

Contractual Protection of Confidential Business Information

In Norwegian Employment- and Business Contracts

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Number of Words: 14 986

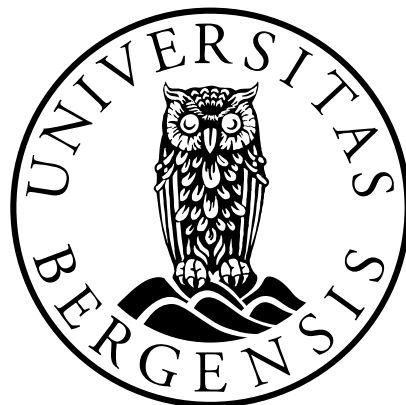


Table of Contents

<u>1</u>	<u>Introduction</u>	<u>4</u>
1.1	Topic of the thesis	4
1.2	Delimitations	5
1.3	Related Areas of Law	5
1.3.1	Relationship to Intellectual Property Law	6
1.4	Progress	7
<u>2</u>	<u>Legal Sources and Default Rules</u>	<u>7</u>
2.1	Introduction	7
2.2	Case Law	8
2.2.1	Notflottør – Rt.1964.238	8
2.2.2	Cirrus – Rt.1999.199	8
2.2.3	SAS – Rt.2007.1841	9
2.3	Statutory Regulations of Confidential Business Information	9
2.3.1	The Marketing Control Act	9
2.3.1.1	MCA Section 28	10
2.3.1.2	MCA Section 29	11
2.3.2	The General Civil Penalty Code	12
2.3.2.1	Section 294, No. 2	12
2.3.2.2	New Penalty Code Section 207	12
2.3.3	Regarding know-how	12
2.3.4	Regarding the Term “unlawful”	13
2.3.4.1	The general importance of the unlawful criteria	13
2.3.4.2	In Employment	13
2.3.4.3	Between Professional Parties	15
2.3.4.4	The Springboard Doctrine	16
2.3.5	MCA Section 25	17
2.4	Non-Statutory Protection of Confidential Business Information	17
2.4.1	The Duty of Loyalty between Contractors	17
2.4.2	Between Employer and Employee	18
2.4.3	Between Professional Parties	19
2.4.4	The relation between the duty of loyalty and MCA Section 25	19
2.4.5	Remedies	20
2.4.5.1	Penalty	20
2.4.5.2	Damages and Preliminary Injunction	20
2.4.5.2.1	Unjust Enrichment	22
2.4.5.3	Other remedies	23
2.4.6	Summary	23
<u>3</u>	<u>Contractual Regulation of Confidential Business Information</u>	<u>24</u>
3.1	Introduction	24
3.2	Employment	24
3.2.1	Available Contractual Provisions	25

3.2.2	Presentation	25
3.2.2.1	Confidentiality Agreement	25
3.2.2.2	Non-Compete Agreement	26
3.2.3	Limitations to the Freedom of Contract	27
3.2.3.1	ACA Section 36	27
3.2.3.2	ACA Section 38	28
3.2.4	Summary	30
3.3	Business Partners	30
3.3.1	License Agreements	30
3.3.1	Due Diligence	31
3.3.2	Research and Development	31
3.3.3	Fabrication Contracts	32
3.3.3.1	Example from the Petroleum Industry	32
3.3.3.2	Example from Construction	33
3.3.4	Limitations to the Freedom of Contract	34
3.3.4.1	ACA Section 36	34
3.3.4.2	ACA Section 38	34
3.3.4.3	Competition Law	34
3.3.5	Summary	35
3.4	Remedies	35
3.4.1	Contractual Remedies in General	35
3.4.2	Damages	35
3.4.2.1	Unjust Enrichment	36
3.4.3	Remedies of Labor Law	36
3.4.4	Remedies of Business Contracts	37
4	<u>The Relation between Background Law and Contract Law</u>	37
4.1	Agreed documents as background law	37
4.2	The Background Law's influence on Contracts	38
5	<u>Concluding Remarks</u>	40
	<u>List of Sources</u>	42

This thesis is written in affiliation with Nordic Restatement of Contract Law – University of Bergen
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1 Introduction

1.1 Topic of the thesis

Some business information is valuable because it is unknown to the company's competitors. This confidential information can be one of the most valuable assets of a business. Companies therefore wish to keep this information secret, as it gives a competitive advantage. The holder of confidential business information should take measures in order to protect and maintain its confidentiality.

The main purpose of this thesis is to establish how and to what extent companies can protect confidential business information by contractual regulations according to Norwegian law.

The two contractual relationships that are to be treated in the thesis are employment- and business contracts. Employees have access to sensitive information when it is necessary to perform their tasks. In some contractual relationships it is also necessary that business partners exchange information, or that one company has access to the sensitive information of the other company. Business partners and professional parties are terms used to describe a commercial entity with which the company has some form of alliance. This alliance may be strong or weak, and of a longer or shorter duration. Both employees and business partners might be disloyal and take advantage of their access to sensitive information. The thesis will present how companies are protected from misuse of information from these contract parties.

Confidential business information is a collective term for information of commercial value, the disclosure of which is likely to cause substantial harm to a company's competitive position. The term includes trade secrets, know-how and some information that is not covered by these terms for instance marketing plans, new product plans, patentable inventions et cetera. Information is also used as a collective term, covering ideas, know-how, technology and inventions.

The topic is of major relevance today due to the historical development from an industrial society to a society based on information and knowledge. There has been an increased valuation of knowledge in the business sector. At the same time, employees and contractors change more frequently.¹

In order to consider the need for an additional contractual protection, it is necessary with an evaluation of the solutions of the statutory-, non-statutory law and general principles that make the Norwegian background law.

¹ Irgens-Jensen p.13-16

1.2 Delimitations

The thesis does not cover cases where information is illegally obtained, for instance by espionage. The subject is more relevant in studies of criminal law. Espionage is regulated in the GCPC Section 405 a, and covers both insiders and third parties. When insiders exploit the information obtained by espionage, both Section 294 and 405a are applicable.

Third parties' misuse of legally obtained information will neither be treated, for instance if a subcontractor misuses information obtained by the contractor or if a new employer misuses information obtained by the former employee. GCPC Section 294 No. 3 also covers these situations, as the information is obtained "in connection with an assignment from it". The thesis only covers the regulations inter partes. The subject is how to protect confidential business information in contract, and therefore it is only relevant to discuss contract parties.

Consultants represent a threat to confidential business information. This type of contractual relationship has factors of employment, but the consultant is more of a professional party. The arguments that limit the freedom of contract in regular employment are not as relevant, but they are still of importance. "[T]echnical and mercantile consultant[s]" are covered by the GCPC Section 294 No. 3. I will only discuss employment in general.

A solution for the company to receive a reasonable compensation is to include a provision about liquidated damages in the contract. ACA Section 36 can be used to declare these provisions void. Questions of international private law arise in this area of law. Therefore it is also practical to state the governing law and jurisdiction in contract. Due to the space limitations of this thesis these provisions will not be discussed further.

1.3 Related Areas of Law

The subject of the thesis includes market-, competition-, contract- and quasi-intellectual property law. Adjacent areas of law are tort- and individual labor law.

Market law protects sensitive information, which is of importance for the company's market position. The rules of competition law limit the freedom of contract, if the contract prevents competition. Contractual law contains rules on for instance how to interpret a contract, what can make a contract be declared void.

The focus of general contract law is mainly on the positive duties of the contracting parties, such as payment and time of performance. The subject of this thesis is the negative duties; prohibition of disclosing or using trade secrets obtained through the contract relationship.

In traditional tort law, the question that rises is where one should place the responsibility when an injury has occurred. In this area of IP-law the case is that two competitors willfully

harm each other, without it necessarily being unlawful.² Individual labor law is of relevance as the thesis includes the limitations of an employment contract.

1.3.1 Relationship to Intellectual Property Law

Confidential business information is an intangible asset and falls under the category of intellectual property, but it is mainly not covered by the Intellectual Property laws. Some confidential business information might be a patentable invention³ or a patentable design⁴ and therefore covered by the industrial Intellectual Property laws. As long as the company does not register the information, it must in most cases either rely on the rules protecting this confidential business information or regulate the subject in contract. The table⁵ illustrates the advantages and disadvantages of patent registry.

	Pros	Cons
Patents	<ul style="list-style-type: none"> • Monopoly / Exclusive rights • Court actions • Base for loans • Involuntary infringement 	<ul style="list-style-type: none"> • High costs • 20 years limited protection • Disclosure • Length of procedures
Trade Secrets	<ul style="list-style-type: none"> • No registration costs • Not limited in time • No disclosure required • Immediate effect 	<ul style="list-style-type: none"> • Not easily enforceable • Voluntary infringement • Can be patented by others • Limited remedies

Not all Intellectual Property laws require registration, such as the Copyright Act. The company can be partly protected by the Copyright Act. Architectural drawings, for instance, are protected by the rules of the Copyright Act Section 1, No. 9. The Marketing Control Act Section 29 in addition protects them if they are confidential.

In general IP-law, the question is typically if a product is similar to the product protected by one of the Acts. There is a different approach when considering whether there has been a misappropriation of confidential business information, one estimates what benefit of the alleged violator.

It can be argued that it is unnecessary to have statutory rules protecting confidential business information that is not protected by the other IP-laws. The main argument is that competitors should not be able to take advantage of information that may be detrimental to a company's market position.

² Irgens-Jensen, p.256

³ The Patent Act Section 1

⁴ The Designs Act Section 1

⁵

http://www.iprhelppdesk.eu/sites/default/files/newsdocuments/How_to_manage_confidential_business_information.pdf

1.4 Progress

Protection of confidential business information is a relatively new subject in Norwegian law, there has not been written much in legal theory⁶ and there are few examples from case law available.

Under Norwegian domestic law, companies are protected from former employees' and contractors' misuse of sensitive information. There are statutory rules protecting trade secrets and other sensitive information in the General Civil Penalty Code and the Marketing Control Act (hereon GCPC and MCA). In addition, there is a statutory duty of "good business practice" in MCA Section 25, and a non-statutory duty of loyalty that might be of specific importance.

In Chapter 2 of the thesis I will first give a presentation of background law. Chapter 3 is the main part of thesis on confidential business information in employment contracts and in contracts between various professional parties. The available remedies in background law and in contract law will be presented at the end of Chapter 2 and 3. Contracts concerning sensitive information are rarely available. The most known publicly available contracts are NFC⁷ and NS 8405⁸. The provisions regarding confidential business information will be presented in Chapter 3. The subject illustrates the relation between background law and contract law in general, and I will make some observations in Chapter 4.

All translations of Acts, cases, literature et cetera are my translations, unless otherwise specified.

2 Legal Sources and Default Rules

2.1 Introduction

In a competitive society, there must be certain rules on how to protect one's competitive position. Background law is the same as default law; the rules that apply if a question is not regulated in contract. If the company does not regulate the treatment of sensitive information in a contract, the background law is the only protection. Background law describes the general rules in Norwegian law, and consists of statutory and non-statutory rules. The non-statutory rules are based on case law or even business practice⁹. Default law is also of importance when interpreting a contract to find a reasonable solution. In order to establish the need of contract regulation, one must look at the protection in the background law.

This Chapter is only an overview of some important rules in Norwegian legislation. The listed sections of GCPC and MCA cover both employees and professional parties. Because the

⁶ Except for Harald Irgens-Jensen's doctoral thesis

⁷ Norwegian Fabrication Contract – Petroleum Industry

⁸ Norwegian Standard – Construction Work

⁹ This will be discussed in Chapter 4

MCA is the most important law in practice, I will use it as a starting point even though the GCPC also regulates the subject. The relation between the GCPC and the MCA is not thoroughly treated, as this is not of major relevance for the subject. This Chapter is mainly focused on the conditions in the default rules, because it illustrates what situations are covered by the background law.

The question is if the background law provides a sufficient protection for confidential business information.

2.2 Case Law

There are three cases I have chosen to focus on in the thesis. They are some of the leading cases when it comes to confidential business information and will be used throughout the thesis. This calls for a brief presentation of the facts.

2.2.1 Notflottør – Rt.1964.238

This case was between a former employer and employee. A company had developed a method and a machinery to produce a floating device for fishing nets made of PVC-plastic. The newly developed floating device was an improvement of the former floating devices made of cork.

An employee, hired in 1955, left the company the year after, because of a conflict with the management. His employment contract contained a provision stating that “[t]he Company will be the owner of the methods and ideas we develop and everything we do in this process must remain a trade secret.” The former employee started working at a competing company, which had not yet managed to produce floating devices made of plastic. Their new employee, however, told the company about the production process in detail. The competing company then started producing floating devices in PVC-plastic.

The similarity of the floating devices showed that the employee must have exploited a large amount of sensitive specific information from the former employee.

The Supreme Court unanimously concluded that the exploiting the information was clearly a violation of the contract of employment.

2.2.2 Cirrus – Rt.1999.199

The conflict occurred between a shipyard and the engineering company Cirrus, i.e. professional parties. The shipyard had cooperated with the engineering company Cirrus for a long time to develop a new type of vessel. 15 boats were produced in total. During the contract period, the yard group used the engineering company’s drawings and descriptions to develop a competing “next generation” boat. This development was held hidden from Cirrus. The yard group ended the contract and a year after the contract expired; the “next generation” boat was ready.

The result was (3-2) and the majority of the Supreme Court concluded that the yard group was liable and had to pay compensation to the engineering company.

2.2.3 SAS – Rt.2007.1841

The SAS case also occurred between professional parties. The airlines Braathens (later bought by SAS) and Norwegian cooperated on the ticketed sale on the route Ålesund-Stavanger in Norway. Braathens had access to all of Norwegians “PNR-data” (passenger name record), which includes information about the company’s ticket reservations. For some reason, the access continued after the end of the cooperation. SAS argued that the information was not obtained “in connection with an assignment from” Norwegian, as they had only used the PNR-data after the cooperation had ended. The Supreme Court stated that because SAS would not have had access to the information without the contract relationship, the term was fulfilled.

The Supreme Court unanimously sentenced SAS to corporate penalty.

Norwegian later raised a civil law suit against SAS. The case did not go further than the Court of Appeals and is therefore not a leading case on the subject. It will be mentioned briefly under 2.3.8.2.

2.3 Statutory Regulations of Confidential Business Information

2.3.1 The Marketing Control Act

In market law the purpose is to achieve an effective use of resources. Resources are used more effectively when companies have competitors, but the MCA restricts competition that is contrary to good faith.

The relevant part of the MCA is Chapter 6, which is not mandatory between the parties. The Chapter protects the interest of traders, where the principle of freedom of contract is the strongest. The main purpose of the MCA Chapter 6 is to protect competitive positions. The preparatory works to the MCA emphasize the incentive of innovation and the importance of justice. Protection of trade secrets makes companies more willing to invest, because the competitors are to some degree prevented from misusing their information. This shows that the protection of confidential business information is based on significant societal interest. These arguments are known from general intellectual property law.

On the other hand, there are reasons to encourage competition. The public should have access to valuable technical solutions and employees should be free to change employers. This shows that the legislator recognizes the importance of trust between contractors and balance between the parties. Contractors would in any case possess an unwarranted advantage if they could use information with no limitations. This area of law is of major importance for society, as it affects the freedom of employees as well as socioeconomics.

The MCA Chapter 6 does not protect companies from private use of information, as it regulates the relationship between "traders", cf. Section 25. A "trader" is according to MCA Section 5 (b) "a natural or legal person who is acting for commercial purposes, and anyone acting in the name of or on behalf of that person". The chapter is for instance not applicable to "present" employees exploiting confidential information, as the employee is not a trader. The situation is covered by the GCPC Section 294 No. 2, and will also be covered by the new penalty code.¹⁰ The new employer has the criminal responsibility in these cases. Chapter 6 is applicable to former employees who establish their own business or attains a leading position at a competing business. The state of the law is not clear on what position in the new company that qualifies for being considered a "trade[r]".¹¹

I will first discuss the specific provisions and then the general provision. Section 28 is the most important section in practice when it comes to protection of trade secrets.¹² Section 29 has mostly the same contents. Both sections are covered by the penal provision in Section 48. Out of the three relevant sections of MCA, Section 25 is far more often a subject of conflict in court. This is because it covers several other actions than exploitation of confidential business information.

2.3.1.1 MCA Section 28

The section covers "trade secrets". The term includes both commercial and technical trade secrets. Commercial trade secrets include for instance "operating results, statistics [and] marketing plans". The technical trade secrets can be either non-patentable inventions or not registered patentable¹³ inventions. Personal skills such as "general, professional knowledge" are not qualified as trade secrets¹⁴.

According to the preparatory works the information must fulfill two conditions to be a "trade secret". The knowledge must be "specific for the company" and be "of importance for the business"¹⁵. In addition the company must explicitly or implicitly has marked the information as confidential. Irgens-Jensen argues that the "minimum requirements" for protection of trade secrets are not extensive.¹⁶ He claims that the information must be of some importance to the company and that the company must have taken reasonable steps to protect the information.

Some other relevant factors are the novelty of the idea, the company's effort to protect it, the value of the idea et cetera. The Norwegian preparatory works do not mention how novel or original an idea must be in order to be protected by the section. The minimum amount the information must be worth in order to be protected is not defined in statutory law or case law.

¹⁰ Irgens-Jensen p.68 cf. Ot.prp.57 (1972-1972) p.25

¹¹ Ibid.p.69

¹² Ibid.p.51-55

¹³ Inventions that fulfill the terms of the Patent Act Section 1

¹⁴ Innstilling fra konkurranselovkomiteen, 1966 p.48

¹⁵ Ibid.

¹⁶ Irgens-Jensen p.247

The value is to some extent naturally adjusted, as the company is not likely to take the case to court unless it is of some economic importance.¹⁷ It is of no importance if the company has defined a piece of information as a trade secret, if it is publicly known or it has not been treated confidentially.

If it can be determined that the violator has achieved the result in a less expensive way because of the information, this is often considered to be enough to establish that the information was a trade secret. This is closely related to the springboard doctrine that is used to consider unlawfulness. The term will be discussed below in 2.3.4.

The wording of “obtai[n]” does not exclude what the employee or contractor has invented or developed. The term “exploit” indicates that use of information without intent to benefit from it, is excluded from the section. The information must have been “obtained in connection with an employment or business relationship or a position of trust”. If the information is not obtained in any of these ways, but for instance in an employee’s free time without input from the company, the information can be used without violating MCA Section 28. The general duty of loyalty between contractors can however prevent establishment of a competing business as long as the employment contract lasts.

2.3.1.2 MCA Section 29

This section covers “technical aids”, which means that commercial aids are not covered. Most of the conditions are equal to those of Section 28, but they are characterized in a different way. A condition that differs from Section 28 is that only “entrusted” information is covered. The company must have given the technical aid with an “explicit or implicit condition” that it will be used in the interest of the company or in accordance with what the parties have agreed on¹⁸. The wording shows that if the employee or contracting party has contributed to the invention, MCA Section 29 is not applicable.

This section protects misuse of “technical drawings, descriptions, formulas, models or similar technical aids”. The wording excludes information that is only given orally, not in some written form. The Copyright Act, the Designs Act or the Patent Act can in addition cover some of the technical aids.

Section 28 protects both commercial and technical trade secrets, while technical aids are additionally protected by Section 29. One can ask why the protection of technological secrets is stronger than that of commercial secrets. The legislative reason is that the incentive of investment¹⁹ in development is stronger in relation to technology. A weak protection of technological information could lead to a limitation of the technological development in society. Companies would be more reluctant to invest in research, because the risk of misappropriation is larger than the incentive of investment.

¹⁷ Ibid.p.233

¹⁸ Innstilling fra konkurranselovkomitéen, 1966 p.57

¹⁹ The preparatory works to the Competition Law, p. 49

On the other hand Section 29 seems superfluous, as the term “trade secret” is quite extensive. The legislator shares this view, as Section 28 and 29 will be merged in to one Section 207 in the new Penalty Code.

2.3.2 The General Civil Penalty Code²⁰

2.3.2.1 Section 294, No. 2

The Section covers any person who “makes use of ... or discloses” a “business or operational secret”. This is more extensive than “exploit in the course of trade” in Section 28. The other conditions of the section are for the most part equal to those in MCA Section 28.

2.3.2.2 New Penalty Code²¹ Section 207

The new penalty code has passed in the National Assembly, but has not yet entered into force. Section 207 will replace GCPC Section 294 as well as MCA Section 28 and 29. This shows that the legislator has concluded that it is more expedient to have the provisions in one place.

The main difference between the old and the new penal provision the level of fault is reduced. The maximum penalty will be increased to 2 years. The changes show that the legislator acknowledges the need of more predictability in this area of law.

2.3.3 Regarding know-how

The term know-how is not to be found in Norwegian legislation. It can be described as the practical knowledge of how to get something done.

In the Notflottør-case the Supreme Court defined know-how as ”... the sum of technical details, knowledge and experience that together can be decisive to a company’s ability to compete, but individually seem insignificant. The term mainly covers the area between trade secrets and common technical knowledge.”²²

Know-how is considered to be in a grey zone between trade secrets, which are protected by Section 28, and common knowledge, which is not protected.

The wording of Section 29 covers technical know-how²³. Technical know-how is the sum of knowledge on practical skills and experiences, that makes one capable of producing a given article or output in the right way.²⁴ As mentioned above, personal skills are not trade secrets. Commercial know-how includes all relevant information of a non-technical matter. Some examples are consumer lists, company strategies et cetera.

²⁰ Act of 22 May 1902 No. 10

²¹ Act of 20 May 2005 No.28

²² Rt.1964.238

²³ Commentary, note 115

²⁴ Schovsbo and Rosenmeier p. 230

If commercial or technical know-how fulfills the conditions mentioned above in 2.3.1.1, it acquires trade secret status and is covered by section 28. Both section 28 and 29 can in these cases cover technical know-how. Commercial know-how is only protected if it qualifies as a trade secret. For this reason, there is a particular reason regulate know-how in contract.

2.3.4 Regarding the Term “unlawful”

2.3.4.1 The general importance of the unlawful criteria

In general an act is unlawful if it is a violation of either law or contract. The term is of major importance when establishing a misappropriation of a company’s trade secret and is found in GCPC Section 294 No. 2 and MCA Sections 28 and 29 as well as in case law.

Unlawfulness can be interpreted as a reservation from the legislator that the condition is not meant to include all instances that are covered by the description in the penal provision. This means that the judge must take in to account all circumstances of the exploitation or usage in the particular case, even if the conditions of the provision are violated. The preparatory works to MCA state that if the alleged violator was in conscious good faith, the act was not unlawful.²⁵ Another example is if the company has given its permission.

In the Cirrus case²⁶, the majority of judges stated that the meaning of the term “unlawful” depends on the specific situation. For instance, it is of relevance if the alleged violator was in good faith or acted blameworthy. The Court also stated that assessments regarding reasonableness can be of relevance.

The word “unlawful” does not in itself indicate a term of potential loss, and it is not necessary that a loss has occurred. But if the alleged violator has neither in fact harmed the company, nor made the company or others capable of causing loss, the judge may acquit. This shows the difference between this area of law and the general intellectual property laws, as there is no such measure of loss when deciding whether there has been a violation of a regular intellectual property right.

2.3.4.2 In Employment

According to the preparatory works to MCA, the court should show restraint when considering whether the employee acted unlawfully when disclosing information.²⁷ The employee has a reasonable expectation to be able to use this information outside the company for which he currently works. This is especially true if he has participated in developing the technology.

The fact that the employee contributed to an invention, or was the inventor, is of significance when considering of the unlawfulness. If the invention is patentable the Act respecting the

²⁵ Ot.prp.nr.57(1971-1971)p.26

²⁶ Rt.1997.199

²⁷ Ot.prp.nr.57(1971-72)p.26

right to employee's inventions²⁸ is of relevance. The starting point is that employees "shall have the same rights to their inventions as other inventors".²⁹ An exception is if the employee is mainly "engaged in research or inventive work" and makes an invention "in the course of such duties", or similar.³⁰ Then the employer is entitled to "all or part of the rights to the invention".³¹ The Act will not be treated further.

If the invention or idea is not patentable, the assessment must be based on the background law. If the employee has come up with an idea outside of work, it is reasonable that it belongs to the employee. On the other hand if the employee has only contributed, the assessment depends on the circumstances. If the employee's contribution had been of major relevance, it might have led to unfavorable results.³² There should be limitations of what the employee can share with the new employer, even if he has contributed to the invention.

A practical question is if the employee can use parts of this information, particularly if he can develop the information further. If the contract does not provide an answer, the judge must look to the general duty of loyalty or the background law.

Employees, who have served the same company for a long period of time, should not be judged strictly as employees on short-term contracts. The major part of their professional knowledge is obtained during the long employment, and it would be challenging to find an occupation where they don't need this information.³³ However, an employee who has been hired for a long period cannot freely copy essential trade secrets from his former employer. A short-term employee on the other hand can develop products that are inspired by knowledge he obtained from his employer.

If the employee has had an entrusted position in the company, he might have less access to make use of the obtained information.

In Rt.1990.60 the former CEO and another former employee in an entrusted position started a competing company. The Supreme Court stated that according to the duty of loyalty and "particularly considering the positions they had been in", they had a duty to inform the board about their plans.

In consideration to the value of trust in contractual relationships, it is reasonable that the assessment is stricter for these employees. This is at least the case during the employment. After the employment relationship has ended, the former employee must have the right to engage in a competing business to the same extent as other employees, as long as he hasn't signed a competition agreement.

²⁸ Act of 20 May 1970 no.13

²⁹ Section 3

³⁰ Section 4, first paragraph

³¹ Section 4, first paragraph

³² Irgens-Jensen p.314

³³ Ibid.p.299

2.3.4.3 **Between Professional Parties**

Professional parties do not have the same protection as employees, as they are considered to be able to look after their own interests. Therefore they are more qualified to estimate what actions might be unlawful, and the threshold is lower than for employees.

The parties in the Cirrus case were professional, and the Supreme Court stated “[i]f the offender has acted subjectively blameworthy, the act is in most cases considered to be unlawful. But valuations of reasonableness are also relevant in this sense, for instance when a cooperation agreement, which has lasted for several years, is terminated by one party. It can be argued that it is important that the party must be able to use its’ own expertise. On the other hand the former cooperation can lead to a special duty of loyalty.”³⁴

This statement indicates that there are strict requirements of precaution between businesses. The Leading Judge also emphasizes that it is of relevance how the cooperation ended.

”... I find that the use of drawings, test of models and specifications, indicate that Cirrus’ material was used when developing UT 904 against Cirrus’ rights and without considering when the limit of good business practice would be exceeded.”

The experiments that Cirrus had performed were of importance for the “next generation” boat. The yard group had violated Cirrus’ copyright and also the contract by copying some of the specifications of the “first generation” boats. Finally, the Leading Judge emphasized that it was the yard group who terminated the contract.

The Supreme Court’s conclusion was that “[t]he use of drawings, research data and specifications was unlawful by MCA Sections 1 and 7. In this case, the MCA draws lines of lawful competition between businesses.”

The dissenting judges in the Cirrus-case expressed that “each of the parties must be able to make use of the technological results that they have developed together”. In addition Cirrus had been paid well and the yard had undertaken a considerable risk and large costs. They also emphasized that there were substantial qualitative differences between the “first-“and “next generation” boats. The majority still meant that the shipyards had acted unlawfully, because of the circumstances when they used a large amount of Cirrus’ contribution.

When it comes to what the parties have developed together, the Act of Joint Ownership³⁵ may work as a guideline. It states the rights of the co-owners, and shows the limits of acceptable use. According to Section 3 “joint owners” have the right to “use the property for the purpose it was meant for or for the purpose it is normally used”, unless otherwise is agreed upon or follows by statutory or non-statutory law. It directly covers physical property, but according

³⁴ Rt.1997.199

³⁵ Act of 1965, June 18th No. 6

to the preparatory works it also covers patent rights. As the information subject to the thesis is just a “quasi-intellectual property”-right, it is assumedly not covered by the act. However, equitable considerations argue that the developer of this information should have the same access to use it, than the co-owner of physical property³⁶.

2.3.4.4 The Springboard Doctrine

The “springboard doctrine” can be a useful tool to decide where to draw the line of unlawfulness. The principle has not yet gained a foothold in Norwegian law, but is a well-known term in the UK Supreme Court.

In *Terrapin Ltd v. Builders’ Supply Co (Hayes) Ltd et al.*, it was stated that “a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication”.³⁷

The wording shows that it would be unlawful to use any information received “in confidence” if it is “detrimental” to the contractor and if it gives a competitive advantage.³⁸

The decisive factor is if the information has been used to achieve results faster and cheaper than what was possible for the other competitors. In certain situations, the springboard doctrine is considered enough to establish unlawfulness; some arguments are if the information is entrusted, or if the employee has contributed, if the alleged violator has obviously copied information and if the information is collected illegally, and how the information was used.³⁹

In the *Cirrus* case⁴⁰, the dissenting judges argued according to the principles of the springboard doctrine, but the judges did not refer to the theory.

The case is an example of a situation that is too complicated for the springboard doctrine to be useful. It had been a long lasting cooperation and exchange of information, which both parties had gained from. There was a need for a more extensive assessment, of the engineering company’s behavior in total.

The springboard doctrine is a useful guideline to make the assessment of unlawfulness more predictable. When the case is more complicated, it is necessary with a more complex assessment. The springboard doctrine has yet to become accepted in Norwegian law, but the guidelines do not seem to differ from acknowledged principles in this area of law.

³⁶ Irgens-Jensen p.318

³⁷ Ibid.p.141

³⁸ Ibid.p.257

³⁹ Ibid.p. 258

⁴⁰ Rt.1997.199

2.3.5 MCA Section 25

Section 25 is the general provision of the relationship between contractors. It prohibits acts which “conflic[t] with good business practice among traders”.⁴¹ The wording shows that the traders need not be in a contract relationship. Section 25 is often invoked in addition to section 28 or 29 in cases regarding sensitive information. It does not seem reasonable that situations that are not covered by the special provisions should be covered by the general provision.

In Rt.1998.1315 the Supreme Court stated that there should be a high threshold to use the general provision when the circumstances are similar to those covered by the special provisions. The Supreme Court did not however exclude the possibility that the section might be of relevance as the court stated that it depends on the situation. The situation should be covered “... if there are elements not covered by the special provisions, but the principles of competition indicate a stronger protection ...”

This indicates that the general provision is less relevant for cases nearly covered by Section 28 or 29. This section might however be of relevance in some situations. If an employee wants to establish a competing business or is hired in a competing company, Section 25 in general covers the act. Section 28 or 29 might cover the misappropriation of sensitive information. It is also relevant for professional contractors who make use of information obtained in cooperation with the company.

There is a high threshold to use the general provision in cases regarding exploitation of sensitive information.

2.4 Non-Statutory Protection of Confidential Business Information

2.4.1 The Duty of Loyalty between Contractors

In the public sector the duty of confidentiality of certain professions is protected by statutory rules. For instance in the Public Administration Act Section 13 and GCPC Section 121. In the private sector, one must rely on the non-statutory duty of loyalty between contractors.

Contract parties have a strong connection and there is a need for balance between the duties of the parties to achieve the purpose of the contract. The duty of loyalty can be implied into the contract as an implicit commitment or considered to be a part of the contract by gap filling.⁴² It is considered to be a duty that continues throughout the contract period. The duty of loyalty is considered to be “an integrated part” of contract law in the Nordic countries.⁴³ This is why it is placed under background law in the thesis.

⁴¹ <http://www.forbrukerombudet.no/id/11039810.0>

⁴² Høgberg p.202

⁴³ Simonsen p.157 and Nazarian p.106

I will compare the level of the duty of loyalty in employment and between professional parties, to see if it differs in these situations. I will also discuss whether the duty of loyalty gives an extended protection of confidential business information.

2.4.2 Between Employer and Employee

The duty of loyalty between the employer and employee is strict, as the background of the duty is the mutual obligations of the parties in the employment contract; in return of salary and other benefits from the employer, the employee performs his tasks. These tasks should be performed in a loyal manner.

When an employee does not provide the employer with relevant information during the course of the employment, he is in most cases acting in conflict with the duty of loyalty. This is especially the case if he later shares the information with a new employer. Some types of information can be kept to oneself without conflicting with the duty of loyalty. There is not much practice regarding this subject that states where to draw the line.

Planning to start a competing business is acceptable according to rules of employment law, as long as it has no damage potential. This act is within the ongoing risk facing the company; that new competing businesses may appear. There is however a violation of the duty when the employee competes against the company during his employment period, if he uses trade secrets from the employer or not.

One can say that the duty of loyalty in most cases ends at the same time as the employment, unless the employee has signed a confidentiality- or competition agreement. It would however be unreasonable if the employee could reveal any trade secrets as soon as he leaves his employer. Also other confidential business information than qualified trade secrets might be subject to the duty of loyalty even after the employment.

In RG.1991.579, the Court of Appeal treated the post contractual duty of loyalty. The case was about former employees' usage of knowledge from their former employer who constructed caloric machines. The former employees started a competing company that produced machines of the same type after the patent protection had expired. The leading judge stated that the technical principles were openly available and that it as a starting was legal to copy a competing company, even if they were former contractors.

The judge then emphasized the extended duty of loyalty in employment. "Former employees must be more careful than others when using the know-how obtained from their former employer and not just common technical knowledge."

It might not seem reasonable if the former employee or contractor must have a larger distance from the company's products than competitors that the company has not been in a contract

relationship with. On the other hand, a former contract relationship calls for additional precaution.⁴⁴ This is only the case for a certain period of time after the employment ended.

Furthermore the judge stated that "[i]nstead of preparing Pro-El-specifications and drawings and thereby creating independent business models, the former employees have in an unnecessary and unreasonable way used their former employer's "know-how" to enter the market."

This was considered to be a violation of the general clause in MCA. The case shows that the duty of loyalty in employment also can protect the employer ex post, from disloyal activity from the former employee or contractor. The protection of trade secrets in particular must be based on the statutory rules.⁴⁵

2.4.3 Between Professional Parties

The duty of loyalty between professional parties is also known as the standard of good business practice. In employment the parties are more closely related to each other, as the employee is a representative of the company. Whereas two competing companies can to a reasonable extent compete with each other, both during the contract period and post contract.

There is still a need for trust between contractors, as this makes the cooperation more productive. Businesses that are or have been in a contractual relationship, or are negotiating to enter a contract relationship, must be more considerate than third parties.⁴⁶

2.4.4 The relation between the duty of loyalty and MCA Section 25

The duty of loyalty appears to be identical in the non-statutory principle and MCA Section 25. The Section in fact states the non-statutory duty of loyalty "among traders".

In Rt.1990.607 the Supreme Court stated that the general standard of "good business practice" in MCA Section 25 is of minor importance next to the primary legal basis, which is the general duty of loyalty between contractors.

Simonsen goes further, and assumes that the contents of MCA Section 25 and the duty of loyalty are identical.⁴⁷ The duty of loyalty in Section 25 in MCA does not have the same requirements to the relationship between the parties as the non-statutory duty of loyalty. The thesis only covers parties in a contractual relationship, and in this particular area they overlap.

⁴⁴ Irgens-Jensen p.223

⁴⁵ Bruserud and Irgens-Jensen

⁴⁶ Lassen p.5

⁴⁷ Simonsen p.190

2.4.5 Remedies

This is a presentation of the available remedies when confidential business information is not a subject in contract.

2.4.5.1 Penalty

GCPC Section 294 No. 2 and 3, and MCA Section 28 and 29 are penalty provisions. If GCPC Section 294 is violated, the offender is “liable to fines or imprisonment” up to six months.

According to Section 48, the violator of Section 28 or 29 is “subject to fines, imprisonment of up to six months, or both, unless a stricter penal provision applies.” The penalty provisions are only used in the most severe cases. The standard of proof in penalty provisions is guilt beyond a reasonable doubt. There is so far only one case from the Supreme Court, where there was found a violation of the GCPC Section 294.

In the SAS case⁴⁸, SAS was sentenced to paying 4 million NOK in fines, for unlawful misuse of Norwegian’s PNR-data.

The result would probably be the same if the Supreme Court had used the former MCA Section 7, now Section 28.

The act is no longer punishable according to GCPC Section 294 and MCA Section 28 and 29 if the exploitation or use of information occurs more than “two years” after the violator was in the position of employment or trust.⁴⁹ If the company wants the protection to last longer, there is a need of an additional contractual regulation.

2.4.5.2 Damages and Preliminary Injunction

To establish legal liability and preliminary injunction the standard of proof is preponderance of evidence. Because the standard of proof in penal provisions is guilt beyond a reasonable doubt and the level of liability is purpose, it is more practical to claim damages or preliminary injunction. These are the most important remedies in practice. Preliminary injunction will not be treated here.

Neither the GCPC nor the MCA contain a direct basis for liability, but it follows by established case law that a violation of law can lead to liability.⁵⁰

In the Cirrus case⁵¹ the leading judge stated that a violation of MCA Section 7 and 8⁵² was a sufficient basis to establish legal liability, “[b]reach of these norms must lead to liability.”

⁴⁸ Rt,2007.1841

⁴⁹ Cf. GCPC section 294 and MCA section 48

⁵⁰ Commentary, Lunde p.35

⁵¹ Rt.1997.199

⁵² Now section 28 and 29

Section 25 is not a penal provision, but a violation might lead to civil remedies, such as damages to the aggrieved party. Lawsuits can be a claim that the act in contrary to “good business practice” must be ended or the company can require a declaratory judgment stating that the party has acted in conflict with Section 25. These remedies of private law are also of relevance regarding the duty of loyalty.

There is no requirement of financial loss in either the GCPC or MCA. The problem with damages is that it is difficult to measure a reasonable sum. One can initially estimate what would be a reasonable license price.

The amount of the compensation is usually small, as it is meant to reflect the financial loss. The company is to be compensated with a sum to restore the economic situation the company would be in if the trade secret was still unknown. The company has the burden of proof. It is difficult to prove the actual size of the financial loss; one reason is that it is impossible to tell what the company would have earned if the competitor had not used the trade secrets. The sum is decided by judicial assessment in court. The Norwegian Courts rarely awards high sums of compensation.

In the Rt.1990.606 the claim was for NOK 6.9 million, but the award was for NOK 600 000. The demand was the difference between the budgeted contribution margin and the actual margin the company earned. The Supreme Court rejected that this was a realistic basis for the compensation, and determined a discretionary compensation.

The exception from small sums of compensation is the civil case regarding SAS’ misuse of information from their mutual booking system.⁵³ SAS was sentenced to pay Norwegian NOK 160 million in damages. The claim was between NOK 300 and 400 million.

The SC denied the appeal⁵⁴ from SAS and the case from the Court of Appeals is therefore legally enforceable.

The largest award for harm to competitive position in the Supreme Court is NOK 2 million⁵⁵ in the Cirrus case⁵⁶. The claim was NOK 16 million.

This shows that the courts are reluctant to award companies with large compensations.

⁵³ LB.2008.133972

⁵⁴ HR.2010.1618.U

⁵⁵ Lunde p.86

⁵⁶ Rt.1997.199

2.4.5.2.1 Unjust Enrichment

A theory that is accepted to some extent in Norwegian law is the basis of unjust enrichment. The basis of unjust enrichment is particularly practical in this area of law. It both works as a basis for liability and to settle a reasonable compensation. The considerations behind the theory and the conditions are almost identical to the springboard doctrine. In general tort law, the compensation must only cover the loss of the suing party. This is in many cases difficult to prove. On the basis of unjust enrichment, the compensation sum can be based on what the violator has gained on misappropriating information.

Monsen divides the theory of unjust enrichment into “remuneration” and “relinquishment of gain” in his doctoral thesis⁵⁷. “Remuneration” is compensation despite no proof of economic loss. As a starting point, it should be equivalent to the ordinary market price, which is found in similar license agreements. In most cases regarding confidential business information, there are no such license agreements available. Then the sum must be based on an overall assessment.⁵⁸

In the Cirrus case, the leading judge acknowledged that a possible approach to estimate the size of the compensation was “what would be a reasonable remuneration for the technology.”⁵⁹

“Relinquishment of gain” means a duty for the violator to return what was unlawfully gained.⁶⁰

When the SAS case was in the Court of Appeals⁶¹, relinquishment of gain was mentioned as an alternative basis of liability in an obiter dictum. This was not claimed by Braathens and was therefore not treated further, and the Supreme Court did not use the theory.

SAS had violated a non-compete provision, and the case indicates that there is no access to establish relinquishment of gain on a contractual basis.⁶² This shows that The Supreme Court did not acknowledge this perspective of the theory of unjust enrichment when there has been established a violation of the MCA. Neither preparatory works nor other Supreme Court Cases indicate if the basis remuneration is acceptable.⁶³

In practice the difference between remuneration and relinquishment of gain might not be significant.⁶⁴ The two bases cannot be cumulated.⁶⁵ Monsen argues that relinquishment of

⁵⁷ Monsen p.

⁵⁸ Irgens-Jensen p. 354 cf. Monsen p.540-545

⁵⁹ Rt.1999.199 p.225

⁶⁰ Ibid.p.356 cf. Monsen 421

⁶¹ LB.2008.133972

⁶² Irgens-Jensen p.356

⁶³ Ibid.p.356

⁶⁴ Ibid.p.357

gain and compensation should neither be cumulated.⁶⁶ He however argues that remuneration and compensation should be subject of accumulation. An additional compensation is only reasonable when the loss is not sufficiently compensated through the remuneration.⁶⁷

Monsen argues that there in the most serious cases should be “a discretionary increase of the remuneration, when it is necessary according to preventative considerations”.⁶⁸ Irgens-Jensen agrees on this view, but there are not a sufficient amount of authoritative legal sources in support of it.⁶⁹

2.4.5.3 Other remedies

Prohibition is a practical remedy. It can be claimed in combination with damages or according to the rules of preliminary injunction.⁷⁰ This remedy is available even if the alleged violator was in conscious good faith.⁷¹

In criminal cases there is a basis for confiscation in GCPC Section 35 ff. In the civil cases, there is no legal basis for confiscation when there has been a violation on the MCA.⁷² There is not stated a non-statutory base for confiscation in Norwegian legal theory.⁷³

2.4.6 Summary

The background law protects trade secrets and technical know-how. The general provision of MCA and the duty of loyalty will rarely give a more extensive protection. The protection of trade secrets in MCA Sections 28 and 29 is not dependent on a contractual relationship; it is sufficient that the contractor is in a position of trust.

The MCA only covers former employees who use sensitive information in the course of business. The GCPC covers the cases where the employee exploits information to a third party. The SC has stated that the general clause in section 25 can only in a few situations be used to extend the protection of Section 28 and 29. The duty of loyalty has little or no independent influence next to the statutory rules.

The protection in the background law is based on vague and discretionary criteria. The judge must consider whether the information fulfills the minimum requirements in the relevant provision, and then whether the misappropriation was unlawful. This calls for complex assessments. If the company solely relies on background law, the outcome in court is

⁶⁵ Ibid.p.357.cf. Monsen p.515

⁶⁶ Ibid.p.357.cf. Monsen 515-519

⁶⁷ Ibid.p.358

⁶⁸ Monsen p.329

⁶⁹ Irgens-Jensen p.356

⁷⁰ The Dispute Act Chapter 34

⁷¹ Irgens-Jensen p.358

⁷² Ibid.p.348

⁷³ Monsen p.65-66. Lunde p.39

unpredictable and the company might already have suffered loss. Companies might wish to settle the question on an earlier stage.

Both the result and the amount of a potential compensation are unpredictable factors according to the background law. The rules are in theory a sufficient protection, but in practice there are too many uncertainties.

The conclusion is that background law does not provide companies with a satisfactory protection for confidential business information.

3 Contractual Regulation of Confidential Business Information

3.1 Introduction

The presentation of background law has shown why companies might want additional contract provisions to protect their confidential business information. Companies can extend or limit the protection stated in the background law when formulating a contract. The contract can in principle state that the contractor must keep all sensitive information to itself. Or it can state that both parties can use sensitive information freely. Contractual regulations are of course only necessary when the company does not consider the background law satisfactory protection.

There are two types of contractual relationships to be treated here; contracts between employer and employee and between two businesses.

A contract regulation is a way for the company to display that the information is sensitive. Then the employee or contractor cannot claim to have been in conscious good faith, and be acquitted. If the information is publicly available, a confidentiality provision is not an adequate precaution.

The subject of Chapter 3 is the need of an additional protection in contract, available contractual provisions and the limits of the freedom of contract.

3.2 Employment

Employees normally obtain knowledge and improve their competence during an employment period. In the cases where an employee starts working at a competing company or starts his own competing company, the former employer suffers a "double loss". The employee's competence is no longer available, and the competence is used in a competing business instead.

If the former employee also exploits confidential business information, it might potentially lead to serious consequences. Companies therefore have a particular interest in defending themselves from former contract parties' misappropriation of their trade secrets.

There is a tension between the expectations of the employer and the employee. The employer expects to receive the results of the employee as the company's property. The employee on the other hand expects to be able to use the competence in any company he works for.

The background of the protection of employees in these cases, are several principles stated in statutory law. The Norwegian Constitution Section 101 states that there should not be any "restrictions on freedom of livelihood" in the employee's future. Section 110 establishes that it is the responsibility of the Norwegian State to "create conditions enabling every person capable of work to earn a living by his work". And finally, the purpose of the Competition Act is according to Section 1 to "further competition and thereby contribute to the efficient utilization of society's resources". This shows that the legislation favors the employees and that exceptions to the freedom of livelihood must have a legal basis.

The question is how and to what extent the employer can protect confidential business information from misuse by former employees.

3.2.1 Available Contractual Provisions

3.2.2 Presentation

There are several ways for a company to protect its' competitive position in contract. Confidentiality agreements and non-compete clauses are the most practical in this area of law and the focus will be on these provisions.

The company can make the employees sign non-solicitation-and non-dealing-clauses. These clauses are not as strict as confidentiality clauses and non-compete agreements, because they don't prevent the employee from using knowledge or pursuing any professions. Another indirect way to protect the company against misappropriation of their sensitive information is employment bonds. These clauses go further than competition clauses, as they both compel the employee to serve the employer for a specific period of time and prevent competition. The employee is to a large extent protected from unreasonable bonds. These provisions will not be treated further.

3.2.2.1 Confidentiality Agreement

The most relevant restrictive covenant to protect confidential business information is a confidentiality agreement. A confidentiality agreement defines what type of information must be kept secret. This is clarifying for the employee. When the employee has signed a confidentiality agreement, it is therefore easier to establish liability as it reduces the possibility of claiming conscious good faith.

A leading case on protection of industrial trade secrets is the Notflottør case⁷⁴. The Supreme Court concluded that due to the confidentiality provision, the company had an extended protection of their information than that of trade secrets in background law.

The former employee was found guilty even though he claimed to have invented the product. He had signed a provision giving the employer title to “everything the parties developed together”. The exploitation of information to the new employer was in any case a breach of the confidentiality provision in the employment contract.

In the judge’s opinion it was not necessary to consider whether the information qualified as a trade secret. The confidentiality agreement covered the information. The breach of the provision was considered to be enough to establish legal liability. The Supreme Court did not discuss whether the new employer had acted in good faith or not.

The Supreme Court did not consider whether the non-compete provision was enforceable according to ACA Section 38, because the circumstances of the termination of the employment contract were arguable. Neither did the Supreme Court consider whether the GCPC Section 294 had been violated.

The judgment apparently divides information in three parts, “trade secrets”, cf. GCPC section 294 and MCA section 28, “common knowledge” which has no restrictions, and “know-how”, which can be protected by contract or by the general provision in MCA Section 25.

The result in this particular case might have been the same even if there had not been a confidentiality provision in the employment contract. Then the Supreme Court could have based the conclusion on the general non-statutory duty of loyalty. This shows that the contract might not have extended the protection of the company in practice. This is because the confidentiality agreement was quite extensive. The employee had clearly acted unlawful and stepped over the borders of the background law, independently of the confidentiality agreement. If he had only used publicly available information, that the parties also had developed, the result might have been different.

3.2.2.2 Non-Compete Agreement

It can in some cases be problematic to state a violation of the duty of confidentiality. This is because employees can share a certain amount of their knowledge with their new employer, without violating the confidentiality agreement. Another question is what general knowledge the employee was in possession of before he started working at the first company. It is difficult to prove if it doesn’t relate to a specific product. If the employee uses methods in a production process that he learned in his former company, it can both be difficult to discover the activity, and to prove that the method was covered by the confidentiality provision.

⁷⁴ Rt.1964.238

The company should therefore also make the employee sign a non-compete agreement. The provision prevents the employee to compete against the company, for a certain time after the employment ends. When the former employee starts working for a competing business, there will be several ways to prove a violation of a non-compete provision. For instance if the competing business starts producing a similar product, a simple comparison can show whether the employee has violated a non-compete provision.

This shows that non-compete agreements protect the employer in a larger degree than confidentiality agreements. The employer should of course make sure to use both confidentiality- and a non-compete agreement.

3.2.3 Limitations to the Freedom of Contract

Clauses of confidentiality and competition are however not always valid. Whether such clauses are enforceable against the employee will depend upon the particular circumstances of the case. The company is the most qualified to know what information is the most valuable and should therefore bear the responsibility of forming a contract that includes a clause of confidentiality.

The Act relating to conclusion of agreements, etc.⁷⁵ (hereon ACA) plays an important role in adjusting unreasonable contracts. It is mainly used to aid the weaker party in the contract relationship.

3.2.3.1 ACA Section 36

This section was formerly only a legal basis to reduce liquidated damages. The ACA was passed in 1918 and Section 36 was revised in 1983 and it is now the general clause of the ACA. It can work as a legal basis to limit any contractual provision. Before the revision of ACA, the law of King Christian the 50th Article 2 was the general basis to declare unreasonable contracts void. It is still applicable, but is rarely used in practice.

The first paragraph states that an agreement can be set aside wholly or in part if it is contrary to “good business practice”. The judge must take into consideration the “contents of the agreement, the parties’ position and the circumstances” when they entered into the contract, cf. the second paragraph. The background law is of importance when establishing the threshold of “good business practice”. This means that the threshold stated in MCA will work as a guideline. In employment law the considerations protecting the former employee will be of importance.

If a confidentiality clause is unreasonably extensive, Section 36 can either be used to declare it void wholly or partly. It can in principle work as a legal basis restrict non-compete provisions, but it has not been used for this purpose yet.

⁷⁵ Act of May 31st 1918

3.2.3.2 ACA Section 38

The ACA Section 38 states the limits of non-competition. One can ask why the legislator did not remove Section 38 when Section 36 was adopted. The thought was that the competition clauses would remain limited by Section 38, whereas Section 36 would limit the liquidated damages. The section has no rules regarding clauses of confidentiality.

The first paragraph is also applicable to contracts between professional parties, more about this below. The main purpose of Section 38 is however to protect the employees against unreasonable limitations of competition.⁷⁶ Therefore the Ministry of Labor has suggested moving the second and third paragraphs in Section 38 regarding employment contracts to the Working Environment Act.⁷⁷ The new Sections would be more restrictive than ACA Section 38, but so far no changes have been made.

In the first paragraph, it is stated that employees are not bound by clauses limiting “his possibility of making a livelihood” “to an unreasonable extent”.⁷⁸ This is in accordance with the Constitution, Section 101. The employee is only bound as far as “necessary for protection of undue competition”. The courts should take into consideration the “importance for the other party of the maintenance of the agreement”. This shows that the interests of the employer are protected to some extent.

The tendency in case law is that competition clauses without compensation to the employee are acceptable if they last no more than one year. In legal theory it has been implied that the limit should be drawn at two years.⁷⁹ In Rt.2001.301 the SC accepted a competition clause that lasted for two years after the resignation. The preparatory works to the ACA Section 38 state that when the employee receives compensation, the size of it is of considerable importance when considering the reasonableness of the competition clause. In the other hand, the preparatory works emphasized that the public interest in using the available labor can be an argument for limiting competition clauses.⁸⁰ The wording of Section 38 does not in itself indicate that there is a condition that the employee receives compensation in order for the competition clause to be valid.

According to the second paragraph, most employees who are not in a particularly entrusted position cannot be bound by clauses of competition. This covers some operators, technicians, salespeople and other similar professions. Non-compete provisions are however not just relevant for senior executives. If the employment gives the employment knowledge of the company’s “clientele or trade secret” which can cause harm if it is misappropriated, the agreement is binding for the subordinate as long as it does not “to an unreasonable extent

⁷⁶ Utkast til lov om avtaler og andre retshandler paa formuerettens omraade, 1914 p. 18

⁷⁷ Hearing from the Ministry of Labour p.13

⁷⁸ Translation: “Norwegian laws etc. selected for the Foreign Service”, p.941

⁷⁹ Jakhelln, Henning, p.320

⁸⁰ Preparatory Works 1913, p.91

prejudice his possibility of making a livelihood, or extends beyond the limits necessary to protect the employer against undue competition”.

The competition clause is not enforceable if the employee is dismissed “without reasonable grounds”, or if he gives up his position because of the employer’s “non-fulfillment” of his obligations, cf. the third paragraph. In employment law the dismissal can be “objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee”, cf. the Working Environment Act Section 15-7.

In Rt.2006.1025 it was settled that the dismissal must have been justified on the basis of circumstances relating to the employee in order to be “reasonable” according to Section 38.

This means that if an employee is dismissed, for instance because of downsizing in the company, the agreement is not enforceable. The employee is however still limited by the rules of the background law.

A relevant factor is whether the clause is part of the “original” employment contract or part of the negotiation when the employee wishes to leave the company. If it is a part of a standard employment contract, it is more likely to be considered to be unreasonable.⁸¹ This is because the company should be able to protect its interests when the employee leaves earlier than the company had expected.

If the confidentiality clause in reality is a competition clause, the courts will treat them as such. For instance, if the clause states that the employee cannot use any knowledge from the employer in a new company. Then the court can state that the clause is not enforceable for the employee. The clause could also be interpreted restrictively, so that only sensitive information is covered.

The competition clauses best ensures effective enforcement. A confidentiality agreement can come in addition. Competition and confidentiality clauses are to be interpreted restrictively, to the benefit of the employee. There are two reasons for this principle; the employer is the “stronger” party and the clause is written in the employer’s interest alone. Only in regard to the purpose of the clause, it can be interpreted to the benefit of the employer.

In the Notflottør case⁸² the employment contract was quite vague. The Supreme Court did not interpret it in a way that protected the company in a larger degree than according to the background law.

This shows that confidentiality agreements in employment cannot be much more extensive than the background law.⁸³

⁸¹ Krüger, p.593

⁸² Rt.1964.238

⁸³ Irgens-Jensen p.99

3.2.4 Summary

The employer can protect confidential business information from misuse by former employees in various provisions in the employment contract. The restrictive covenants must be proportionate to the purpose of the provision and can only limit the rights of the employee to a reasonable extent.

The assessment when considering restrictive clauses in the employment contract is a balance between the employee's freedom of choosing employer and the protection of the expectations of the employer when hiring the employee.

Because the employee is a weaker party than the employer, there are extensive restrictions to the freedom of contract. The legislator has considered it to be important to protect the employee to a large extent.

3.3 Business Partners

Contracts between two professional parties are in most cases meant to last for a shorter period than employment contracts. Often there is a large scale of exchange of information, and the contractor can in many cases use the information after the contract period.⁸⁴

In the following, I will present some contractual relationships where there is a large degree of exchange of information. The relevant contract relationships that are to be mentioned is license agreements, Due Diligence-agreements, joint venture - particularly in research and development (hereon R&D) and fabrication. In these businesses there is a need of additional protection in contract.

The available contractual provisions are the same as in employment. There will be given examples of confidentiality- and loyalty provisions from two different agreed documents. Then the restrictions to the freedom of contract in business contracts will be presented. These are also similar to those in employment. To avoid repetition only the differences from employment will be discussed. Finally, the contractual remedies for both employees and business partners will be presented.

The question is how companies can protect confidential business information in contracts with other professional parties, and what restrictions apply to the freedom of contract.

3.3.1 License Agreements

The contractual protection of confidential business information is particularly of importance in license agreements, as the sensitive information is the object of trade. The licensor needs to prevent the licensee from misusing the secret information after the contract expires or in other ways than mentioned in the license agreement.

⁸⁴ Irgens-Jensen p.315

The contract can for instance give a license on a secret production method for a specific product. The information is part of the contract, and is easier to define. If it is of a long duration, the licensee might earn experiences that are valuable for other tasks.

3.3.1 Due Diligence

In due diligence, the potential buyer of the undertaking is given access to all relevant information about the company, in order to decide whether to purchase. The buyer is naturally interested in what condition the company is in, its' financials et cetera. The potential buyer is in many cases a competitor. Before entering into negotiations, the company should therefore make sure the buyer signs a contract stating that all confidential information must be held in strict confidence. It is however difficult to be specific on what should be held secret. In these situations, there is no gain of experience as in employment.

The parties are in a pre-contractual phase. No contractual relationship exists, but the parties are negotiating. In this phase, clauses of confidentiality in general are not common, but it is of essence in due diligence. Violation of the duty in the pre-contractual phase can lead to termination of the negotiations. If the other party has suffered a monetary loss, it can claim compensation.⁸⁵

The Supreme Court has stated that the duty of loyalty between contractors is also applicable before the parties have signed the contract.⁸⁶

The dispute in this particular case was between consumers, but the statement is based on several other cases from the Supreme Court and several legal theorists share the same view.

Another mechanism used to protect sensitive information in due diligence in practice is use of external consultants. Then there is a third party with access to the information, instead of representatives of the buyer. This way the company runs an even smaller risk if there ends up being no purchase.⁸⁷

3.3.2 Research and Development

Parties sometimes cooperate when developing knowledge, such as in research and development – R&D - agreements. The most complex questions regard what the parties have the right to use and how they in that case can use the knowledge in these cases. R&D agreements between professional parties are usually detailed when it comes to the parties' access to use information that the other party shares during the cooperation⁸⁸, as confidential business information is of large importance.

⁸⁵ Simonsen p.188-189

⁸⁶ Rt.2010.1478

⁸⁷ Bruserud/Irgens-Jensen 18 min

⁸⁸ Irgens-Jensen p.317

R&D-contracts are often of some duration, and both parties contribute with “background knowledge”. After the contract period, the parties go back to being competitors. The contracts must therefore have clauses protecting both parties against misuse. It is however difficult to define in advance what background information they will share during the contractual relationship.

The pharmaceutical industry is a quite competitive industry, which involves large values and where the exchange of information is a major part of the cooperation.

The main rule is that both parties can use the result of the cooperation, as long as the result is more valuable than the secret information brought into the project by one of the parties. A party cannot begin production mainly based on material that the other party developed on its own.⁸⁹ In some cases it is difficult to establish what the parties developed together, and what was mainly developed by one of the parties. When in doubt, the party wanting to use the information can pay a reasonable compensation.

3.3.3 Fabrication Contracts

Fabrication contracts regulate the duties of the company and the contractor in a manufacturing process. The agreed documents of the offshore sector and construction works are publicly available, and are therefore suitable to use as an illustration of regulations between professional parties.

3.3.3.1 Example from the Petroleum Industry

In the offshore sector there have traditionally been contracts with non-disclosure agreements. Article 34 in The Norwegian Fabrication Contract states how the Contractor must treat “[c]onfidential information” obtained from the Company. The duty of confidentiality is for the most part identical as other contracts of some duration, between collaborating businesses, fabrication or same type of production. The duty of confidentiality is as a starting point absolute, but there are certain practical and principal limitations.

In MCA Section 28, the term “trade secret” is a positive definition of the protected information. In NFC on the other hand, the subject of protection is “all information”, and the limitations are listed in a)-d).

«[A]ll information» covers everything from factual data to patentable inventions. Both information known to the party before the conclusion of contract and information developed during the cooperation. The information must however have some connection to the contract relationship to be included by this article.

According to a), the party delivering information to a Third Party, must make sure that he agrees on confidentiality, cf. art.34, cf. art. 34.1. The duty of confidentiality does not cover

⁸⁹ Rt.1997.199

information from the other party that is received by other sources at the same time or later, cf. b). If the recipient already was familiar with the information, no duty of confidentiality exists. Neither is the duty applicable if the information was “part of the public domain” even if the recipient did not know of it, cf. c). If the information later becomes “part of the public domain”, the duty ends.

Finally, the party is released of the duty if the information is received from a third party “without an obligation of confidentiality”, cf. d). An “obligation” must mean a statutory or non-statutory provision. Information exchanged between the parties need not be treated as confidential and may be disclosed to a Third Party if “rightfully” received. The wording indicates that if the party has not unlawfully obtained the information, there is no breach of Article 34.

3.3.3.2 Example from Construction

The agreed document “Norwegian building and civil engineering contract”, NS⁹⁰ 8405, regulates the construction of buildings or other installations on real property. The large construction projects are not significantly different from offshore fabrication. They involve professional parties, who will cooperate for a long period of time, and there is a need of agreed terms.

Section 5 states the general duty of loyalty between contractors and the contents are the same as the general provision in MCA Section 25. It can be debated whether the provision is of independent importance in addition to Section 41, in the same way as Section 25 of MCA.

The regulation of confidential information is less thorough in NS 8405 than in NF 07. This is because of the more complex character of offshore-contracts, and a larger degree of innovation and use of confidentiality than in land based construction. The section protecting confidential information is Section 41.

The first paragraph limits the parties’ access to share the documents that are exchanged between them. The second paragraph states restrictions on the parties’ access to use the documents in other projects.

Section 41 is similar to MCA Section 29. NS 8405 protects “all descriptions, drawings etc.” regardless of whether they are intellectual or creative works. Consequently, the agreed document also protects “know-how” that the parties may exchange.

⁹⁰ Norwegian Standard

3.3.4 Limitations to the Freedom of Contract

3.3.4.1 ACA Section 36

This section is rarely used in relation to business contracts between equal parties. Section 36 can be relevant when one professional party is considerably weaker than the other.

3.3.4.2 ACA Section 38

Only the first paragraph is applicable to commercial contracts. It is however rarely used in Court, and when it is used, the competition agreement is not likely to be set aside completely. It can be limited so that the result is less extensive.

In LB.2005.189 a corporation had signed a non-compete provision that according to the wording was for an indefinite period. The Court of Appeal interpreted the provision as lasting one year.

This shows that the section can limit the freedom of contract for professional parties, and that there are requirements of clarity and precision.

3.3.4.3 Competition Law⁹¹

Competition law can limit the freedom of contract in two aspects.⁹² If a company in a dominating market position refuses competitors to have access to the components of their products, this can conflict with the prohibition against the Competition Act Section 11.⁹³ Contracts between professional parties that are considered to restrict competition can be invalid according to the Competition Act Section 10.⁹⁴

There is an exception to this main rule, called block exemptions. The background of the exception is that it is necessary in some businesses to be able to protect sensitive information, or the companies would not risk entering into the contract. Therefore it is to some extent possible for the parties to agree not to compete or use information obtained from the contractor for a certain period of time. For instance transfer of technology⁹⁵ and R&D-contracts⁹⁶.

The block exemptions naturally make an exception where the knowledge is commonly known. If it is not somewhat confidential, the contract is likely to be considered a violation of competition.

⁹¹ Antitrust law

⁹² Irgens-Jensen p.30-33

⁹³ The EEA Agreement.Art.54

⁹⁴ Ibid.Art.53

⁹⁵ Commission Regulation (EC) No 772/2004 of 27 April 2004 [...]

⁹⁶ Commission Regulation (EU) No 1217/2010 of 14 December 2010 [...]

The block exemptions are not the only exception. A contract limiting competition can also be valid if it is considered necessary according to art.53, third paragraph. An example is if the contract is a prerequisite for the parties to exchange technical information that makes the production process more efficient.⁹⁷

Competition law typically limits the access to enter into non-compete agreements. It can also restrict confidentiality provisions in some cases. If the provision is so extensive that it in reality limits competition, it can be invalid according to the Competition Act.

3.3.5 Summary

The restrictions are less extensive for professional parties than employees, as the parties are considered to be in equal positions. If a professional party chooses to sign a provision, it is in most cases considered to be at their own risk. In addition competition law prevents the company from protecting its confidential business information.

Companies can protect confidential business information in contracts with other professional parties. The relevant provisions are the same as in employment. The restrictions that apply to the freedom of contract are less extensive than in employment contracts.

3.4 Remedies

3.4.1 Contractual Remedies in General

This is a presentation of available remedies when confidential business information is subject of contract. These contractual remedies apply when there has been established breach of a contractual provision. In Chapter 2, 2.3.8 the available remedies in default law were presented. These rules apply if there are no regulations in contract regarding confidential business information. They are of course applicable as long as the parties have not explicitly agreed to depart from the background law.

A breach of contract cannot lead to penalty, because no one can be convicted except “according to law”, cf. the Constitution Section 96 and the principle of legality.

3.4.2 Damages

As mentioned above, a violation of MCA is a basis for liability. Breach of contract is a basis for liability and compensation is a remedy of importance in this area of law. The violator must have acted culpable.

⁹⁷ Sejersted et al p.529

3.4.2.1 Unjust Enrichment

The theory of unjust enrichment to declare liability is also relevant when there has been a breach of contract. The amount of the compensation should according to case law be based on the market value.⁹⁸

The case Rt.2007.817 regarded a violation of a non-compete provision. The Supreme Court did not exclude the possibility that this type of violation might lead to liability based on unjust enrichment. There were not enough bases for stating unjust enrichment when the level of fault was negligence. The Supreme Court did not state what level of liability was necessary.

This case indicates that there is a basis compensation for unjust enrichment. The judges did however not mention unjust enrichment by violation of MCA. Neither the preparatory works nor case law clarifies the possibility of compensation on the basis of unjust enrichment.⁹⁹

3.4.3 Remedies of Labor Law

As mentioned above, misappropriation of confidential business information is the most relevant for former employees in background law. When an employee exploits confidential business information despite a confidentiality clause, remedies of labor law are available. The most relevant remedies in practice are a dismissal or a summary dismissal. These remedies are only relevant when there has been a significant breach of contract.¹⁰⁰ If the employee has exploited information, this is a “circumstance[e] relating to ... the employee” and it is not an unfair dismissal, cf. the Working Environment Act¹⁰¹ Section 15-7. Section 15-14(1) states that the employee may be summarily dismissed when found “guilty of a gross breach of duty or other serious breach of the contract of employment”.

Rt.1937.62 is an example of what remedies of labor law the Supreme Court has accepted. An engineer, who had signed a confidentiality clause in his employment contract, had exploited trade secrets. He had only acted carelessly, but it still gave the company a right to give a summary dismissal.

This illustrates that breach of a confidentiality clause in an employment contract can be considered to be a serious breach of contract.

The remedies of labor law are, of course, not relevant after the employment has ended. Therefore they are neither relevant for non-compete clauses, as they apply after the end of the employment.

⁹⁸ Irgens-Jensen p.355, cf. Rt.1940.48, Rt.1966.305, Rt.1967.1335 and RG.2007.1317

⁹⁹ Ibid.p.356

¹⁰⁰ Ibid.p.337 cf. Hagstrøm p.410-426

¹⁰¹ <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156>

3.4.4 Remedies of Business Contracts

Confidentiality clauses are of importance in all the mentioned businesses. Non-compete clauses are the most relevant in due diligence and R&D. Violation of the contractual provisions can lead to contractual remedies.

Prohibition and termination are practical solutions. The threshold is of course lower to ban an activity than to terminate the contract. The ban must be proportionate to the unlawful use. In some cases it would be more proportionate to pay a smaller compensation, than to end a valuable production.¹⁰² Termination of the contract is not a likely solution, as it hardly can be considered to be a substantial breach. However, situations can occur where the exclusion of important confidential business information is a substantial breach.

The presented agreed documents do not have rules stating remedies in case of violation of the duty of confidentiality. If there are no adequate bases in the contract, remedies must be determined by background law.

4 The Relation between Background Law and Contract Law

Background law and contract law have been discussed in separate chapters in the thesis. In this chapter, some possible general relations between them will be presented, and how they might affect each other.

4.1 Agreed documents as background law

In some cases, frequently used agreed terms can be considered to be background law. This means that the terms also apply to contract parties who have not adopted the contract. This might seem unreasonable because the legislator has not formed the rules and therefore they have no democratic legitimacy.

Agreed documents can however only be viewed as background law if the same rules can be found through other sources, such as legislative considerations or other sources of soft law.

Soft law does not have any legally binding force, but is considered to be a tool for interpretation. Examples of soft law are model laws¹⁰³, private codifications¹⁰⁴ and restatements¹⁰⁵.

When this reservation is made, the statement seems more reasonable. The agreed documents can be seen as a codification of already existing principles from the background law.

¹⁰² Irgens-Jensen p.336-337

¹⁰³ Such as UNCITRAL

¹⁰⁴ Such as INCOTERMS

¹⁰⁵ Such as PECL

Using agreed documents as default law is the most relevant for parties in the same line of business as the parties who formulated the agreed documents. For instance the provisions in the NFC and NS 8405 could work as background law in the petroleum industry and construction, even if the contract parties have not signed it. When it comes to NFC and NS 8405, the mentioned sections are close to principles stated in both background law and soft law.

It is for instance common to have reservations regarding how the party received the information in confidentiality contracts. The reservation might state that if the contractor 1) can prove that it knew of the information before obtaining it from the other party, 2) has obtained the information from a third party who lawfully provided it or 3) can present documentation showing that it developed the information based on commonly known information or such information as mentioned in 1) and 2), there is no breach of contract.¹⁰⁶ This is equivalent to the NFC and NS 8405. One can therefore state that the agreed documents are background law, but in practice they are only a codification of acknowledged principles.

In my opinion, it is reasonable that agreed documents could be considered to be background law if there are other sources stating the same principles. Background law is only of importance when the contract is mute or unclear. The judge must to a large extent base the decision on a discretionary assessment. When agreed documents are viewed as background law, they work as a guideline for the judge's assessment. This might lead to more predictability, than when the assessment is only based on the judge's subjective opinion.

4.2 The Background Law's influence on Contracts

The first question is if background law can be considered a restriction of the freedom of contract. Irgens-Jensen and Bruserud stated this in a lecture from 2010. This is particularly of importance for confidentiality provisions. The argument is that the legislator has formed the background law and considered it to be adequate. Høgberg claims that it takes more to depart from background law when it is formed to provide balanced solutions in contract relationships.¹⁰⁷ When the contract deviates from the background law, it is contrary to the legislator's will.

The principle of trust and balance in the contractual relationship is important in this field of law. This is reasonable in employment, as the employee clearly is a weaker contract party. The freedom of contract between professional parties should however not be subject to this restriction in my opinion. The principle of trust and balance is of less significance between professional parties than in employment, as professional parties are considered to be able to protect themselves from unreasonable provisions. Background law cannot as a general rule limit the freedom of contract.

¹⁰⁶ For instance ICC Model Confidentiality Agreement Article 4

¹⁰⁶ Irgens-Jensen p.317

¹⁰⁷ Høgberg p.216-217

On the other hand there is a principle in contract law that the party responsible for formulating the contract has the responsibility. If the contractor is to be bound by extensive provisions, then there is a requirement of clarity in Norwegian contract law. Because this field of law is of public importance, the demand of clarity is stricter. It would be contrary to general contract law if a company could use vague terms to form extensive and perhaps unreasonable contracts.

As mentioned above, the Notflottør case does not indicate that that a general and extensive provision can expand the protection of confidential business information. Vague or general contract terms might be interpreted restrictively. In these cases the background law plays an important role, as it is used for a tool of interpretation. If the terms are extensive, but specified, it does not seem reasonable with restrictions to the freedom of contract.

If the wording of the provision is vague or general, the contractor might however claim to have interpreted in another way than the company meant. Therefore it is also important to use clear formulations, to establish liability.

The challenge lies in formulating a provision that covers all situations that might occur in the contract relationship, without using formulations that are too “general” or vague. Then the contract may be interpreted restrictively in accordance with the background law.

Irgens-Jensen and Bruserud argue that the Supreme Court is most likely to interpret extensive but specified confidentiality provisions restrictively. The question might however be of limited importance. The party, who wishes to depart from the background law, is responsible to form a clear contract. If a company forms a provision that is vague, then it is the nearest to bear the risk of restrictive interpretation. This is an unproblematic principal of general contract law, also between professional parties.

The background law can in practice be considered a restriction of the freedom of contract

The next question is if the court can interpret a reservation of unlawfulness into a contract.¹⁰⁸

As a starting point, the contract should be interpreted objectively. This means that if no reservation of unlawfulness is mentioned, no such reservation applies. The reservation of unlawfulness is clearly stated in the background law and is a condition for the provisions in GCPC and MCA to apply.

If a confidentiality clause covers “all information”¹⁰⁹ without a reservation for already known information or similar it is likely to be considered unreasonably extensive. If there is no reservation of unlawfulness it means that the alleged violator is liable even when in conscious

¹⁰⁸ Irgens-Jensen argues that this is the case

¹⁰⁹ Such as in NFC Article 34

good faith, this is contrary to general principles of tort law. The court would probably limit these provisions.

The court can interpret a reservation of unlawfulness into a contract. This question might also be of limited importance, as companies are not likely to sue if the act was clearly not unlawful.

5 Concluding Remarks

The Norwegian background law provides a quite extensive protection of confidential business information. There are still several advantages of contractual regulations.

The company can protect its confidential business information in confidentiality clauses. A confidentiality clause might expand the protection when it comes to information that is not protected by the default rules, which is the case for commercial know-how. The most important effect of a confidentiality clause is that it emphasizes what information is to be kept confidential. Non-compete clauses provide a general protection against competition, and they are a useful tool prevent unlawful use of confidential business information.

If the clauses exceed what is considered reasonable measure, they are likely to be declared void in court. The same provisions in ACA apply to commercial contracts as employment contracts, except for the second and third paragraph in Section 38. The thesis has shown what different assessments apply to employment- and business contracts. Societal interests are of relevance in employment contracts. The assessment on a “societal level” is a balance between the right to pursue one’s profession and the incentive of the employer’s investment. In practice the courts are hesitant to overrule the freedom when the parties are equal and professional.

Together the two provisions create predictability for the company. There are limitations as to how far the company can depart from the background law.

If the use in question is a violation of the background law, penalty and compensation are available remedies. If there is established a breach of contract, contractual remedies are available. In employment contracts, dismissal with or without notice can be the result. In contracts between professional parties, the breach can lead to termination if it is considered to be fundamental.

The occurred loss is important both when considering unlawfulness and when estimating a reasonable compensation. To state a violation, one must compare what resources the violator has “saved” on using the information belonging to the company. If this is of a substantial amount, the result will often be a violation. The basis of unjust enrichment is not sufficiently accepted in Norwegian law for companies to rely on it. Therefore it might be necessary with liquidated damages in contract.

A contractual regulation of confidential business information is an advantage for judicial economy, as procedural policies are set in advance. If the protection is specified in advance there will be fewer conflicts in court and the conflicts will be less extensive when they do occur.

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