Chapter 7

International employment contracts in the technology sector: an analysis of their key clauses

JOSÉ LUIS IRIARTE ÁNGEL
Professor of Private International Law, Public
University of Navarra
jluis.iriarte@unavarra.es
ORCID: 0000-0002-2353-5003

MARTA CASADO ABARQUERO
Lecturer and PhD in Private International Law
University of Deusto
marta.casado@deusto.es
ORCID: 0000-0002-7228-4044

SUMMARY: I. LEGAL CHALLENGES OF THE TECHNOLOGISATION OF LABOUR RELATIONS. II. EMPLOYMENT CONTRACTS IN THE TECHNOLOGY INDUSTRY: CLAUSES AND SPECIFIC FEATURES. III. CONFIDENTIALITY AND TRADE SECRETS. *1. Legal and conceptual framework of confidentiality and trade secret clauses.* 2. *Structure and typical content of confidentiality clauses in the transnational labour context.* IV. INTELLECTUAL AND INDUSTRIAL PROPERTY CLAUSES. *1. Legal and conceptual framework of intellectual and industrial property in the transnational labour context.* 2. *Structure and typical content of clauses on ownership, assignment and financial compensation.* V. CLAUSES ON TELEWORKING AND THE RIGHT TO DISCONNECT. *1. The transnational legal framework for teleworking: regulatory diversity and regulatory gaps.* 2. *Structure and typical content of contractual clauses in transnational teleworking. VI.* CLAUSES ON THE USE OF DEVICES AND EMPLOYER MONITORING IN INTERNATIONAL EMPLOYMENT CONTRACTS. 1. *The international legal framework for employer monitoring of work devices.* VII. NON-COMPETITION AND RETENTION CLAUSES IN INTERNATIONAL EMPLOYMENT CONTRACTS. 1. *Concept and legal basis. 2. Regulatory frameworks in our region and issues of harmonisation between them. 3. Standard content and validity criteria.* VIII. SOME REFLECTIONS FROM THE PERSPECTIVE OF PRIVATE INTERNATIONAL LAW.

I. LEGAL CHALLENGES OF TECHNOLOGISATION LABOUR RELATIONS

In just a few decades, labour relations have undergone a major revolution, marked by the rapid changes that have taken place as a result of the application of new technologies, not only to the economy, but to all facets of life. The digitalisation of the economy, driven by the development of telecommunications and the high degree of global interconnection, has altered not only the way in which production is organised, but also labour relations between employers and workers.

The opportunities generated by this change are undeniable. But so too are the regulatory challenges that have arisen in parallel, many of them highly complex. This complexity is accentuated when the employment relationship crosses borders and takes on a transnational character.

Until the 20th century, the regulation of employment contracts had been based on the concept of the workplace and the time at which the service was provided. Both factors have gradually faded with the rise of new technologies. Nowadays, it is possible for a programmer in India to work for a company based in Berlin, or for a graphic designer in Lisbon to provide services for a company in New York, or for a Spanish engineer to be part of a multidisciplinary team spread across five continents. Geographical location no longer necessarily determines the existence of an employment relationship. The same applies to working hours, which have become much more flexible thanks to the rise of remote working, or the provision of services that is measured more by the objectives achieved than by

on-site working hours. All of this has forced us to rethink the fundamentals of employment contracts, a trend that has been further accentuated following the COVID-19 pandemic, when millions of workers worldwide made an abrupt shift to remote working. Since then, numerous companies have adopted hybrid or fully digital working models, cementing a change that had already been on the horizon since the first decade of the 21st century.

In this new landscape, employment contracts must necessarily adapt to new realities. For this reason, specific clauses are being incorporated regarding intellectual property, the use of digital tools, confidentiality, cybersecurity, data protection, remote working, etc. With this modernisation of the employment contract, shifting the focus to intangible assets, the parties to an employment relationship are seeking to adapt employment rights and obligations to their new reality, in an attempt to fill the gaps still present in labour legislation. In this regard, the self-regulatory capacity of the parties to the employment relationship is pushing the regulatory role of national labour laws into the background, as the breakneck speed of the changes taking place outstrips the institutional capacity for regulation.

Furthermore, the complexity is heightened by the fact that many of these contracts have a transnational dimension that raises numerous questions. Beyond the classic questions of which courts have jurisdiction in the event of a dispute or which domestic law applies, much of the difficulty arises when the content of these clauses clashes head-on with the basic and fundamental rights of the worker[1], and the legal systems involved have

1. On this subject, see the interesting articles published in **Teleworking and Private International Law: Problems and Solutions** (ed. A. Ortega Giménez and coord. L. S. Heredia Sánchez), Aranzadi, 2023; and in *New Problems and New Solutions in Cross-Border Teleworking* (edited by A. ORTEGA GIMÉNEZ and coordinated by L. S. HEREDIA SÁNCHEZ), Aranzadi, 2024. Furthermore, more specifically, FERNÁNDEZ ORRICO, F. J.: 'Protection of workers' privacy against digital devices: analysis of Organic Law 3/2018 of 5 December', Revista Española de Derecho del Trabajo, no. 222, 2019; FERNÁNDEZ VILLAZÓN, L. A: Employers' powers to monitor work activity, Aranzadi, Cizur Menor (Navarra), 2003; LÓPEZ INSUA, B. del M. and MONEREO PÉREZ, J. L.: 'The right to one's own image and the dignity of the worker in the General Data Protection Regulation. A critical study of the most recent case law of the Court of Justice of the European Union', *La Ley Unión Europea,* no. 115, June 2023; SAN MARTÍN MAZZUCCONI, C. and SEMPERE

very different labour standards. Thus, whilst some legal systems have highly advanced laws on teleworking, data protection or intellectual property in digital environments[2] , others have barely begun to regulate these matters. The resulting imbalances are significant, leading to a marked increase in legal uncertainty. Furthermore, international organisations such as the International Labour Organisation (ILO) and the European Union, despite being aware of the need to address these challenges, still offer only very partial and fragmented solutions. Thus, whilst it is true that there are international conventions seeking to harmonise standards, the pace of technological change often outstrips the capacity for regulatory response.

A telling example can be seen in the handling of confidential information accessed within the context of an employment relationship. The strategic value of this type of data is particularly significant for companies operating in the technology sector. However, the rules governing confidentiality and the protection of trade secrets vary significantly from country to country. Consequently, an employee working for a multinational company may face uncertainties regarding the actual scope of their duty of confidentiality, the continued validity of confidentiality obligations following the termination of their contract, or the legal consequences of any potential disclosure. This regulatory diversity requires both companies and employees to pay particular attention to contractual clauses, as the effectiveness of the legal protection of sensitive information depends on their wording.

The same applies to intellectual property (since, in these companies, much of the value of the work lies in the creation of *software,* algorithms, databases or designs). However, copyright and patent regimes differ considerably between jurisdictions; with the protection of personal data (since, although the European Union's General Data Protection Regulation has become a global benchmark, imposing requirements even on companies located outside Europe that process citizens' data

NAVARRO, A. V.: 'On New Technologies and Labour Relations', Revista Doctrinal Aranzadi Social, no. 15, 2002.

2. Thus, in general, the EU and most Member States are good examples of legal systems with high standards in these areas *(see* Eurofound [2022], *Telework in the EU: Regulatory frameworks and recent updates,* Publications Office of the European Union, Luxembourg [https://www.eurofound.europa.eu/en/publications/all/telework-eu-regulatory-frameworks-and-recent-updates]),

Europeans[3] (not all countries have similar regulatory frameworks);with the relocation of work resulting from the rise of remote working and the consequences this has for corporate monitoring and control of work activities (the use of monitoring software, webcams, productivity analysis via algorithms or artificial intelligence may balance the worker's right to privacy against the company's interest in ensuring economic viability and the optimal use of invested resources), to name just a few of the most common issues.

II. EMPLOYMENT CONTRACTS IN THE : CLAUSES AND SPECIFIC FEATURES

The international dimension of contracts in the technology sector represents**,** in almost equal measure, an opportunity for global integration and a growing source of problems of a very diverse nature, including, amongst others, legal issues.
Pending the introduction of regulations tailored to these new requirements, companies are seeking to devise a contractual framework that combines flexibility and innovation with legal certainty. Consequently, employment contracts in the field of new technologies go far beyond traditional provisions. Their key feature is the protection of intangible assets (information, *software,* data, *know-how),* alongside adaptation to emerging working arrangements such as remote working and the internationalisation of work. Consequently, clauses on confidentiality, intellectual property, cybersecurity, digital disconnection, device control, non-competition, assignment of intellectual property rights, post-contractual non-competition clauses, and provisions on device use, cybersecurity and training have become essential elements.
This paper will address only those clauses which, due to their particular relevance in the context of technological and transnational work,

3. BAZ RODRÍGUEZ, J.: 'Privacy, data protection and employment relationships. New realities and new regulatory and jurisprudential parameters in Europe', *Privacy and data protection of workers in the digital environment,* Bosch, 2019, pp. 198–203. From the perspective of international jurisdiction, HEREDIA SANCHEZ, L. S.: 'Notes on the determination of international jurisdiction in international cases of personal data breaches. The legal interplay between the European Regulation and Spanish Organic Law', LA LEY newspaper, no. 10008, Opinion Section, 11 February 2022.

raise greater interpretative and practical challenges. In particular, the analysis will examine confidentiality and trade secret clauses, intellectual and industrial property clauses, clauses relating to teleworking and the right to digital disconnection, clauses on the use of devices and employer monitoring in international employment contracts, as well as non-competition and retention clauses applicable in this context. The analysis will focus on identifying their legal basis, their role within the technological employment relationship, and the tensions they generate between the protection of business interests and workers' rights.
The extent to which this objective does or does not sacrifice the protection of workers' labour rights is something that will need to be analysed on a case-by-case basis, and a comprehensive solution will require dialogue between legislators, businesses, workers and international organisations.

III. CONFIDENTIALITY AND TRADE SECRET CLAUSES

I. LEGAL AND CONCEPTUAL FRAMEWORK OF CONFIDENTIALITY AND TRADE SECRET CLAUSES

Companies' strategic information constitutes a large part of their intangible assets and determines their market value, viability and future prospects. Consequently, the protection of such information must be properly structured and, as a result, often extends to the rights and obligations of workers employed by such companies, particularly when they are technology firms.

As is to be expected, current legal systems provide for legal mechanisms to safeguard companies' strategic information. More specifically, the protection of this type of intangible asset takes on particular importance in employment contracts, which is why confidentiality and trade secret clauses are regarded as an essential tool.

Confidentiality agreements are not regulated by labour legislation, being subject to contractual freedom, and may be useful for setting out the matters on which the employee must maintain silence, the duration of the agreement, and the consideration provided by the employer, particularly if its effects extend beyond the end of the employment relationship

and the consequences of breach, thereby creating a qualified duty of confidentiality for the employee with possible disciplinary, financial or even criminal consequences[4] .

The legal framework governing trade secrets aims to strike a balance between competing interests. On the one hand, it seeks to promote innovation and encourage the development of new knowledge and socially valuable information; and, on the other, to ensure free competition and the mobility of workers in order to foster an optimal and efficient labour market[5], as well as to safeguard their collective rights.

The general validity of this type of clause is beyond dispute. However, different legal systems introduce nuances that may affect their validity to varying degrees[6] . The common denominator among them all is the following: (i) The definition of protected information must be clear. A broad or ambiguous definition

4. ASENSIO, Carlos Gómez; MARTINEZ, Pablo Puente. The new configuration of trade secrets in labour relations and its impact on business networks. *Labour and Law: New Journal of Current Affairs and Labour Relations,* 2020, vol. 66.
5. GARCÍA-PERROTE, L.: 'The Governance of Labour Relations', in: Various Authors*, The Future of Work: 100 Years of the* ILO. *29th Annual Congress of the Spanish Association of Labour and Social Security Law,* MTMSS, Madrid, 2019, p. 220.
6. The legal framework governing this type of clause is linked to international regulations on the protection of trade secrets. Thus, for example, within the European framework, Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 15.6.2016). At national level, through national legislation on unfair competition. For example, in Spain, through Law 1/2019 on Trade Secrets (BOE No. 45, of 21 February 2019). The Directive and the LSE set out similar concepts regarding trade secrets (they define a trade secret as undisclosed information, having commercial value and subject to reasonable measures to keep it secret), and do so by continuing the previously existing concept, in which, in the absence of a specific legal definition, the reference has been the definition set out in Article 39.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the ratification of which by Spain was published in the BOE No. 20 of 24 January 1995. In the United States, the regime is dual: (i) At federal level, the *Defend Trade Secrets Act* (2016) provides uniform protection against the misappropriation of trade secrets; (ii) At state level, most states apply the *Uniform Trade Secrets Act* (UTSA). On the concept of trade secrets and their protection under US law, *see ZUECO PEÑA, A.:* 'Lawful acquisition, use and disclosure of trade secrets', in *Commentary on the Trade Secrets Act,* La Ley, 2020 (LA LEY 6280/2020).

may compromise the validity of the clause; (ii) The consequences of a breach of the duty of confidentiality must be clearly specified and detailed, and must be proportionate in terms of their temporal and material scope; (iii) The duty of confidentiality must not impede the employee's professional development.
Proper drafting of such clauses can prevent unwanted leaks or restrictive interpretations that undermine their effectiveness as a tool for protecting business interests, but it can also reduce legal uncertainty and strengthen the protection of employees' rights.

2. STRUCTURE AND TYPICAL CONTENT OF CONFIDENTIALITY CLAUSES IN THE TRANSNATIONAL LABOUR CONTEXT

The content of the confidentiality clause, far from being a mere formality, constitutes a fundamental tool for the protection of business information, a true strategic asset in a digital economy. ,
Its standard content must be defined by what is meant by confidential information, by the employee's main present and future obligations in relation to it, by the duration of the clause, and by the penalties for breach.
With regard to the definition of what constitutes confidential information, such clauses may provide a definition or an illustrative list that includes strategic information, such as algorithms, source codes, internal processes, communications, customer and supplier databases, etc. If a definition of confidentiality based on lists is chosen, these are usually open-ended in nature, so that the list includes the items specified therein but does not exclude other types of information of a similar nature. For this reason, a mixed formulation is often used, that is, a conceptual definition accompanied by a list of examples illustrating the scope of the theoretical definition. Furthermore, it is not uncommon for the definition to be accompanied by a set of exceptions that qualify the scope of the general definition. These types of exceptions usually refer to information that is public or, whilst not public, is easily accessible to persons

who do not have an employment relationship with the company [7] . Clearly, the duty of confidentiality does not extend to information that must be disclosed by court order or law, nor to cases where the company has not taken reasonable and effective measures to protect the information[8] .

The obligations undertaken by the employee through this type of clause generally combine a passive obligation of confidentiality or a non-disclosure undertaking with an active obligation to safeguard and protect the company's sensitive information. This protects the company against both intentional and negligent conduct on the part of the employee[9].

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With regard to the duration of such clauses, it is common for the obligation of secrecy to extend beyond the termination of the contract, as its effectiveness would be significantly reduced if the duty of confidentiality were limited to the duration of the employment relationship itself. Furthermore, in many legal systems, the duty of confidentiality during the employment relationship does not require any express clause to that effect, but may be legally imposed on the employee as a further employment obligation[10] . Depending on the sector and the nature of the information, the usual duration typically ranges **from** one **to** five years, although in exceptional cases it may be indefinite (consider, for example, the formulae for products such as Coca-Cola). In any event, a disproportionate duration may

7. Spanish case law has consistently required that information claimed to be confidential must be clearly identified, have economic value, and that reasonable measures must have been taken to protect it. Thus, among others, judgments of the Barcelona Provincial Court dated 16 March 2023 (ECLI: ES:APB:2023:4535), 31 March 2015 (ECLI: ES:APB:2015:2007), and of 4 March 2024 (ECLI: ES:APV:2024:416) These last two judgments also specify that the knowledge, skills and experience acquired during the employment relationship do not constitute protected trade secrets, unless the specific information sought to be protected is specified and substantiated.

8. Judgment of the Barcelona Provincial Court of 4 March 2024 (ECLI: ES:APB:2024:3474.ª).

9. Negligence is not a criminal offence, but it may be punishable under civil and employment law**.** This was already noted in the judgment of the High Court of Justice of the Basque Country (Social Division) of 26 May 1998, **No.** 1947/1998. This line of reasoning has subsequently been further developed in the judgments of the Provincial Court of Zaragoza of 11 April 2023 (ECLI: ES:APZ:2023:1067A) and that of the High Court of Justice of Castile and León (Valladolid) (Social) of 17 January 2022 (ECLI: ES:TSJCL:2022:122).

10. In the Spanish case, Article 5 of the Consolidated Text of the Workers' Statute refers to the basic duty of every worker to *"fulfil the specific obligations of their post, in accordance with the principles of good faith and diligence".*

compromise the validity of the clause, as it would affect the worker's right to pursue their professional career[11] .

Finally, proportionality must apply not only to the duration of the confidentiality obligation but also to the penalty attached to it. For such clauses to be effective, a breach cannot result in a mere reprimand or warning. They must provide for more significant consequences, such as dismissal or the employee's obligation to compensate for any loss or damage caused by the disclosure of the secret. Thus, if the confidentiality agreement does not establish a specific penalty or a clear penalty clause, the company cannot automatically claim compensation. The company must prove the specific damages arising from the alleged breach[12] .

INTELLECTUAL AND **INDUSTRIAL PROPERTY CLAUSES**

I. LEGAL AND CONCEPTUAL FRAMEWORK OF INTELLECTUAL AND INDUSTRIAL PROPERTY IN THE TRANSNATIONAL LABOUR CONTEXT

In technology-related employment contracts, the services provided by an employee hired by the company may result in the creation of patents, utility models, industrial designs… that is to say, industrial property rights; and/or the development of computer programs, databases, manuals… that is to say, intellectual property rights.

When this occurs, it is necessary to clarify who holds the rights to these works generated during the term of the employment relationship: the employee, as the author of the works, who has created and designed them using their technical expertise; or the employer, who has financed them through the payment of the employee's salary

11. If the confidentiality agreement effectively restricts the employee's ability to practise their profession or work in the sector following the termination of the contract, it must be treated as a non-competition clause, subject to the requirements regarding duration and financial compensation. The absence of these requirements has led some of our courts to declare such agreements null and void. Thus, amongst others, the judgment of the High Court of Justice of the Basque Country (Labour Division) of 4 April 2017 (ECLI: ES:TSJPV:2017:1305), of the High Court of Justice of Catalonia (Labour Division) of 19 December 2022 (ECLI: ES:TSJCAT:2022:11762) and the High Court of Justice of Madrid (Social), dated 26 October 2018 (ECLI: ES:TSJM:2018:9987).
12. In this regard, see the judgment of the High Court of Justice of Madrid (Social), dated 19 February 2021 (ECLI: ES:TSJM:2021:1596) or 6 November 2015 (ECLI: ES:TSJM:2015:13185).

Who has developed them? The answer may vary depending on the legislation applicable to the employment contract and on the specific terms and conditions that the parties have included in the employment contract binding them. Consider, for example, an Indian programmer who has been hired by a US company to develop a specific *piece* of *software* to be marketed in Europe and the United States.

Most legislation is based on the principle that the economic rights to works created within the context of an employment relationship belong to the employer, provided that the work was created by the employee whilst performing their duties and using the company's financial, technical and human resources. However, despite the general consensus on this broad principle, it is the nuances between different legal systems that introduce a high degree of legal uncertainty on the matter.
Thus, for example, in the United States, *'works made for hire'* automatically attribute ownership to the employer[13] , whilst in European countries moral rights are inalienable. In some legal systems, the advance assignment of future rights is restricted or compliance with specific formalities is required [14] . Furthermore, when the employee carries out their work in different countries, this transnational mobility can multiply the uncertainties regarding the applicable legislation. In short, *'(...) the main difficulty to be resolved lies in the solution to the contradiction between the basic principle of intellectual property law, which recognises only the creator of the work as the author, and the requirement under labour law, which attributes the fruits of* the labour *to the* employer'[15].

13. The *work-for-hire* doctrine demonstrates that, in US law, the concept of authorship is a legal fiction or construct that does not correspond to the natural concept of authorship, insofar as it allows the author to be equated with the employer, regarding the latter *from the outset* as the owner of the work. This argument is reinforced by the fact that, in works classified *as work-for-hire,* it is the employer's name that must appear in the register. FISK C.: 'Authors at Work: The Origins of the Work-for-Hire Doctrine' *Yale Journal of Law* & *the Humanities,* vol. 15, no. 1, Winter 2003, pp. 1–71. 14. For a deeper understanding of this doctrine, *see* RABAS, A. MARTÍNEZ, L.:
'The recovery of copyright: the right of revocation and *work-for-hire* in US and Spanish law' *La LEY mercantil* no. 64, December 2019 (LA LEY 15130/2019)
For a more in-depth study of the issue, *see* HURTADO GONZÁLEZ, L.,
'Employment Contracts and Authors' Intellectual Property Rights', *Labour Relations,* 2001, no. 15, pp. 61 ff.

It is true that international conventions in this field, such as the Berne Convention, the TRIPS Agreement (WTO) or the Paris Convention, have helped to create a common regulatory framework, but the margins of discretion left to each State mean that, although the relativity inherent in an international context diminishes, it does not disappear [16] . In short, in international employment contracts it is essential to adapt these clauses to the regulatory framework of each jurisdiction, as the protection of certain intangible assets may vary.

2. STRUCTURE AND USUAL CONTENT OF CLAUSES ON OWNERSHIP, ASSIGNMENT AND FINANCIAL COMPENSATION

The standard content of this type of clause must include the definition of its scope of application, the establishment of ownership of the rights generated during the term of the employment relationship, in both their economic and moral dimensions, and the possible existence of supplementary remuneration.

15. BONDIA ROMÁN, F., 'Salaried Authors', *Revista Española de Derecho del Trabajo,* 1984, no. 19, p. 422.

16. The protection of intellectual and industrial property is underpinned by an international regulatory framework. Without claiming to be exhaustive, the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Instrument of Ratification of 2 July 1973, BOE, 30 October 1974, No. 260) regulates copyright, recognising the inalienability of moral rights. For its part, the Paris Convention for the Protection of Industrial Property of 1883 (ratified by Spain on 13 December 1971, with the Instrument of Ratification published in the BOE on 1 February 1974) establishes principles regarding patents, trade marks and industrial designs. In the commercial sphere, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), adopted in 1994 under the World Trade Organisation, harmonises minimum standards of protection among member states (WTO, 1994). Likewise, Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009) provides that computer programs created by employees automatically belong to the employer, which reflects the importance of expressly regulating works created within the employment relationship. These instruments demonstrate the existence of a common regulatory framework, but practical implementation depends on individual national legislation, which poses challenges for contractual consistency.

Determining their scope of application is closely linked to the precision of what is subject to protection, that is, the definition of the type of employee creations that are included in the provision of labour and within the framework of the assigned duties. A clear definition of the subject matter of protection can prevent problems that may arise in relation to those creations of the employee that arise in parallel with their work and which, in some way, may be linked, even indirectly, to the company's *know-how* or trade secrets.

Just as important, if not more so, than determining the subject matter of protection is the attribution of ownership of the rights thereto and/or their possible assignment. Although there are some legal systems that automatically and by statutory mandate attribute economic rights to the employer in respect of certain works created by the employee in the course of their employment[17] , it is advisable for such clauses to confer ownership of the economic rights inherent in the works created by the employee in the course of their employment or to provide for an advance contractual assignment of those rights to the employer.
Closely linked to the economic rights in works created by an employee are the moral rights that arise from them. In civil law systems, moral rights relate to the authorship of the work, its integrity or its disclosure, amongst other things, and enjoy broader protection than in common law jurisdictions. Such rights are generally inalienable and non-transferable, which sometimes conflicts with the interests of employers, who require flexibility in exploiting the works. This poses a challenge for employers, who require flexibility in the exploitation of the works. The way to overcome the differences between the jurisdictions involved is to introduce a contractual provision whereby the employee waives the acquired rights (only possible to the extent permitted by applicable law) or expressly authorises the employer to exercise certain rights on their behalf.
Finally, some legal systems, such as the German or Spanish ones, recognise the right of the worker/inventor to receive a

17. As is the case with software in the European Union, where economic rights belong exclusively to the employer. This is provided for in Article 2 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009).

additional remuneration if the invention generates a significant and substantial economic benefit for the employer. This is intended to balance the economic asymmetry between the employee's creative contribution and the employer's commercial exploitation of the creation. If the assignment agreement does not expressly provide for compensation proportional to the profits obtained by the company, and the profits obtained by the company are very significant, the compensation received by the employee may be reviewed or supplemented [18] . For this reason, such clauses sometimes provide for a fixed financial compensation or establish a formula for calculating it that appropriately sets out the percentage, the basis on which it is to be applied (generally linked to net profits) and the method of payment (whether through a single lump-sum payment or through staggered payments linked to the achievement of certain milestones).

In conclusion, clauses of this kind are usually reinforced by confidentiality clauses and provisions on the protection of trade secrets, which oblige the employee to protect the company's sensitive information and its intangible assets.

CLAUSES ON TELEWORKING AND THE RIGHT TO DISCONNECT

I. THE TRANSNATIONAL LEGAL FRAMEWORK FOR TELEWORKING: REGULATORY DIVERSITY AND REGULATORY GAPS

The regulation of international teleworking presents particular complexity due to the absence of a uniform regulatory framework. It is an area where national, European and international rules converge, which may overlap and present regulatory gaps[19] . Despite this multiplicity of regulatory instruments, the reality is that they often

18. In this regard, see the judgment of the Madrid High Court of Justice (Labour Division) of 22 February 2023 (ECLI: ES:TSJM:2023:1968) or that of the Catalonia High Court of Justice (Labour Division) of 13 September 2023 (ECLI: ES:TSJCAT:2023:8179).

19. For example, and without claiming to be exhaustive, at international level, ILO Convention No. 177 (1996) on home work, which recognises minimum rights that also apply to telework. At European level, Regulation (EC) No 883/2004 on the coordination of social security systems, which establishes which legislation on contributions applies when a worker resides in another Member State; Directive 2019/1152, which guarantees transparent working conditions, with an obligation to provide information on the nature of cross-border work; Directive 89/391/ EEC, which reinforces the employer's obligation to ensure health and safety at work, including when working remotely, and the GDPR (Regulation 2016/679), which is key to data processing in cross-border contexts. At the domestic level, in Spain, Law 10/2021 on remote working regulates teleworking agreements, their voluntary and reversible nature, and obligations regarding expenses, resources, working hours, monitoring and risk prevention.

focus on the regulation of domestic telework, excluding from its standardising scope the regulation of cross-border telework, in which the worker provides services in different states[20]. In other words, despite the existence of various international, European and national legal instruments regulating telework, none of them expressly addresses its transnational dimension. Thus, for example, at EU level, the European Commission recognised the importance of this issue, but the European Framework Agreement on Telework made no reference whatsoever to the international nature that this form of work may entail. Nevertheless, that Agreement helped to establish minimum conditions for social protection and to facilitate the operations of multinational companies within a single market, but always from an internal perspective[21] .

Similarly, in domestic legislation, Law 10/2021 of 9 July on remote working[22] does not expressly address transnational teleworking either. Consequently, the transnational dimension of teleworking falls outside the specific regulations on this matter and must be resolved through the application of the rules of private international law[23] . Specifically, the following would apply in matters of jurisdiction

20. ROMERO BURILLO, A.M., 'Some considerations on cross-border teleworking', in AA.W. *Productive decentralisation and new forms of work organisation:* 10th *National Congress on Labour and Social Security Law,* Ministry of Labour and Social Affairs, p. 1144.

21. MELLA MÉNDEZ, Lourdes. General commentary on the Framework Agreement on Telework. *Labour Relations: A Critical Journal of Theory and Practice,* 2003, vol. 19, no. 1, pp. 21–52.

22. BOE no. 164, 10 July 2021.

23. On this subject, *see* ROMERO BURILLO, A.M., 'Some considerations on cross-border teleworking', in Various Authors. *Productive decentralisation and new forms of work organisation:* 10th *National Congress on Labour and Social Security Law,* Ministry of Labour and Social Affairs, pp. 1135–1150. CRESPÍ FERRIOL, M.M.*:* 'Transnational remote working'. In *Remote Work: with a specific analysis of Royal Decree-Law 28/2020 of* 22 *September,* edited by Francisco Pérez *de* los Cobos and *Orih*uel, Javier Thibault-Aranda, 2021, pp. 659–688.

internationally, the Brussels I bis Regulation[24] . And in matters of applicable law, the Rome I Regulation[25]

For all these reasons, clauses relating to cross-border remote working are necessary to provide legal certainty for this type of employment contract; however, it must be borne in mind that their validity may be subject to mandatory provisions of international, European and national law that limit their effectiveness to the extent that they may affect workers' fundamental and inalienable rights. Let us not forget that there may be state regulatory laws, enshrined in both European and domestic legislation 0 including in collective agreements, which contain such provisions and which directly or indirectly affect various aspects of the transnational employment relationship, such as recruitment, the performance of the contract, the organisation of work, issues of equality and diversity, health and safety, protection of property, employment-related rights or the termination of the employment relationship, etc.

2. STRUCTURE AND TYPICAL CONTENT OF CONTRACTUAL CLAUSES IN TRANSNATIONAL TELEWORKING

Aware of the risks arising from the existence of mandatory or even internationally binding regulations governing this type of employment relationship, companies often seek to mitigate the risks stemming from differing social and labour standards in this area through specific clauses that regulate the most contentious aspects of transnational telework.

Apart from issues relating to tax and social security matters, it is common for the parties to determine the competent jurisdiction for resolving any disputes between them and to specify the law applicable to the employment relationship. However, the scope of contractual freedom may be limited by the minimum, inalienable rights of the place where the worker habitually performs their duties

24. Articles 20 to 23 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012).

25. Articles 8 and 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008).

(generally linked to the country where the employee has their habitual residence)[26] . For this reason, it is not uncommon for the parties to expressly identify in the employment contract itself the location from which the employee will telework, even going so far as to restrict the employee's ability to take up residence in certain countries which, for tax, social security or data protection reasons, may undermine the employer's interests.

Similarly, this type of employment contract usually contains specific provisions regarding occupational health and safety, in which the parties allocate their respective obligations. In this regard, it is common for the employer to assume the obligation to provide the necessary information and training for the performance of the duties assigned to the employee. The employee, for their part, usually assumes the obligation to maintain a suitable workspace.

Regulations on data protection and the duty of confidentiality are also common in this type of employment relationship, often requiring the employee to use company devices and secure networks, and prohibiting the storage of any information on personal devices.

All this without overlooking the monitoring and control functions incumbent upon the employer, which generally take the form of establishing and regulating appropriate mechanisms for recording working hours and supervising the work carried out; these must, in any case, respect the employee's right to privacy and to digital disconnection.

In any case, as mentioned above, the parties' right to self-regulate and to determine the terms of their employment relationship is not unlimited and must never undermine the minimum rights recognised in the country where the work is actually carried out. Thus, for example, in the field of occupational risk prevention, although the contract may limit the employer's liability, occupational health regulations recognise the worker's inalienable rights to protection, which render any clauses potentially exempting the employer from liability null and void. However, we must emphasise that

26. On this connecting factor, which is key to the regulation of transnational teleworking, *see* IRIARTE ÁNGEL, J.L., 'The precision of the habitual place of work as the forum of jurisdiction and connecting factor in European regulations', *Cuadernos de Derecho Transnacional,* no. 2, 2018, pp. 477–496.

At the domestic level, Royal Decree-Law 28/2020 does not provide specific regulations on risk prevention in teleworking; instead, it merely applies the general framework designed for on-site work, without providing rules tailored to specific risks such as isolation, technostress or hyperconnectivity[27]. This creates significant tensions. For example, the difficulty employers face in assessing and monitoring a space over which they have no direct control, the need for greater commitment from workers towards prevention, and legal uncertainty regarding employer liability[28] .
The same applies to data protection. The GDPR is mandatory, and the parties cannot exclude its application if remote working involves the transfer of personal data to countries without adequate safeguards. In this context, Regulation (EU) 2016/679, the General Data Protection Regulation (GDPR), acts as a genuine *European regulatory framework* that is also applicable in the workplace. And it applies both when the employer has the establishment responsible for data processing within the European Union, and when the employee habitually performs their duties within the EU, even if the employer is established in a third country. The GDPR does not, in principle, prohibit the processing of special categories of sensitive data in the workplace, but requires that such processing be justified on grounds of compliance

27. We would like to draw attention here to Technical Prevention Note No. 1123/2018, ICT II, which addresses the psychosocial risk factors associated with teleworking, and which mentions the following: Extended working hours (carrying out work during downtime between journeys, working outside normal working hours, at home, etc.), which may also lead to an intensification of work. • Extended working hours that may interfere with family life and leisure time. • Difficulty in accounting for work carried out outside working hours (via remote connection to servers at weekends, sending and receiving emails outside working hours, etc.). • Reduction in, and difficulty in enjoying, rest time and/or physical and mental recovery due to the ease of connecting to carry out work outside working hours. • The ease of working at any time and in any place thanks to ICT can act as a trigger and/or catalyst for workaholism and/or addiction to the use of ICT (https://www.insst.es/documentacion/colecciones-tecnicas/ntp-notas-tecnicas-de-prevencion/32-serie-ntp-numeros-1101-a-1135-ano-2018/-las-tecnologias-de-la-infor-macion-y-la-comunicacion-tic-ii-factores-de-riesgo-psicosocial-).
28. In this vein, SÁNCHEZ-URÁN AZAÑA, Y.: 'Employers' duty to protect health in remote working', in *Remote working: with a specific analysis of Royal Decree-Law 28/2020 of* 22 *September,* edited by Francisco Pérez de los Cabos and Orihuel, Javier Thibault Aranda, 2021, ISBN 978-84-18662-20-1, pp. 377–418.

of legal obligations relating to employment or social security, or for the exercise of specific rights, always with sufficient guarantees to protect the rights and interests of the worker. Alternatively, the processing of this data is also permitted for the purposes of occupational medicine o or the assessment of the employee's work capacity[29].

VI. CLAUSES ON THE USE OF DEVICES AND EMPLOYER MONITORING IN INTERNATIONAL EMPLOYMENT CONTRACTS

1. THE INTERNATIONAL LEGAL FRAMEWORK FOR COMPANY MONITORING OF WORK-RELATED DEVICES

Clauses governing the use of devices and the employer's control over the provision of services by the employee are a useful tool for, on the one hand, seeking to reconcile the interests of the employer (protection of company assets, by regulating their misuse by the employee and monitoring their productivity) and those of the employee (safeguarding and protecting the right to privacy, dignity and personal data protection).

However, the use of electronic devices (such as computers, mobile phones, tablets and corporate *software*) and the employer's control over employees' activities pose significant legal challenges, particularly when the provision of labour extends beyond national borders.

Consequently, it is increasingly common for international employment contracts to expressly regulate these matters through specific clauses that define the use of the technological tools the company makes available to the employee and set out the monitoring and supervision mechanisms in place.

As in the previous section, various regulations converge in the regulation of this matter. Thus, for example, in Europe, the European Convention on Human Rights recognises the right to respect for private life, which also applies to the workplace30.

29. In this regard, see ESPINIELLA MENÉNDEZ, Ángel. *International Employment Relations.* Tirant lo Blanch, 2022, para. 223.
Article 8. Indeed, the European Court of Human Rights (ECHR) has set limits on the monitoring of employees' emails. Case of *Barbulescu v. Romania,* European Court of Human Rights, Section 4, Judgment of 12 January 2016, Application No. 61496/2008. *See* GOÑI SEIN, J.L. 'The protection of employees' electronic communications: the doctrine of the Strasbourg Court and constitutional case law', *Trabajo y Derecho,* No. 40, Studies Section, April 2018, pp. 12–26.

The General Data Protection Regulation governs the processing of personal data in the context of device monitoring and requires proportionality, transparency and prior notification to employees[31] . Directive 2002/58/EC (ePrivacy Directive)[32] sets out specific requirements regarding electronic communications. Under US law, employers have greater scope to monitor devices, although the Electronic Communications Privacy Act (ECPA, 1986) imposes certain limits. To summarise the issue in general terms, we might conclude that in Europe the protection of privacy takes precedence, whereas in the United States corporate control prevails.

This brief overview of the legislative landscape highlights the difficulty of drafting clauses that are valid in a multinational context, as their effectiveness will depend on striking a balance between the legitimate interests of the company (promoting productivity and protecting corporate assets) and the fundamental rights of the employee (protection of their dignity and privacy).

VII. NON-COMPETITION AND RETENTION CLAUSES IN INTERNATIONAL EMPLOYMENT CONTRACTS

1. CONCEPT AND LEGAL BASIS

Post-contractual non-competition clauses are a legal instrument under labour law whereby the employee undertakes not to engage in any work or professional activities that may constitute direct or even indirect competition with their employer once the employment relationship has ended. Generally, such clauses are limited in terms of territory and duration.

30. Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119, 4.5.2016.
31. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). OJ L 201, 31.7.2002

The ultimate purpose of this type of clause, as was the case with confidentiality or trade secret clauses, is to safeguard the economic, commercial and strategic interests of the company, particularly its know-how, its clientele and its confidential information.

From a conceptual perspective, this type of agreement intersects with and with the promotion of competition through employment[33]) and competition law, as it restricts the right to free choice of profession and trade in order to protect free competition and fair dealing between companies.

Due to this delicate balance, legal systems in our region subject such clauses to a somewhat restrictive regime of validity. Thus, their validity and enforceability are generally conditional upon the existence of a legitimate interest on the part of the employer, reasonable temporal and territorial limitations, and the payment of a financial sum that adequately compensates the employee for the restrictions imposed.

The legal nature of these clauses has traditionally been a matter of debate. Although they are included in the employment contract, their effect extends beyond the termination of the contract. Hence, their interpretation requires reconciling the principles of labour law (based on the inalienability of minimum rights and the protection of the contractually weaker party) with the principle of contractual freedom upon which civil and commercial law is founded. Furthermore, this dichotomy is particularly pronounced in the international arena, as the multiplicity of legal systems that are potentially applicable and the diversity of existing standards in this area make it difficult to ascertain the actual effectiveness of such clauses.

REGULATORY FRAMEWORKS IN OUR ENVIRONMENT AND ISSUES OF RECONCILIATION BETWEEN THEM

The treatment of post-contractual non-competition clauses varies significantly across different legal systems, giving rise to significant harmonisation issues in a cross-border context.

33. Thus, it is recognised in the Spanish Constitution (Article 35), the 1948 Universal Declaration of Human Rights (Article 23.1), the 1966 International Covenant on Economic, Social and Cultural Rights (Article 6.1), and the 1966 European Social Charter (Article 1), amongst others.

On the European continent, these clauses are permitted, but subject to strict conditions of validity, whereas in countries with an Anglo-Saxon legal tradition they tend to be subject to a more flexible and case-by-case judicial review of reasonableness. Thus, the European Union does not provide uniform regulation of these clauses, meaning that their regime is determined in accordance with national legislation and, in transnational contracts, through the application of the rules of private international law (primarily the Rome I Regulation).

In Spain, Article 21 of the Workers' Statute sets out a clear framework: the agreement must be in writing; its duration may not exceed two years for technical staff and six months for all other workers; there must be a genuine commercial or industrial interest on the part of the employer; and, above all, the worker must be financially compensated with adequate consideration. In the absence of compensation or if the agreement exceeds reasonable time or geographical limits, it is considered null and void.

In France[34], Germany[35] and Italy[(36),] the existing restrictions are similar. In the United Kingdom, there is no specific statutory provision, but *post-termination restrictive covenants* are subject to the *reasonableness test.* That is to say, the courts assess whether the restriction is reasonable in light of the employer's legitimate interest and the proportionality of the means employed. If the clause unduly restricts the employee's freedom or prevents them from earning a living, it is declared void[37] . In the United States, the landscape is fragmented. There are states such as California, which effectively prohibit any non-competition agreement. Whilst others recognise their validity, but subject them to

34. Article L1121-1 of *the Code du travail.*
35. Section 74 of *the German Commercial Code* regulates these clauses, requiring a minimum financial compensation of 50% of the previous remuneration for each year of the non-competition period, and prohibiting their application where they impose a disproportionate burden on the employee.
36. Article 2125 *of the Civil Code* also permits them subject to certain conditions: they must be in writing, define an objective, temporal and territorial scope, and provide for adequate compensation. The absence of any of these elements renders them null and void. Furthermore, the duration of the restriction may not exceed five years in the case of executives, and three years in all other cases. If a longer duration is agreed, it shall be reduced to the extent indicated above.
37. DEAKIN, S. AND MORRIS, G., *Labour Law* (8th ed.). Oxford University Press, 2019, pp. 533–540.

A proportionality test and financial compensation. This is the case in the State of New York, for example[38] .

3. USUAL CONTENT AND VALIDITY CRITERIA

Despite legislative diversity, international practice has established a relatively uniform structural model in which the validity and effectiveness of such clauses depend on a series of principles based on proportionality, transparency and contractual balance.

With regard to their purpose and material scope, these clauses must specify the subject matter of the prohibition, that *is to say,* the activities deemed to be competitive. A generic reference to 'activities in the same sector' or 'competing activities' may be insufficient or excessively broad.

Furthermore, this type of non-competition clause must be limited in terms of territory and time. The territorial scope must be reasonably defined, particularly if the employment contract is of a transnational nature. In short, a prohibition on working in countries where the company has no actual interests may be deemed disproportionate by a court or tribunal.

Similarly, the time limit of the prohibition is one of the main criteria for its validity. As a general rule, the duration must be reasonable and proportionate to the interest it is intended to protect. The standard duration is one or two years, although this depends on the employee's level of responsibility. Thus, for example, as mentioned above, Article 2125 of the Italian Civil Code provides that the restriction may not exceed five years in the case of executives, and three years in other cases. In any event, longer durations require objective justification and are usually subject to higher financial compensation.

Alongside these factors, financial compensation is a key determinant of the agreement's validity. Under no circumstances should it be regarded as a token incentive. It must constitute genuine compensation for the inability to carry out the activity without restriction

38. GARRISON, M.A. and WENDT, J.T., 'The evolving law of employee non-compete agreements: Recent trends and an alternative policy approach'. *American Business Law Journal 45(1),* pp. 107–186.

Thus, a balance must be struck between the restriction imposed and the potential harm suffered by the employee. For example, in Germany, a minimum financial compensation of 50% of the previous remuneration is required for each year of the prohibition. In any case, we must not forget that post-contractual non-competition clauses are usually combined with confidentiality and trade secret clauses. Nevertheless, their coexistence must be carefully managed, as the duty of confidentiality, by its very nature, may continue indefinitely without compensation, whereas the non-competition clause always requires a time limit and financial consideration. Confusing these two aspects frequently leads to litigation and the invalidity of the restrictions on the grounds that they are excessive or indefinite[39] .

Finally, the clause must set out the consequences of non-compliance, which may give rise to contractual liability or compensation for damages, provided that the harm suffered by the employer is proven. Some jurisdictions permit pre-determined penalty clauses, but their validity depends on them being proportionate and not *effectively* impeding the worker's professional mobility.

VIII. SOME CONSIDERATIONS FROM THE PERSPECTIVE OF PRIVATE INTERNATIONAL LAW

In international contracts, existing regulatory differences regarding this type of clause may seriously compromise their validity and effectiveness. Under the Rome I Regulation [40], the parties may choose the law applicable to the contract (Article 8(1)), but this choice may not deprive the employee of the minimum protection that would generally be afforded by the law of the country where or from which the employee habitually performs their work (Article 8(2)).

Therefore, a non-competition clause that is valid under the chosen law (for example, the law of the State of New York) could become ineffective if the employee performs their services from a European country with higher protective standards.

39. Judgment of the Supreme Court (Social Plenary), of 14 December 2023, No. 1163/2023, rec. 494/2021 (ECLI: ES:TS:2023:5799).
40. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). OJ L 177, 4.7.2008.

Furthermore, Articles 9 and 21 of the Rome I Regulation could justify the application of internationally applicable mandatory rules or public policy exceptions of the forum where the employee's fundamental rights are compromised. In other words, a European court could set aside a clause, formally valid under the *lex causae*, if it infringes fundamental rights such as freedom of occupation, proportionality or the principle of adequate compensation.

In this context, the lack of international harmonisation creates considerable legal uncertainty for both employers and employees. Multinational companies may find that the same contractual clause included in an employment contract produces different effects depending on the country in which it is enforced. For their part, employees may be unaware of the true scope of their contractual obligations until the dispute reaches the courts. In order to avoid this legal uncertainty, we agree on the need to draft these clauses with a multi-jurisdictional perspective, one that respects the minimum social and labour standards of the various legal systems relevant to the employment relationship in question.

In any case, despite the growing prevalence of these clauses, which are closely linked to employment contracts in the digital economy, we are still at an early stage in terms of their legal development and the establishment of case law governing them. The recent emergence of these concepts (transnational teleworking, digital control clauses, assignment of rights to technological creations or global confidentiality agreements, etc.) and the lack of harmonised regulation have prevented the establishment of settled case law regarding their validity, scope and effects at the transnational level. Judicial practice is only just beginning to address the conflicts arising from this new model of digitised employment relationships; consequently, the development of uniform interpretative criteria will depend on the gradual evolution of comparative case law and, where appropriate, on any parallel legislative developments.