INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

How to protect the employer's interests after the termination of employment contracts – aspects of labor law in general and sports law in particular

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National Report of France in Labour law **National report in Sport Law**

Clémence COLIN

J.P. KARSENTY & ASSOCIÉS
Avocats à la Cour de Paris

30, rue d'Astorg - 75008 Paris
Tél. +33 (0) 1 47 63 74 75
ccolin@jpkarsenty.com

Anne Salzer

CABINET SALZER | AVOCATS

51 avenue Montaigne -75008 Paris
Tel : + 33 1 83 79 02 60
anne@salzer-avocat.com

General Reporters:

Dr. Hans Georg LAIMER, LL.M. (LSE) zeiler.partners Rechtsanwälte GmbH Stubenbastei 2 // Entrance Zedlitzgasse 7 A-1010 Wien // Vienna Phone: +43 1 8901087-81 E-mail: hans.laimer@zeiler.partners	Dr. Stephan DITTL SALGER Rechtsanwälte PartGmbB Darmstädter Landstraße 125 D-60598 Frankfurt am Main Phone: +49 (69) 66 40 88 251 E-mail: dittl@salger.com

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1. Employment Law

1.1. Restrictive covenants

1.1.1. Is the principle of A POST TERMINATION RESTRICTIVE COVENANT known in your legal system? If yes, how can this principle be defined? Where does the principle have its origin? (Civil Code, case law, etc)

French legal system knows the principle of post termination restrictive covenants, basically defined as "non-competition covenants".

There is no definition provided by the French labor code. Therefore, it must be referred to the applicable Collective Bargain Agreement, if any, and to French case-law.

Indeed, the contours of post termination restrictive covenants are defined by case-law, based on article L.1121-1 of French labor code that states that any restriction to human rights, individual and collective freedoms shall be justified by the nature of the task and proportionate to the objective pursued.

Under French labor law, the non-competition covenant prohibits an employee from competing with its former employer after the termination of his contract, for a certain period and in a certain geographic area, against financial compensation.

As it restricts the employees' rights, it must be justified by the nature of the job and proportionate to the objective, which is the protection of the employer's interests.

The clause terminology is not relevant for French courts: a post termination restrictive covenant is recognized by its content (see point 1.1.5 below).

1.1.2. At what stage in the employment relationship between employee and employer are post termination restrictive covenants agreed upon in your jurisdiction? Is there any relevant case law?

Theoretically, the clause can arise from an oral agreement. Nevertheless, post termination restrictive covenants are not presumed and imply the express agreement of the employee. **Therefore it is hardly recommended to have a written agreement.**

The covenant can be either provided in the employment contract, either later during its execution in a separate written document distinct from the labor contract, according to an old decision of French Supreme Court *(Cass, Soc, 17 June 1998 n° 96-41548).*

Collective Bargain Agreements may also provide formal rules applicable to post termination restrictive covenants (e.g. time limit, waiver form)[1].

1.1.3. Once the employment contract is signed, is there a general obligation of non-compete also in the absence of an express agreement after the termination of the employment? Are there specific statutory provisions or precedents referring to this? Could whistle blowing be regarded as a part of the employee's post termination restrictive covenant?

● During the performance of the employment contract, the employee has a duty of loyalty and a obligation of good faith, even in the absence of an express agreement after the termination of the employment, which excludes acts of competition.

However, this obligation stops when the employment contract terminates.

● The post-termination period is ruled by a principle of freedom. Thus, as soon as the employment contract terminates, whoever breaches it, the employee is free to carry on any activity, even in competition with his former employer in the absence of any post termination restrictive covenant in the employment contract.

Nevertheless, such "freedom" shall not lead to unfair competition based on tortious liability[2].

For instance, unfair competition has been recognized for an employee steering away from his former employer the clients he brought during the contract, even in the absence of non-competition clause in the employment contract *(CA Paris, Chambre 5, Section B, 3 April 1997- Société Soderec/ De Lima Ferreira).*

Unfair competition has also been recognized for an employee who kept after having himself breached the contract, files of the employer in order to use them within the competing company he planned to create even before the breach of the contract *(Cass. Soc., 28 September 2011, n°09-67510).*

On the contrary, unfair competition was not admitted in the case of a company canvassing clients of the former employer of a new employee, as no confidential information was transmitted by this employee about the know-how of his former employer *(Cass. Soc, 11 February 2003).*

● Whistle blowing policy under French law aims at preserving the free speech of employees during the performance of an employment contract. In that framework,

[1] For instance, according to the Collective Bargain Agreement applicable to maintenance companies, distribution agricultural equipment, public works activities of 23rd April 2012, the non-competition covenant shall not exceed 6 to 18 months according to the employee's job classification.

Furthermore, the "VRP" (specific sales force) Collective Bargain Agreement of 3rd October 1975 sets strict rules about the application of the non-competition covenant, the amount of the compensation, etc.

[2] Such action is based on the French civil code and requires a prejudice resulting from a fault. The grounds are different from an action based on a non competition clause.

employees can report to the administration illegal practices of the employer, provided that he does not act dishonestly with false accusations.

Theoretically, as long as it is not abusive, the employee should keep his freedom to report and lodge a complaint for illegal practices of his former employer even after the performance of the employment contract (public defamation).

1.1.4. Which obligations regarding post termination restrictive covenants exist on the employer's side in the absence of an express agreement? Are there specific statutory provisions or precedents governing employer's duties after the termination of the employment in your jurisdiction?

In the absence of an express agreement in the employment contract, there is no obligation on the employer's side within the limits of the law and tortious/criminal liability.

Indeed, the use of unlawful or unfair methods to discredit or denigrate a former employee may lead to the employer liability for the damages he caused.

Nevertheless, French judges did not have the opportunity to state on that specific matter.

1.1.5. What kind of different restrictive covenants that may be available and can be agreed between employer and employee in your jurisdiction? (see the examples in the introduction). Please describe how these can be defined and how they work in your jurisdiction.

As explained above (1.1.1) any post-termination restrictive covenant is qualified by French case-law as a "non-competition covenant". The terminology of the clause is not relevant as French courts recognize post termination restrictive covenants by the effects of the clause.

Thus, it was judged that:

- A "non-solicitation covenant" in the employment contract of an engineer, couched in ambiguous, broad and imprecise terms, actually prevented the employee from exercising any activity in accordance with his qualification. This clause was in fact an illegal non-competition covenant as far as there was no financial compensation *(Cass. Soc., 2 July 2008, n°07-40618).*

- A "customer protection clause" prohibiting for 24 months the employee from contacting directly or indirectly, by any means, the customers he had canvassed during his employment contract is in fact an illegal non-competition clause considering the requisites fixed by French case law for the validity of such provision *(Cass. Soc, 2 March 2011, n°08-43609).*

- A "customer clause" containing a prohibition to contract directly or indirectly with the clients of the former employer, even if the clients would consider it spontaneously without any solicitation nor canvassing, is considered as a non-competition covenant. Thus, it is illegal because there was no financial

compensation or limitation in time and space *(Cass. Soc, 27 October 2009, n° 08-41501).*

1.1.6. What are the conditions for a valid post termination restrictive covenant in your jurisdiction? (E.g. prerequisites like minimum age, minimum salary, minimum employment period; way of termination of employment, etc.). Please describe the conditions applicable and how these work in your jurisdiction.

French case law strictly defines the validity conditions of post-restrictive covenants as it faces the fundamental freedom to find a job. Post-restrictive covenants remain a strictly regulated exception.

The conditions of validity are not linked to the employee's age, minimum salary, employment duration, or to the type of company. However, all this features may help the judge to appreciate the proportionality of the clause.

To be valid, the non-competition covenants must meet the following conditions:

● The employee shall still have the opportunity to find another job after the termination of his employment contract.

Post termination restrictive covenants cannot lead to the impossibility for the employee to find any other job.

● The clause must be necessary to protect the legitimate interests of the company.

This criterion must be assessed in relation to the company's activity and the nature or specificity of the employee's job. Furthermore, the clause itself should highlight the necessity for the company to introduce a non-competition covenant regarding the considered position.

Indeed, such a clause is more justified for a highly qualified employee who has acquired a specific technical expertise and know-how from his former employer, than for an employee with a low qualification.

To this extent, French Supreme Court has already judged that for an employee with a low status, no access to specific information or confidential information likely to affect the normal competition, a non-competition clause was not necessary to protect the interest of the company *(Cass, Soc, 13 January 1999, n°97-4023).*

● The clause must be limited.

1- Limited in time.

A limited period should be provided. No minimum or maximum limit exist, this is a case-by-case basis balance between the protection of the legitimate interests of the company and the possibility to work for the employee.

For instance, a five years non-competition covenant for a window cleaner was judged excessive *(Cass, Soc, 7 may 1991, n°87-43.470).*

As long as it respects the others prerequisites, there is no rule about the time limit, except if it is set in the Collective Bargain Agreement. However, it is often limited to two years.

2- Limited in space.

Therefore the non-competition covenant must stipulate the geographical area(s) where the activity is forbidden (from a few kilometers to a country or several ones), always taking in consideration the possibility for the employee to find a job.

For instance, it has been considered that a one year clause unlimited in space did not let the employee work in the sector he was specialized in, and thus was judged illegal *(Cass, Soc, 11 May 1994, n°90-40.312)*.

A clause without precision about the limitation in space that just mentioned the impossibility to work in companies that have the same activities is illegal *(Cass, Soc, 12 October 1983, n°81-41.341)*.

● Financial compensation must be provided.

Through two decisions of 10th July 2002, French Supreme Court has required that non-competition covenants include the payment by the employer of a financial compensation, otherwise the clause is illegal *(Cass, Soc, 29 January 2003 n° 00-44882)*.

The parties are free to decide the amount, unless abusive or derisory. Indeed, a derisory compensation would make the clause null and void *(Cass, Soc, 23 June 2010, n°08-44160)*.

For instance, the supreme court has considered that a 2,4 months' salary counterparty for a 24 months restrictive covenant is derisory *(Cass, Soc, 15 November 2006, n°04-46721)*.

Furthermore, the amount cannot only depend on the duration of the contract.

Regarding the modalities, its payment cannot be made before the expiry of the work contract *(Cass, Soc, 7 March 2007, n° 05-45511)* but must be made monthly after it.

Therefore, the validity conditions are linked to the motivation and effects of the restrictive covenant on the possibility of further employment for the employee.

1.1.7. What is the potential scope of a post termination restrictive covenant in your jurisdiction? (E.g. taking into consideration time, geographical scope, content, interest, activities; etc.). Please describe how that works in your jurisdiction and what pitfalls have to be observed for both employers and employees.

The scope of a post termination restrictive covenant is defined by its validity conditions set out under point 1.1.6.

● Under French law, considering the requirements here above mentioned, we can identify "key moments" in the application of the non-competition clause, which are the followings:

- When selecting a candidate: check if the candidate is bound by a post-restrictive covenant with his former employer, otherwise, liability of the new employer may apply.

- When drafting the non-competition clause.

- During the performance of the employment contract, any change of the post termination restrictive covenant is a modification of the labor contract that requires the employee's approval.

- When breaching the employment contract: waiver or application of the clause and payment of compensation?

It has to be noted that the waiver must be express and formalized in a restricted time after the end of the employment contract.

● Furthermore, several pitfalls shall be identified and avoided in the drafting of a post restrictive covenant. The employer must ensure that the following requirements are met to make the clause valid:

- Respect the cumulative substantive requirements set out under point 1.1.6 and balance the different parameters.

- Comply with the formal requirements of a Collective Bargain Agreement, if any.

- Provide the cases of application of the clause.

In principle, the non competition covenant applies whoever breaches the employment contract, whatever is the reason or whenever it happens. However restrictions may be possible if it is expressly set, which implies rigor in the drafting.

To the contrary, it is not possible to reserve the payment of the compensation only for the termination at the employer's initiative *(Cass, Soc, 31 May 2006, n°04-44598)*, or at the employee's initiative *(Cass, Soc, 27 February 2007, n°05-44984)*, or to exclude it in cases of dismissal for serious misconduct *(Cass, Soc, 28 June 2006, n°05-40990)*.

As soon as the non competition interdiction is applied, the compensation has to be paid. In addition, it is forbidden to reduce the compensation based on the type of termination.
In practice, the employee would be entitled to claim the whole payment *(Cass, Soc, 25 January 2012, n°10-11590)*.

- Set the compensation proportionally to the time and geographical limits and to the restriction of the employee's freedom (100%, 50%, 30% of the salary), in compliance with the amount set by the Collective Bargain Agreement, if any.

When the compensation is based on earnings, it is appropriate to clarify the basis: net or gross.

● In case of bad drafting of the clause, French judges may declare the non competition covenant void or restrict it.

It has to be noted that it is considered that a void clause prejudices the employee. Therefore, in case of litigation, the employer automatically has to repair it *(Cass, Soc, 12 January 2011, n°08-45280).*

In such case, judges freely estimate the prejudice which may not be less than the non competition compensation set in the Bargain Collective Agreement, if any *(Cass, Soc, 5 May 2010, n° 09-40710).*

French judges can also reduce/restrict the clause (geographical area/time limit) to let the employee the possibility to find a job in the area he is specialized in *(Cass, Soc, 18 September 2002, n°00-42904).*

1.1.8. What are the possible sanctions against the employee in the event of a breach of a post termination restrictive covenant? Describe how that works in your jurisdiction and provide for practical information about the dos and don'ts.

The obligation is breached if the employee violates the clause by fulfilling acts of competition within the limits of the clause (for instance, by approaching clients in the limits set by the clause and proposing them identical services than the former employer: *Cass, Soc, 26 May 1993 n° 91-45266).*

However, the employer has to prove such acts, which can be difficult.

● The possible sanctions are as follows:

- Suspend the payment of the financial compensation.

- Ask the judge the reimbursement of the compensation from the date of the breach of the contract.

- Sue the former employee in order to make him stop the acts of competition asking a penalty, and/or claim damages. However, the financial loss must be proved and quantified, which can also be difficult.

● Therefore, in order to face a breach of a non-competition covenant by the employee, it is recommended to:

- Have a written and precise post restrictive covenant.

- Collect serious evidence (clients/websites), using bailiff's reports if necessary.

- Insert a "penalty clause" in the non-competition covenant. Such a clause is legal and the difficulty for the employer to prove his financial loss has encouraged the evolution of such provisions.

However the judge can reduce or increase the amount of the lump sum agreed. Whether the financial loss could not be proved or quantified, the employee would only be sentenced to one symbolic euro.

1.1.9. What are the possible sanctions against the new employer in the event of a breach of a post termination restrictive covenant by the employee of the former employer? Is it a matter of unfair competition in your jurisdiction?

When the new employer hires a candidate, he shall check if the employee was bound by a non-competition covenant with his former employer.

If he was aware that the employee he has hired was bound by such covenant, he might be liable. However, the former employer should prove that the new employer was aware of it. In that case, the latter may be sentenced to pay damages to the former employer, based on the tortious liability.

The former employer may also claim an unfair competition against the former employee.

For this reason, it is recommended to provide a clause in the employment contracts in which the employee declares he is not bound by a non-competition covenant.

1.1.10. When an employer has invested money in an employee's training, is there any possibility for the employer to get a refund from the employee, in case of breach of the post termination restrictive covenant, and under which conditions?

There is no such possibility under French law if no specific clause states it specifically.

The employer may insert a "clause de dédit-formation" when the position requires specialized training (training commitment clause: an employee has a professional training paid by the employer and therefore undertakes to stay employed with him for a specific time or to pay an agreed financial compensation when he leaves). Its main goal is to encourage the employee to remain in the company for a specific time.

However this is different from getting a refund in case of breach of the post termination restrictive covenant as it refers to a specific training that was provided by the employer to the employee.

1.1.11. What are the possibilities of lawsuit for the employee in case of the employer's disadvantageous actions during a period covered by a restrictive covenant (e.g. the employer prevents the employee from finding a new job by spreading out rumors)?

Those actions are subject to tortious liability and are not covered by the non-competition covenant.

It therefore requires a prejudice linked to a fault and the former employee would have to prove it.

1.2. Garden Leave

1.2.1. Does the concept of "garden leave" exist in your jurisdiction? How does it work, what is the scope and what are the prerequisites?

Under French law and in several Collective Bargain Agreements, a notice period must be applied in case of termination of an employment contract, whoever breaches it. The duty of loyalty remains applicable during the notice period.

The notice period is generally from one to three months, depending on the seniority of the employee and on the provisions of the Collective Bargain Agreement.

● If the employer requires the employee to spend all or part of the notice period at home, the employer necessarily has to pay the regular salary until the end of the notice period.

● Finally, the employee can ask not to work during the notice period, with the employer agreement. In that case, the notice period does not have to be paid and the contract terminates on the date both parties agreed on.

If an employee creates a business in competition with his former employer during the notice period, it does not imply an act of unfair competition *(Cass, Soc, 7 November 1995, n°92-42290)*. In contrast, if such business starts before the beginning of the notice period, the employee would have infringed his duty of loyalty *(Cass, Soc, 22 January 1985)*.

1.2.2. Talking about garden leave provisions: do employees – or certain types of employees – have a right to be "actively employed" in your jurisdiction, e.g. so that a garden leave provision would not – or not be fully – be enforceable for an employer and the employee would have a "right" to continue working until the end of the employment? What is the respective legal framework in your jurisdiction?

During the execution of the employment contract, the employer must provide work to the employee and the needed resources for its execution.

However, if the employee is exempt from notice period, the employee should no longer be subject to any contractual obligations.

For example, he theoretically could be hired in another company as long as he respects the non-competition covenant, if any. Several Collective Bargain Agreements provide that in such case, the employer is exempted from paying the salary.

1.3. Are there any other specific means to protect the employer's interest at the end of an employment contract in your jurisdiction? Please explain in detail and provide for practical guidance.

The employer's interests at the end of an employment contract are mostly protected by non-competition covenants. However, they could also be protected as follows:

● Obligation of discretion:

This obligation of discretion, usually provided in the employment contract, is still applicable after the breach of contract. Every employee can be subject to this obligation.

However, such obligation would be protected by the matter of unfair competition, based on tortious liability as explained under point 1.1.3 here above.

Therefore, even if the non competition clause was declared null and void by the Judge, the employer still have the possibility to sue his former employer on the unfair competition ground *(Cass, Soc, 28 January 2005, n°02-47527*).

● Trade secret:
Trade secret can be defined as any process offering practical or commercial interest implemented by an industrial and kept hidden from competitors.
Its revelation or attempt of revelation is punished by a 30.000 Euros fine (Article L 1227-1 of French Labor Code).

● Professional confidentiality:
Because of their functions within the company, the employees' representatives are legally bound to professional confidentiality for all the questions related to the fabrication process or to the confidential information (Article L 2325-5 of French Labor Code).

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2 The World of Sports and Employment Law

2.1 General questions

2.1.1 Does employment law apply to the relation between athlete's and sports clubs/Associations in your jurisdiction? Are there relevant differences between the kinds of sports and between professionals and amateurs?

In France, the labor law applies to Sports salaries and the jurisdiction in case of dispute is in labor law Court: *Conseil des Prud'hommes*, Tribunal for the employment contract in the 1er degree, the Social Chamber of the Appeal Court and the Supreme Court the upper degrees.

Players are also affiliated to the social system (work injury, occupational disease, unemployment benefits).

There are significant differences depending on the sports and specific regulations or compliances with federations or leagues.

An amateur in France is a person who can justify resources or sufficient work outside his sport.

A professional player is a player with a contract and its resources exclusively to its sport.

Labor law in Sport area relates mainly football, rugby, basketball and handball

2.1.2 Are there specific employment law provision (statutes, rules of sports associations) applicable for athletes in your jurisdiction? In particular regarding post termination restrictive covenants and/or garden leave provisions and/or the right to continue to work?

There a particular rules with a special contract – ***le contrat d'usage*** (Article L.1242-2, 3 ° of the Labor Code) because of the nature of the activity which prevents the permanent contract.

Most of the time, the recruitment of salaried sport professional is through a fixed-term contract (football, cycling, basketball, rugby, handball).

Otherwise, the labor law and the labor code which is ***a very thick bible*** in France applies.

A charter has been used by the federations for the respect of specific clauses in the sport. If these rules are not met, the contract is not registered (football league, Articles 200 206 - LFP).

In football, there are salary scales (CCNMF art.759)

With restrictive clauses, the parties apply the act. Of course, the compliance rules taking in account the Bosman jurisprudence must be respected.

2.1.3 Is there a specific court or arbitration system for employment matters between athletes and clubs in your jurisdiction? Are those arbitration proceedings obligatory before going to court?

There is no specific court in France to settle sports disputes.

Previously, there may be referral to a conciliation commission based federations.

For the Football Federation, it is of the Legal Committee of the LFP (Professional Football League).

For Athletism Federation, it is the National Olympic Committee and French Sports (CNOSF).

These procedures are a prerequisite.

France country also ordered the ban to the use of arbitration in international cases (TAS) if the athlete is domiciled in France and the dispute opposing the French sports federation delegate **public service** (Article 2060 of the civil Code).

2.2 Transfer Fee System and termination of contracts

2.2.1 a) For the EU Member States: Describe how the Bosman case has changed the situation in your jurisdiction and if/how the sports associations and the legislator have responded to this judgement.

b) For the NON-EU Members States: Was there a similar judgement or event that changed the system in your jurisdiction?

The Bosman ruling has changed the terms of engagement.

Previously, if the player is still under contract with his club and a transfer is made (before the termination in the french legal system into accounts the specificities of the employment contract), it is legal if three conditions are met (Article 1275 of the Civil Code):

1. The agreement of the former club
2. The agreement of the new club and the payment of compensation to the former club
3. The consent of the player.

If the contract ends, the football player is free and the notion of - ***juste cause*** - for termination is acquired.

The federations have incorporated rules with early termination with payment of damages and as percentage compensation damages to the pre-training player club.

The federations implemented news rules as a formal prior notice to the player's current club on a transfer.

In football, the Legal Committee under the professional football charter must be entered by the employer prior to any termination of the employment contract to operate a precisely controlled since the Bosman Jurisprudence and ruling.

2.2.2 Are there specific laws or regulations of sports associations (different from the general rules) dealing with the termination of athletes' employment contracts in your jurisdiction? Are such contracts usually open-ended or do they run for a fixed term? Are there any restrictions for fixed-term contracts in your jurisdiction?

In France, a national collective agreement oversees sports modalities and the determination of remuneration.

The principle of the fixed-term contract is also box because it is normally an exception in French law but commonly practiced sports law. That is why we talk about "fixed-term use contract" – ***contrat d'usage***.

Otherwise, we applied the labor law and the labor code with a breach of contract justified by a valid reason, such as the fault of the athlete or force majeure.

2.2.3 Can a player switch the club during the term of the employment contract for a certain transfer fee without the consent of the former club in the absence of a respective clause? Is it obligatory in your jurisdiction to agree on such a clause and a certain transfer fee?

In practice with the French law, the consent of the former club is mandatory, restrictive clause or not, and this is especially controlled by the Legal Committee of the football league.

2.2.4 What are the remedies for the former club in your jurisdiction, if a player switches the club during the term of the employment contract without the consent of the former club and without the payment of an agreed transfer fee?

In France, the former club seized the Legal Committee which sanctions the new club and also the licensee player. Otherwise, the former club can sue the player to the Courts and the CAS if it is an international transfer.

2.3 Are there any further conflicts between employment law and the employment practice of sports clubs and associations in your jurisdiction? Please describe relevant cases or judgements.

The French labor law is coercive.

Most of the time, there are conflicts with:

→ The notion of subordination because employees are quite free with the time rules and also free with his behavior to the media.
→ The notion of working time and work overtime!
→ The qualification of fixed-term contract or not ;
→ The claim under wrongful termination of the contract when the contract of a player is not renewed after a sport injury or it could be as unfair dismissal.