

Employees have access to employers' confidential business information by necessity in the course of fulfilling their professional duties. Having assessed this access and the associated risks, it is common for employers to insert a clause in the employment contract or in a separate document whereby employees declare they are aware of what constitutes confidential information and undertake not to disclose or disseminate said information for the duration of their employment contract and for a specified period of time after termination of the employment contract. Said obligation is an expression of employees' general obligation pursuant to article 126, item 9 of the Labour Code (LC) to be loyal to the employer, i.e. employees shall not abuse employer's trust, they shall not breach the confidentiality of the information provided by the employer and shall protect the reputation of the company.

A difference of interpretation arises on the validity of the penalty arrangement foreseen in the employment contract in case of breach of confidentiality. One opinion is that the penalty clause is not valid because employees' liability for deliberate disclosure of employer's confidential information constitutes full pecuniary liability that is tortious in nature which requires proof of actual damages. Another opinion is based on the strict interpretation of LC article 212 which refers to civil law governing aspects of employees' pecuniary liability which are not expressly covered by the Labour Code, yet not making explicit reference to the provisions of article 45 et seq. of the Obligations and Contracts Act (OCA), and arrives at the conclusion that the clause is valid in the above-mentioned sense, being admissible by virtue of the freedom of contract under OCA article 9.

The analysis of the validity of the penalty clause in an employment contract in cases of disclosure of confidential information goes back to the source of the obligation and, consequently, to the determination if liability is contractual or not and if parallel existence is admissible of a contractual obligation alongside an employment relationship which foresees a penalty for breach of obligation by the employee in fulfilling their duties arising from the provisions of the Labour Code.

In that context, Judgement No. 50077 of 11 May 2023 of the Supreme Court of Cassation (SCC), Civil Division 4, on civil case No. 2835/2022 reads as follows: "It is possible for an employment contract to contain a clause whereby the parties agree to seek liability and compensation for damages for breach of contractual obligation and also for misconduct

outside the existing legal relationship which would result in violation of competition rules – special tort liability pursuant to article 105(3) of the Protection of Competition Act (PCA) or the rules of article 10 of the Trade Secret Protection Act (TSPA), in the case of trade secrets that were wrongfully obtained, used or disclosed, but it shall not contain a penalty agreement related to breach of the non-disclosure obligation.”

According to the justification provided by the Court of Cassation, harm may occur in relation to acts and actions in the meaning of TSPA article 8 and PCA article 1(2) and liability is sought in a civil procedure without any requirement of prior proceedings before an administrative body. In addition, the court refers to PCA article 105 which provides for the right of compensation of harmed persons for harm resulting from any and all violations of PCA, including from unfair commercial practices. The majority of the cassation panel of judges consider liability for breach of confidentiality provisions to be tortious in nature and pursuant to the provisions of PCA articles 105 and 106 full compensation is due for damages resulting from said breaches. The court makes a distinction between tort liability and the function of the penalty under OCA article 92 and states that the former is based on harm that is measurable and defined and is established as a ratio of the value of the property before the harm and after the tort, while a penalty is an agreement that establishes in advance the degree of harm that the creditor in a contract would sustain in case of breach.

One judge on the panel signed the SCC Judgement with reservation. The judge argues that the agreement which obliges the employee to keep employer’s confidential information safe and ensures compliance with that obligation through a penalty is not excluded in principle from the freedom of contract (pursuant to OCA article 9). According to that divergent view, the only condition for the validity of the penalty clause is that it shall be limited in time based on the argument that the restrictions on the activity of the agent after contract termination are limited in time and the reasonable time limit is determined based on the specificity of each case, i.e. based on the employee’s position and the nature of their work.

As a result of the interpretation provided by the Court of Cassation, i.e. that the penalty arrangement for breach of confidentiality foreseen in an employment contract is not valid, the recommendation to employers would be to define the types of confidential information in advance, to make their employees familiar with that information and to include a clause in

the employment contract or in a separate agreement foreseeing the employer's right to seek liability and compensation for damages as a result of trade secrets being wrongfully obtained, used or disclosed by the employee pursuant to PCA and TSPA. When a breach of said obligation to safeguard confidential information is established and harm is quantified, there is a possibility to enter into an agreement to compensate for said harm.