opportunity to adjust the clause.

4.2. Financial protection of parties

Under Cameroonian law, there is no statutory obligation on employers to provide financial compensation to an employee committing to a non-competition agreement, other reasons of violation of human rights. The intervention of judge⁶⁴ to establish equitable rights seems to be the solution on the issue. The employer can sue the employee in an emergency procedure⁶⁵ to get an injunction to prevent

⁶⁰ Cass. Soc., 28 October 1997, *RJS* 12/1997, No. 1369.

⁶¹ See *Affaire Go Sport*, Cass. Soc., 18 September 2002, No. 60-42.904, *Bull. Civ.* 2002, No. 272; *Semaine sociale Lamy* 3/2003, No. 1112.

⁶² Cass. Soc., 25 January 2006, No. 04-43.646, "Droit social" 2006, p. 463, note Jean Mouly; *JCP S* 2006, 1211, note Pierre Yves Verkindt. See also, Antoine Mazeaud, *Clause de non concurrence: l'employeur peut-il retirer unilatéralement une clause illicite ?*, « *Semaine Sociale Lamy* » No. 118, 14 avril 2003, p. 8.

⁶³ See *Arrêt Gan Vie*, Cass. Soc., 18 October 2002.

⁶⁴ Under French law the payment of compensation for a non-compete is guaranteed, irrespective of who ended the contract. In the decision of the French Supreme Court, Cass. Soc., 7 March 2007, No. 05-45.511: *Juris-Data* No. 2007-037811; *JSL* 3/2007, No. 208, p. 18, note H. C. Haller, compensation was considered to be mandatory. Before this decision, see Danielle Corrignan-Carsin, *La contrepartie pécuniaire de la clause de non-concurrence*, « *Revue de Jurisprudence Sociale* » 1992.587; Stéphane Choisez, *La contrepartie financière de la clause de non-concurrence d'un contrat de travail*, « *Droit social* » 1993.662; Corinne Pizzio-Delaporte, *La clause de non-concurrence : jurisprudence récente*, « *Droit social* » 1996.145.

⁶⁵ This procedure called "référé" is brought before a civil or commercial court especially the Court of first instance which the President is the judge of urgency in Cameroon in spite of fact that a mess was created by Law No. 2007/01 of 10 April 2007 instituting the judge of execution's litigation. See François Anoukaha, *Le juge du contentieux de l'exécution des titres exécutoires : Le*

the employee from competing with the employer, or principally the employee can ask for payment of the compensation in court.

4.2.1. Financial compensation to the employee

The employee may be entitled to ask a judge for financial compensation for the time that he has respected the non-competition obligation, if this is not provided by the agreement. Without compensation, the restriction of the individual right to work does not have the consideration counterpart to the employer. Compensation as a result is the consideration of the employer in non-competition clause.⁶⁶ In this regard, the employee may also ask the judge for damages in compensation for the employer's failure to respect its legal obligations. The burden of proof is on the employer who has to prove the contrary.⁶⁷

In the event of non-payment of a non-compete indemnity by the employer, the employee will be freed from the prohibition against competition, and the employer will have no right to forbid the employee from working for its own or with a competitor.

In case of insolvency, the employee will receive compensation during the collective procedure for clearing of debts as provides for by the OHADA legislature.⁶⁸

4.2.2. Damages to the employer

In case of breach, the principal remedy is an injunction, to restrain the alleged breach and damages.⁶⁹ Breach of a non-compete clause might involve the carrying out of unethical practices with competitors, such as the solicitation of clients. If the employer is able to locate evidence of a breach of this kind, the

législateur camerounais persiste et signe...l'erreur, « Juridis Périodique » No. 70, Avril-Mai-Juin 2007, pp. 33-38.

⁶⁶ However, it was held by Labour court of Dakar (Senegal) that the compensation is not a necessary condition of validity of non-compete clause. See Trib. Trav. Dakar, 4 January 1973 quoted by Thiaw *op. cit.*

⁶⁷ It should be noted that contrary to Common law principle "*actori incumbit probatio*", the Cameroonian legislator shift the *onus probandi* to the employer as it could be seen in Article 39 (3) of Labour Code. In France, see the *Arrêt Godissart*, Cass. Soc., 14 May 1992, D. 1992, somm. p. 350, note Yves Serra; "Revue de Jurisprudence sociale" 1992, No. 735; "Droit Social" 1992, p. 967, note Danielle Corrignan-Carsin.

⁶⁸ See Cyrille Monkam, *La condition juridique du salarié dans les procédures collectives*, DEA Thesis, University of Douala, 2005. In France, where a company has become insolvent or has been put into receivership by a commercial tribunal, a specific body (the "AGS") guarantees payment of compensation for non-compete clauses.

⁶⁹ It is important to mention that the employer may also protect him- or herself against breach of contract (a non-compete clause includes) by means of a penalty clause guaranteeing a fixed amount of compensation without the need to prove the harm caused by the employee. This is usually advisable for employers, but it should be borne in mind that a judge could reduce the amount of the penalty clause. See Deprez, *Les clauses pénales dans les relations de travail et leur révision par le juge*, « BS Lefebvre », 1985.267.

employee will lose the right to compensation, even if the breach was temporary. Further, the employee may be required to reimburse any indemnity paid from the date of the breach. However, the employer must prove that the employee did not abide by the non-compete clause.⁷⁰ The employee may also be obliged to pay damages to the former employer, and may even be forbidden by a judge to continue any competing activity. The employer may claim consequential damages on grounds of breach of contractual duties.

The subsequent employer may be held liable as the employee if he knowingly encouraged the employee to breach his contract or otherwise act unlawfully. In effect, the employer may sue the subsequent employer who hired the employee despite the existence of the non-competition clause and ask for (punitive) damages. Liability in tort⁷¹ on behalf of the new employer can be set in motion if an employer hires an employee whilst knowing that the employee is subject to a non-competition clause, even if no real breach by the employee or any actual corruption of clients has taken place.

In the two situations, the amount of damages will be based on the extent of the harm caused by the employee or the new employer to the former employer. The burden of proof is on the former employer.

5. Conclusion

Considered as a territory involving in globalization, the Cameroonian free-market society thrives on competition and the free flow of ideas. As a country governed by constitutional process, the law does favour an employee's right to compete, even against a former employer. Although the legislator has laid down provisions, the practice of prohibition of competition (non-competition clause) is less known by courts in Cameroon because of the informal character of the job market⁷² and a probable crisis of confidence to Justice.⁷³

As we try to show in this paper, the objective of the prohibition is to prevent employees who are responsible for termination from disturbing the smooth running of their former employer's business as entity of economic environment rather than stopping them from working at all.

It is argued that the prohibition of competition is not only an instrument to protect employers but an additional sanction to workers at fault. To avoid this

⁷⁰ Supreme Court, 25 March 2009, No. 07-41.894.

⁷¹ An action for unfair competition can be brought before the competent court when the new employer hired the employee knowing that he/she is under the non-compete obligation. See Ius Laboris (Global Human Resources Lawyers), *Non-Compete Clauses - An International Guide*, at 121. This action is based on Articles 1382 and 1383 of Civil code.

⁷² Due to the nature of this job market, most of the companies are familiar companies in which many practices are contrary to rules and usages of employment such as absence of job description, incompetence, tribalism, nepotism, etc.

⁷³ Justice in Cameroon is marred by corrupt practices and the slowness of its functioning. See for example the 2016 Transparency international report that places justice in second position as the most corrupted institution in Cameroon.

argument, the Cameroonian legislator must extend the condition of validity to termination in consequence of employer's acts.

The author upholds that in order to save the sole liberty that a jobless man can have -the right to work or to look for a job-, the judge in spite of the crisis of confidence needs to intervene in the area of prohibition of competition to protect Human rights or to establish equity within an agreement. This intervention goes beyond the protection of a fundamental right, the judge aims at scrutinizing in priority the reciprocal commitment of parties to an employment contract.

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