INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

Commission(s) in charge of the Session/Workshop:
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INTRODUCTION

When signing employment contracts, employers and employees usually do not think about the problems that may arise at the end of such cooperations. However, it is our task as their advising lawyers to protect our client's interests after the termination of such contracts. Therefore we would like to draw your attention on means to protect these interests of employers in general, such as restrictive covenants and garden leave – before we will have a look into the world of sports and see how it deals with respective problems.

1. Employment Law

What are restrictive covenants?

Information is key for the success of every business.

Thus, restricting the use of this information by employees after their employment has ended has proved to be vital to protect the business and/or customer contacts. An employee having insider-knowledge of the prices, technology, market strategy, customer- or client-base is often an attractive asset to a competitor seeking to enter the market and/or enhancing its existing business.

In order to provide for a certain level of protection for employers they may want to protect the use of the information vital to their business by post termination restrictive covenants.

A contractually agreed restrictive covenant is typically designed to prohibit an employee from competing with his former employer for a certain period after the employee has left the business. Furthermore, it aims to prevent an employee from soliciting or dealing with customers and or other employees of the former employer by using knowledge of those customers and the business gained during the prior employment.

Standard types of restrictive covenants, which are often used by employers, are:

- non-competition covenant,
- non-solicitation covenant,
- non-dealing covenant
- and non-poaching covenant.

Garden leave

Another opportunity to increase the impact of a post termination restrictive covenant – if lawfully agreed upon - is to agree on a garden leave clause in the initial employment contract. Based on such clause an employer can require an employee to spend all or part of the notice period at home whilst the employee continues receiving the regular remuneration.

Thus, a garden leave clause prevents the employee from taking up other employment with a competitor whilst still being employed with the employer. However, it also enables the employee's successor to establish himself and develop relationships with the employee's customers and contacts. A further advantage of such a clause is that whilst on garden leave, the employee is no longer privy to the business' confidential information. Additionally, it has to be noted that all information such employees do have will become out of date until the garden leave ends.

Finally, at the end of the garden leave period the restrictions resulting from the post termination restrictive covenant may step in and further deter the employee from competing with the business of the former employer.

However, from the employee's perspective such garden leave provision contained in the employment contract, if lawfully agreed upon, may prevent the employee from further practicing (and training) his specific occupation. This may be considered a huge disadvantage when it comes to profession, where actively pursuing your occupation is key (e.g. for professional athletes, surgeons, etc.).

2. The Impact of Employment Law on the World of Sports

In some kinds of sports, athletes and coaches are employed by clubs or associations, so the rules of employment law apply. However, the world of sports has always the tendency to set their own rules of law, claiming that the regular laws are not suitable for the relationships in sports. Therefore we are interested in learning if the above mentioned means of protection the employer's interests at the end of an employment contract are found in sports employment contracts and/or if there are any special provisions in athlete's employment contracts in your jurisdiction..

Transfer Fees

Once upon a time, (football) sports clubs and associations have invented the transfer fee system: If a player wanted to switch the club (the employer) after the termination of his contract, the new club had to pay a transfer fee to the former club. The reason

for this was mainly that the former club wanted to be compensated for the education and the improvements of the player. This was similar to the situation of "normal" employers who do not want their competitors to benefit from the know-how that a "normal" employee gathered during his employment.

This system had to be abolished in 1995 after the judgment of the European Court of Justice in the "Bosman" case, C-415/93. It was decided that the obligation for the new club to pay a transfer fee after the termination of a player's contract infringe the freedom of movement for workers.

Since then, transfer fees may only be claimed in the European Union, if a player wants to switch the club during the term of validity of his employment contract. Therefore the duration of the contract has become an important aspect of the player's contracts.

Now, how are these issues dealt with in your jurisdiction?

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- If you need to display a list, you may use bullet points or letters in lowercase.
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BIBLIOGRAPHY

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- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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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.)

The principle of a post termination restrictive covenant is known in the Dutch legal system.

Article 19 subsection 3 of the Dutch Constitution stipulates that the right of every Dutch national to free choice of employment will be recognized, subject to the restrictions under or pursuant to law.

The Dutch law principle of freedom of contract is the underlying leading principle which defines the content of post termination restrictive covenants. Except for the non-competition covenant discussed below, Dutch law does not provide for legislation and/or regulation that specifically regulates post termination restrictive covenants. As a result, in general, post termination restrictive covenant may differ on a case-by-case basis.

In the event a court gives a judgment on a post termination restrictive covenant it will judge the covenant within the context of the employment relationship. In order to assess the restrictions of the covenant it will weigh the interest of the employer against the interest of the employee.

An exception to the principle of freedom of contract is that the particular post termination restrictive covenant for non-competition is specifically regulated in article 7:653 of the Dutch Civil Code (hereinafter: "DCC"). Herein it is provided that the employee and employer are restricted by certain conditions with regard to a non-competition covenant after termination of employment. These conditions and the possibilities for agreement of such covenant will be discussed in more detail below under paragraph 1.1.6.

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?

A post termination restrictive covenant can be agreed between employee and employer at any stage. In practice, it is most common to agree to a post termination restrictive covenant at the three stages as follows:

a. Before or at the start of employment

The post termination restrictive covenants between employee and employer will be usually agreed upon when they conclude an employment agreement.

b. During employment

Specifically for the non-competition covenant it could be that it should be agreed upon (again) during employment. Basically, such might be advisable in the event of a change to the employment such as a change of position, a promotion or if the employment agreement for a definite period will be converted into an indefinite period. This in order to avoid that a previous non-competition covenant may be judged to be invalid for reasons that it weighs more heavily on the employee than when agreed upon originally.

It could also be that due to a transfer of undertaking[2] the non-competition covenant may weight more heavily[3] and therefore should be agreed upon again.

Upon renewal of a definite period of term employment agreement and/or if the position of the employee changes during employment, it is advisable to reconfirm the non-competition covenant by including the covenant in the offer that is signed by both parties or by attaching it to the letter confirming the extension of the employment agreement and at the same time including a clear reference in the letter to the attached covenant.

c. End of employment

Any post termination restrictive covenants between employer and employee could also be agreed upon at the end of employment. At that time the employer and employee usually agree to a termination agreement that qualifies as a settlement agreement (article 7:900 DCC). In such termination agreement, the parties may include and therefore confirm or agree to a new or amended content of post termination restrictive covenants.

In practice, it is often difficult for the employer to propose a post termination restrictive covenant if such restriction is not agreed earlier in the employment agreement.

1.1.3. A. 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?

Even if parties have not agreed to a post termination restrictive covenant, the performance of competitive activities by the employee after termination of the

[2] Supreme Court, October 23, 1987 NJ 1988/234 (Hydraudyne/Van der Pasch).

[3] Court of Appeal of Arnhem, June 5, 2012 JAR 2012/202.

employment may constitute an unlawful act of the employee towards the former employer. An employee can act unlawful if he/she abuses the knowledge that was obtained during the employment.

The criteria of the Boogaard/Vesta[4] judgment serve as a guidance for the admissibility of competition by an employee after termination of employment. The acts of the employee are considered unlawful in the event that clients that are to be considered regular or lasting clients are approached systematically and the employee makes use of the knowledge obtained during the employment. Furthermore, this - systematic - act should be:

- substantial; and
- break down the sustainable clientele of the employer.

Even the fact that there is some case law on this subject, for the employer – who has the burden of proof - it will be still difficult to prove that its former employee competes unlawful. It will be particularly hard to prove that the unlawful act(s) of the employee is/are harmful to the business of the company in such a way that it/they cause damages.

B. Could whistle blowing be regarded as a part of the employee's post termination restrictive covenant?

Under the general principle of standards for being a good employee (article 7:611 DCC), the employee has to keep the confidential information of the employer's company and business confidential. It follows that the employee is bound to discretion and loyalty towards his/her employer.[5]

Usually the employer and employee agree in the employment agreement to a confidentiality covenant which applies in full during and after termination of employment. Generally the confidentiality covenant is not restricted in time.

As of yet, under Dutch law there is no (specific) protection for whistle blowers regulated. For example, there is no statutory provision that provides for an exception to confidentiality for whistle blowing. However, there is case law in which the court decides that under certain circumstances employees are permitted to breach their confidentiality obligation in the event of whistle blowing.[6]

A breach of confidentiality may be permitted by a court in case the disclosed information by the employee:

- has a pressing social interest; and
- consist a gross breach of law or policy that has been kept consciously silent; and

[4] Supreme Court, December 9, 1955, NJ 1956, 157 (Boogaard/Vesta).

[5] Supreme Court, October 26, 2012 (JAR 2012/313, Quirijn/TGB).

[6] Court of appeal of Amsterdam, November 4, 2014 (JAR 2015/8, Regge).

- is a danger for public health, safety and/or environment.

In addition a breach is only permitted in the event all possible internal notification procedures of the employer have been followed. That means that if the employer has an internal complaints procedure, the employee should first make use of this. Besides and/or in the absent of an internal complaints procedure, the employee should also contact the Social Affairs and Employment Inspectorate and - if the company has one - the Works Council before he/she seeks publicity.[7] If these requirements have been met, the employee may be permitted to bring information of the employer into the public domain even though he/she acts against confidentiality obligations in doing so.[8]

Lately, a legislative proposal for the protection of whistle blowers is pending. The proposal provides for certain safeguards for whistleblowers. The proposal provides, amongst others, that the employer which employs at least 50 employees is obliged to have an internal notification procedure for whistle blowers with approval of the Works Council. The proposal starts from the basic premise that the employee first notifies the suspected wrongdoing internally. If such notification has not been handled properly, the employee can turn to an external organization as introduced and established by the proposed law. The employee can make use and/or enjoy certain provisions as introduced by the proposed law, for example, advice, research, (salary) protection and/or cooperation. The proposal also introduces protection against prejudice and dismissal for whistleblowers acting in good faith.

To conclude, in the event a confidentiality covenant is in place, in principle, the employee is (fully) bound to this covenant after the termination of employment. In the absence of such covenant, the employee is still obliged to observe confidentiality obligations based on the principle of being a good employee after the termination of employment. However, under certain circumstances, contrary to such obligations, whistle blowing by the employee may be permitted.

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?

Even if parties have not agreed to a post termination restrictive covenant, the employer has to act within the boundaries of being a good employer. The principle of being a good employer remains relevant to a certain extent after termination of employment. The employer should, for example, not give any

[7] Subdistrict court Tiel, February 10, 1999 (JAR 1999/223). Subdistrict court Alkmaar July 1, 2002 (JAR 2002/157). Subdistrict court Maastricht, July 8, 2014 (JAR 2004/124). District court in preliminary relief proceedings of Amsterdam, January 21, 2010 (JAR 2010/66). Supreme Court, October 26, 2012 (JAR 2012/313).

[8] District court of Amsterdam, July 9, 2003 (JAR 2003/191, Organon).

negative or misleading statement(s) about the employee to a future prospective employer. By making such statement the employer could act inconsistent with the principle of being a good employer but also act unlawfully towards the employee. Such unlawful act can cause damages to the employee.[9] An employee may claim a statement of unlawful act and request damages from his employer in court. In that case there should be a causal link between the unlawful act and the damages of the employee. To prove this properly in court is far from simple.

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.

Generally the freedom of contract ("*contractsvrijheid*") is the principle which defines the content of post termination restrictive covenants. In practice, many different post termination restrictive covenants are known and could be agreed upon between employer and employee.

For a post termination restrictive covenant to be enforced it must not be drafted too widely. On the other hand it should be prevented that the wording is too specific and excluding something that should be protected. The wording must show that the covenant is sufficiently narrow and justified because it protects a legitimate business interest of the employer. The more strict post termination restrictive covenants are reserved for highly skilled or senior employees. Therefore a one-size fits-all covenant to all employees risks them being unenforceable for at least some employees.

These are the most common post termination restrictive covenants in the Dutch system:

a. Non-competition covenant

A non-competition covenant is a contractual prohibition for the employee to compete either by entering into employment of a competitor or directly with a competitive business. The formal restrictions of this particular non-competition covenant will be discussed under paragraph 1.1.6 below. Usually this covenant has a duration that is limited to 12 months after termination of employment. In exceptional cases 24 or even 36 months. A court may limit the duration. The covenant could also be applicable within a specified geographical location. It could also be that the employee will be prohibited to work for certain specified competitors of the employer.

The covenant may be accompanied by a penalty clause. If the employee breaches the covenant, the employer can claim the penalty or instead of said penalty full compensation of all actual damages.

[9] District court of Oost-Brabant, November 26, 2014 (JAR 2015/7).

b. Non-solicitation covenant

A non-solicitation covenant is a contractual prohibition for the employee to approach and/or to (maintain) contact and/or to solicit and/or to entice business relations (i.e. persons and companies) of the employer. The covenant could also prohibit the employee to recruit, (attempt to) employ or entice away (former) colleagues after termination of employment. In this regard it is also known as a non-poaching covenant.

The duration may vary but it is common to be between 6-24 months. For an indefinite employment agreement the average duration would be 12 months.

The covenant may be accompanied by a penalty clause. If the employee breaches the covenant, the employer can claim the penalty or instead of said penalty full compensation of all actual damages.

c. Non-disclosure of confidentiality covenant

Employees acquire confidential information during their employment. A non-disclosure of confidential information covenant is a contractual prohibition for the employee to use or disclose any confidential information of the employer.

The duration of this covenant is usually not limited.

The covenant may be accompanied by a penalty clause. If the employee breaches the covenant, the employer can claim the penalty or instead of said penalty full compensation of all actual damages. As further explained under paragraph 1.1.3.B. a breach of confidentiality obligations could be justified under certain specific circumstances i.e. in the event of whistle blowing.

d. Publications and statements covenant

A publications and statements covenant should prevent the employee to make any or negative publications and/or statements which in any way are related to the employer. It also may prohibit the employee to make any untrue or misleading statement in relation to the employer. Furthermore, such covenant could also include that it prohibits the employee at any time to represent himself/herself as being in any way connected with or have an interest in the employer after the termination of employment.

The duration of this covenant is usually not limited.

The covenant may be accompanied by a penalty clause. If the employee breaches the covenant, the employer can claim the penalty or instead of said penalty full compensation of all actual damages.

e. Use of social media covenant

A use of social media covenant contractual restricts the use of social media by the (former) employee (such as, communications by and linking via e.g. LinkedIn, Facebook and Twitter).

This covenant may restrict the employee to contact business relations in the same way a non-solicitation covenant restricts the employee. That means it may prohibit the employee to approach and/or (maintain) contact business relations (i.e. persons and companies) of the employer via social media.

It can also be that this covenant prohibits the employee to make (negative) statements about the employer, the employer's business, clients and/or products via social media.

Especially if it comes to social media there is a fine line in a grey area of what contacts are to be considered business and what are private contacts and/or relations. A use of social media covenant is strongly advised in this regard. It will serve as the agreement with respect to these types of issues upfront.

f. Insider dealing covenant

An insider dealing covenant may prevent the employee to misuse inside information. This restriction is especially useful during employment and could be relevant for some limited time after termination of employment.

Depending on employer's size and industry, a code of conduct may be applicable to employees and/or individual covenants may be part of the policies with regard to this topic. Such code or covenant may prohibit insider dealing by the employee. If an employee acts in violation during the employment agreement it is usually provided that such will constitute a serious breach of trust. In that event the employer can take suitable measures.

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.

Due to the principle of freedom of contract post termination restrictive covenants are not restricted by conditions. The exception to that principle is that the non-competition covenant is specifically regulated and prescribed by statutory law. Under article 7:653 of the DCC it is provided that the employee and employer are restricted by certain conditions to agree to a non-competition covenant. In principle, if the formal requirements are met the non-competition covenant is valid.

The conditions under which such non-competition covenant can be concluded are:

- **Parties**: Employer and employee. Employee cannot be a seafarer (article 7:700 DCC), a seconded employee nor a private company with limited liability.
- **Form**: The restriction should be agreed upon in writing. Such means in practice that parties sign the employment agreement preferable before or at the start of the employment. A covenant incorporated in a separate document (e.g. addendum) attached to the employment agreement may be valid in certain circumstances (article 7:653 subsection 1 subsection b DCC).[10]
- **Content**: There are no formal restrictions for the content. In practice the content should specify the type of work it covers. Usually it includes the activities equal or similar to those of the employer and/or its affiliated companies. It could also list that the employment with certain companies/competitors is prohibited.
- **Duration:** There are no formal restrictions for duration. However, the duration of enforceability will be specified. Usually the duration after termination of employment is 12 months. In certain circumstances, the period may be extended for a longer period, but periods of more than 24 months are unusual.
- **Geographical scope:** There are no formal restriction for the geographical scope. The geographical area to which it applies is mostly defined. Usually this is within a city, country or worldwide or more specifically within a radius of a certain amount of kilometers.
- **Minimum age**: The restriction should be agreed with an employee of age. Any non-competition covenant entered into with an employee younger than 18 years is invalid.
- **Minimum employment period**:

  No requirements to the minimum employment period. However, effective 1 January, 2015, in principle the non-competition covenant in a definite employment agreement is no longer allowed. An exception to this prohibition is that employer and employee can agree to a non-competition covenant in a definite employment agreement only if a sound motivation in writing is provided in the employment agreement provided that the covenant is necessary by reason of substantial business interests of employer (article 7:653 subsection 2 DCC). As of yet it is still uncertain what shall qualify as "substantial business interests" under the new

[10] Supreme Court, March 28, 2008, JAR 2008/113 (Philips/Oostendorp).

requirement. However, it is clear that such interests should be specific and included in the contract. A covenant without motivation is void. All points in the direction that the benchmark for qualifying is going to be quite tough and interests should be beyond the "standard" competitive advantages or fact that employees will gain knowledge of confidential information. Apart from the specific nature of the business and position in the market it is expected that the position of the employee should be taken into account as well.

- **Minimum salary:** There are no formal nor other clear restrictions for minimum salary.
- **Way of termination:** The way of termination of employment is not considered decisive for the reliance on this covenant.
- **Compensation:** There is no compensation required in the event the non-competition covenant is enforced. In principle, the employer does not pay compensation during the duration of the non-competition covenant to the former employee. However, in the event the covenant seriously hinders the employee to work elsewhere, a judge may grant that the employee a remuneration to be paid by the employer.

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.

First of all, except for the aforesaid non-competition covenant, post termination restrictive covenants generally are not restricted by formal requirements. Nevertheless, a court can decide that a post termination restrictive covenant is void or (partly) unenforceable. In order to assess the restrictions of the covenant the judge will outweigh the interest of the employer against the interest of the employee.

Pitfalls for the employer

Documentation

A pitfall for the employer can be that the post termination restrictive covenant that has been agreed with the employee is not agreed in writing and/or not signed by the employee. In order to avoid any discussions whether the post termination restrictive covenant is enforceable, such would be advisable and in the event of a non-competition covenant would be necessary. Otherwise a non-competition covenant would not be valid.

Further to the scope of the post termination covenant: on one hand the post termination restrictive covenant should preferably define clearly and precisely what it covers. On the other hand the covenant should not be too narrow in a

way that it provide for a certain level of protection of the interests of the employer.

In the event the covenant has a broad scope the risk is higher that it will not be enforced by a court or only partly. Specifically for the non-competition covenant, according to article 7:653 DCC subsection 3 subsection b, a judge has the possibility to set the covenant aside in its entirely or partly. A court may also mitigate the period of time that the covenant will be in force and therefore amend the duration of the contractual covenant. Case law on the enforcement and mitigation is highly casuistic.

Another point that should be taken into account for the scope of the covenant is the level of the employee's position. In general, a broad scope of a covenant for lower positions within the company is less likely to be enforceable. That is because it may result in a disproportionate burden for the employee.

Carrying out post termination restrictive covenants

A second pitfall for the employer is that it has to be consequent in carrying out post termination restrictive covenants. In the event of termination of employment, the employer can decide to hold the employee to or (partly) release the employee of the post termination restrictive covenant. The employer should be able to explain why in situation X it holds the employee to the covenant fully while towards employee Y it releases the employee from its covenant. The employer should have sound reasons to do. If that is not the case, the employee may request for an explanation why his situation is treated differently from another. More importantly, a court will take these circumstances in effect.

Wrongful termination of employment

In the event of a wrongful termination the non-competition covenant is not enforceable.[11] A pitfall for the employer in this respect may be that if the employer gives notice and thereby does not respect the correct notice period this will result in a wrongful termination of employment and therefore, automatically, the non-competition covenant will no longer be of use.

Mitigation of the post termination restrictive covenant or compensation

A further pitfall for the employer arises when an employee is be obstructed by the post termination restrictive covenant to be employed by another employer. In that event a judge could decide to mitigate the period of time of the covenant or to determine that the employer must pay the employee a compensation for the period of time of the restriction by the covenant. The amount of compensation will be determined by the judge.

[11] Article 7:653 subsection 3 Dutch Civil Code.

Pitfall for the employee

Compliance

In general, employees do not always realize the impact and/or enforceability of the restrictions. In particular the non-competition and non-solicitation covenants may have far reaching consequences. Employees may have the idea that the covenants are invalid or that the employer shall not hold them to the agreed post termination restrictive covenant. They may not realize the full scope of the covenant as they agreed to the post termination restrictive covenant at the start of their employment and/or not fully understand the scope of the post termination restrictive covenant and/or the consequences if they do not comply. However, Dutch courts will take the agreed wording as a starting point. This includes the penalty covenant that usually accompany the post termination restrictive covenant.

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.

a. Penalty

Usually a post termination restrictive covenant will be accompanied by a penalty clause. In the event the employee breaches a post termination restrictive covenant the employee is liable to pay a penalty. In practice, in the event of a breach, the employer will confront the employee with the fact of the breach in writing. Usually the employer will:

- request the employee to stop violating the covenant immediately;
- request to pay penalties as due or threaten to do so; and
- hold the employee liable for damages.

Practical "do's" for the employer are:

- obtain information and evidence before discovery;
- upon facts and circumstances, options and goals, decide upon a conscious strategy before sending the letter upfront.

b. Enforce a covenant with a judicially imposed penalty

In practice, the employer will take first the actions as described under a. Also in absence of an agreed penalty clause. Further, the employer may bring preliminary relief proceedings against the employee in order to enforce the covenant subject to a judicially penalty for non-compliance.

Practical "do's" for the employer are to prove to the judge that:

- it has an urgent interest to stop the activities that constitute a breach;

- the breach of the employee is disadvantageous to business of the employer.

The preliminary relief proceedings qualify as a provisional judgment. The employer may also bring proceedings on the merits to enforce the covenant and claim penalties and/or damages.

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?

The new employer is clearly not a party to the agreement of the post restrictive covenant. Consequently, there is no breach of contract.

The breach of a covenant by the employee may result in an unlawful act of the new employer. It may be that the new employer by its acts consciously benefits from the breach of the employee. In general, this may be unlawful in the event that the new employer:

(i) knows or should know of the breach by the employee; and

(ii) collateral circumstances are present, such as but not limited to provocation.[12]

In practice, the employer shall confront the new employer in writing and will request the new employer to refrain from (further) benefiting and hold the new employer liable for damages on the basis of an unlawful act.

As a step further, the employer may bring preliminary relief proceedings so that the new employer is ordered to refrain from (further) benefiting of the breach subject to a penalty by a court. A court may sustain the requested claim to:

- prohibit contact, approach or impose any other duty arising from the covenant; and/or
- cease and not resume employment of the employee with the new employee.

The preliminary relief proceedings qualify as a provisional judgment. The employer may also bring proceedings on the merits to enforce the covenant and claim damages.

Under recent case law, the new employer is expected to actively inquire if a new employee is bound by any non-competition covenant of his/her employee. In particular, if the new employer is a competitor of the employer,

[12] Supreme Court, January 26, 2007 (NJ 2007, 78)

the new employer should realize that there is a possibility that the new employee is bound by the post termination restrictive covenant.[13]

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?

Under the Dutch legal system, breach of a post termination restrictive covenant and training/education received by the employee are not directly linked. The employer can offer its employee tuition assistance and can make certain agreements about it (e.g. repayment of tuition in the event of termination of employment within a certain time limit of the end of a training/study).

Tuition assistance may be qualified as an investment in the employee. This circumstance may be taken into consideration by a court in order to outweigh the restrictions of a non-competition covenant for the employee against the interests of the employer.

Effective July 1, 2015 new employment legislation will come into force. This new legislation concerns changes in the legislation on the termination of employment. In certain circumstances the employer is obliged to pay a transitional compensation to the employee (in Dutch a so-called "*transitievergoeding*"). Certain costs of training/education may be set of against this compensation.

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 rumours)?

First of all, it may be that employer and employee agreed to, for example, a publications and statements covenant in the employment agreement or a termination agreement. In such covenant they agreed that they both cannot at any time make any untrue or misleading statement in relation to each other. The consequence of a breach will depend on the agreement in first instance.

However, in the absence of a publications and statements covenant, the employer is still obliged to refrain from disadvantageous actions against the employee. This obligation of the employer is based on the principle that being a good employer remains in effect after termination of employment. Further, untrue and damaging statements may constitute an unlawful act. The termination of employment does not give license to the employer to act disadvantageous towards the employee and certainly not if these statements are untrue.

[13] District Court of Overijssel, April, 4, 2014 (ECLI:NL:RBOVE:2014:2293).

Article 7:656 DCC stipulates that there is an obligation for the employer to provide references on request of the employee at the termination of employment. If the employer refuses to provide such requested reference or provides a reference with untrue statements, the employer is liable towards employee and third parties for the damages caused.

In practice, in order to stop the disadvantageous actions of the employer, the employee will first confront the employer in writing that it acts unlawful towards the employee. In this writing the employer will be ordered to refrain from (further) disadvantageous actions. Furthermore, the employee will hold the employer liable for damages and claim compensation for these damages.

In the Dutch system a lawsuit in this case would be very rare. It is not a very common problem in the Dutch jurisdiction. Disadvantageous actions, such as rumors are generally hard to prove except for the aforementioned liability under Article 7:656 DCC. Further, in the rare event the employee brings a lawsuit, a causal link between the unlawful act of the employer and damage for the employee is required and such would be hard to prove. In a recent judgment of a district court an employee succeeded after two interlocutory orders to produce evidence.[14]

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?

In principle, the employee has a right to be "actively employed" and the employer should have sound reasons/interests to withhold the employee from performing the agreed work.

Garden leave is not defined as such by Dutch law. Still it is a commonly used concept. Based on case law certain criteria for garden leave can be defined. In general, the admissibility of garden leave will be checked against the principle of being a good employer which is laid down in article 7:611 DCC. Within the boundaries of being a good employer an employer can suspend the employee on full pay and for a limited period of time under certain circumstances.

In practice several definitions are used for releasing employees from their active duties:

- suspension (*schorsing*);
- garden leave (*non-actiefstelling*); and
- exemption from work (*vrijstelling van werkzaamheden*).

[14] District court Oost-Brabant, November 26, 2014, ECLI:NL:RBOBR:2014:7197.

Usually the employer uses the more friendly wording towards the employee, exemption from work. Suspension is a far-reaching measure and is mostly considered as a sanction. In order for the suspension to be lawful, the employer may only take such measure in the event it has a compelling reason. The employer has to demonstrate such compelling reason and should notify the employee it has reasonable grounds for such measure.

In the event the employee is a statutory director, the director can be suspended by the competent authority which is authorized to appoint the statutory director.[15] Such notwithstanding the fact that the articles of association provide otherwise.

While suspension is a clear disciplinary measure, garden leave and exemption from work less so. It certainly helps when the right to put an employee on suspension, garden leave and/or exemption from work is agreed upon in the employment agreement. A contractual basis in the employment agreement is certainly recommended.

Continued payment during leave

During suspension, garden leave or exemption from work the employer shall continue to pay the salary to the employee. It is provided under article 7:628 DCC that if the employee did not perform the agreed work due a cause reasonably for the account of the employer, the employee preserves the right to time-based pay. Basically, the measure lies within the responsibility of the employer and therefore is a cause which is for the account of the employer.

Duration of leave

The duration of suspension, garden leave or exemption from work should not be longer then reasonable. The longer the period, the less likely that it is enforceable in full. What duration of suspension, garden leave or exemption from work is reasonable depends on the facts and circumstances and therefore even a rough indication cannot be provided or distilled from case law. If employer and employee contracted suspension, garden leaven and/or exemption from work previous this is certainly relevant. In general, a much longer duration shall be considered reasonable.

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?

In principle employees have a right to be actively employed under the Dutch jurisdiction.

[15] Article 2:244 Dutch Civil Code.

Essential is that under article 7:610 DCC the employee performs work and the employer pays wages. According to the Supreme Court the employee has a right to work if the employee has personal or business reasons to work and the employee cannot reasonably be required not to work (e.g. to maintain the level of professional competence).[16] While generally this is not an absolute right. Case law of the lower courts shows us that under certain facts and circumstances the employer can withhold the employee to perform the agreed work. In that case the employer should have reasonable grounds for doing so. See also under paragraph 1.2.1

If an employee is withheld from perform the agreed work he/she can bring preliminary relief proceedings against the employer and can claim for reinstatement. In that event being a good employer plays a role based on article 7:611 DCC. The judge will have to weigh the interests of the employer against the interest and right of the employee to work. In this assessment a judge will also take into account the reasons of the employer to withhold the employee to perform the agreed work and any agreements about suspension, garden leave and exemption from work between employer and employee. A judge will only reject a claim for reinstatement if the employer has sound reasons which lie in misconduct or lack of work. During garden leave and as mentioned under paragraph 1.2.1, the employee is entitled to wages and other employment conditions, unless other agreements made as referred to article 7:628 DCC.

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.

In the event of a termination of employment, the employer and employee usually agree to a termination agreement. Such agreement can be qualified as a settlement agreement wherein employer and employee can derogate from mandatory law. The employer and employee may agree to several covenants and these covenants may also protect the interests of the employer (know how, reputation, intellectual property etc.). It is common practice, that all items that are relevant for the employer at the time of termination in order to protect its interests are included in such agreement.

To what extent employer and employee can agree and derogate from mandatory law in the settlement agreement is not limitless. Based on a recent judgment of the Supreme Court, the settlement agreement can be concluded in order to prevent any (future) dispute (article 7:900 lid 1 DCC). However, article 7:902 DCC implies that the settlement may only be in conflict with mandatory law if it entails to terminate an existing dispute and not as a precaution against a dispute.[17] In practice this means, for example, that employer and employee can agree in a settlement agreement to covenants that

[16] Supreme Court January 23, 1980 (NJ 1980/264).

[17] Supreme Court January 9, 2015 (ECLI:HR:2015:39).

protect the employer's interests but cannot contract out mandatory dismissal protection.

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 general, employment law applies to the relation between athletes and sports clubs. The exceptions are limited, however some sports do have sport-specific regulations. For example, football has its own unilateral option provision. This is prohibited in employment law and only applies within the football sport. Within the possibilities of employment law it is possible to differ from certain provisions by a collective agreement. Social partners can make sport-specific regulations in collective agreements that differ from the normal provisions of employment law.

There are no relevant differences between professionals and amateurs. Most amateurs do not have an employment contract.

In the Netherlands the government has the tendency to be favorable for solutions to protect the sport, in particular the football sport.

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?

Sports clubs do have articles of association, but in general they don't have specific employment law provisions. However, the football sport does know a transfer and solidarity compensation. This is a lex specialis of the FIFA-regulations. In my opinion the regulations of the FIFA and Royal Netherlands Football Association (hereinafter: "KNVB") are inconsistent with European Law. The European Court of Justice ruled in the Bernard-Case that costs for education and training of the player cannot be determined in advance.[18] The costs for education and training should be the actual costs. In the FIFA and KNVB regulations is stated that education and trainings costs are a flat amount. This is not consistent with the ruling of the European Court of Justice.

The right to continue to work for an athlete is affiliated with the admission to his training. If there hasn't been a provision included in the player's contract

[18] EHRM 16 March 2010, C-325/08.

that states that a player is allowed to train with the second team, then he/she is not obligated to train with the second team. In the case there isn't any similar provision in the contract, the player always should be allowed to train with the first team. The right to play in matches of the highest team is not honored in the Dutch jurisprudence.

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?

Almost all sports associations provide a condition in their articles of association in which states that disputes need to be resolved by an arbitrary court at all times. Most of these conditions exclude the possibility of going to regular court.

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?

a) The Bosman-case changed the situation, similar to other countries in Europe, in the Netherlands. Most players are being sold in the last year before the termination of their contract. They are no restrictive measures. The Bosman-case did have an indirect influence to the free choice of employment. The free choice of employment would have been limited if a player would change clubs within the Netherlands. By abolishing the fee-regulations of the KNVB this did not happen.

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?

Within the sport there are no open-ended contracts. We only have fixed term contracts. There are boundaries due to employment law on the amount of fixed term contracts before it will become an open-ended contract, although the

football sport has its exceptions. This unilateral option division implies that a sports club can extend the contract during the contract. In that case the player does not need to give his permission for the extension of the contract.

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?

A player is not allowed to switch clubs during the term of the employment contract for a certain transfer fee without the consent of the former club. An employment contract is not terminable unilaterally. The consent of the club is always necessary. This can be different in case both parties agree on a limited transfer fee prior to the signing of the employment contract. In that case the player 'buys' the consent of the club.

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 case a player switches clubs without consent the player is liable for compensation to the former club.

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.

Trabelsi-Case

The Court of Arbitration for Sport decided that a unilateral option during the entering of an employment contract was allowed in this case. And it did not conflict with the legal system regarding the termination of an employment contract. The matter in the Trabelsi-case was the extension of a contract. There are certain conditions that apply. Firstly, the potential maximum term of the employment contract may not be excessive. The total term may not extend the period of five years. Secondly the option must be vetted within a reasonable term before the end of the contract. At last the unilateral option needs to be included in the first contract, so that the player is aware of consequences of the condition during the signing of his contract.

Suarez-case

Suarez has been subject to the Court of Arbitration for Sport many times, but not only for biting incidents. In 2007 Suarez was playing for FC Groningen. He played for one year and wanted to go to AFC AJAX. He started a procedure against FC Groningen because they weren't willing to let him go. He claimed that there was a substantial improvement when he would play for Ajax, not only in his salary, but also on sporting level. Groningen could not offer him the same salary. The arbitrary court decided that the improvement wasn't substantial enough and Suarez had to be kept to his contract at FC Groningen. Even though the Court of Arbitration for Sport didn't allow Suarez to leave for Ajax, the same day of the ruling Ajax and Groningen agreed on a transfer.