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

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National Report of Sri Lanka

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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. A former 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 a former 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 (former) 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" former 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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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)

Post termination restrictive covenants are known to the Sri Lankan legal system.

It is common practice for employers, where there is a risk of confidential information being divulged by an employee, to impose obligations of confidentiality and/or impose restraints on employees being employed by a competitor/soliciting customers.

In Sri Lanka, the law of contract is a mixture of the Roman Dutch law which is the common law of Sri Lanka subject to English common law principles being applicable in certain areas of the law. Historically, during the time when Sri Lanka, (or Ceylon as it then was), was a Crown Colony in the British Empire, the influence of English common law and English law concepts tended to overshadow Roman Dutch law concepts and this phenomenon was accentuated by the fact that many lawyers and Judges were trained in and most familiar with English law concepts.

There is not much reported case law in Sri Lanka dealing with restrictive covenants, and the legal position in regard to the validity of restraint of trade clauses is neither very clear nor well settled. There is considerable uncertainty in this area of law though it is likely that a Court would be guided by English law principles.

In general terms, English common law appears to recognize the category of agreements in restraint of trade as illegal and void unless reasonable, whereas under the Roman Dutch Law there does not appear to be any express principle expounded by the authors *per se* that invalidates such agreements. As a result, agreements in restraint of trade should, arguably, be treated as valid since the residuary common law of Sri Lanka is the Roman Dutch law. However, the influence of English common law decisions and principles in this area is strong, and there has been a tendency by the Sri Lankan judiciary to follow the persuasive authority of decisions of the Courts in England in regard to restraint of trade disputes. Courts in Sri Lanka have held that all contracts in restraint of trade are *prima facie* void and each case must be

examined having regard to its special circumstances to ascertain whether or not the restraint is justified.

The only ground of justification is that the restraint is reasonable having regard to interests of both contracting parties as well as to the interests of the public. These decisions followed British case law precedents brought to the attention of the Court in which it had been held that whether partial or general, covenants in restraint of trade, are *prima facie* void and unenforceable unless the test of reasonableness can be proved.

The Sri Lankan Constitution under Article 14 accords certain fundamental rights to citizens which include the freedom to engage by himself/herself or in any association with others in any lawful occupation, profession, trade, business or enterprise subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to the professional, technical, academic, financial and other qualifications necessary for practicing any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right, and the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.

The Constitution provides that the fundamental rights enshrined therein are justiciable in respect of State or administrative action which infringes such rights. However it is possible that an argument based on a fundamental right could be raised in litigation connected with a restraint clause. We are not aware of any reported judgment in which the impact, (whether direct or indirect, if any), of the said provision in the Sri Lankan Constitution has been considered.

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?

Post termination restrictive covenants are agreed upon at the time of entering into the employment contract/agreement. The restrictive covenant would generally be inserted as a clause in the employment agreement/contract entered into by the employer and employee.

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?

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?

There are no specific Sri Lankan statutory provisions governing an employer's duties after termination of employment in the context of post termination restrictive covenants.

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.

Non-Compete Covenants

These are clauses that require a post termination non-competition covenant from an employee. Although this category is referred to, generally an employer cannot prevent an ex-employee from competing as this is considered by some Court decisions as being contrary to the important public policy underpinnings of freedom of contract and competition. However, a non-compete restrictive covenant may be justifiable if it is designed to protect a legitimate business interest such as confidential information, and if it is reasonable as between the parties as well as in the public interest. A covenant which restrains an employee from competition would likely be held to be void as being unreasonable, unless there is some exceptional proprietary interest owned by the employer, whether in the nature of a trade connection or in the nature of trade secrets, which requires protection. A restraint against competition by an employee has been held to be justifiable if its object is to prevent the exploitation of trade secrets learned by the employee in the course of employment.

Covenants prohibiting contact with customers/clients

It would appear from case law that a restraint protecting an employer's customers from being enticed away from such employer by a former employee would only be valid in cases where the nature of the employment is such that the customers dealt with the former employee directly and personally, with the result that such former employee would probably gain their custom if the former employee were to set up a business of his/her own. It would also appear that a Court would more readily enforce a customer specific restriction but enforcement of such a restriction must also be reasonable so as to permit freedom of trade and the ability for the employee to use his or her skills.

Non-solicitation of employees covenant

There isn't any principle mentioned in the little local case law that has been reported in Sri Lanka which provides that an agreement restricting solicitation and hiring of former colleagues would be legally valid or invalid.

However, if a Court were to find that a former employee engaged in such conduct and such conduct was viewed by a Court as amounting to unfair competition, irrespective of whether or not such restraint was legally valid, it could be prevented.

Restrictive covenants on employment elsewhere during the course of employment

It has been held by the Sri Lankan Courts that a person is entitled to seek employment with multiple employers so as to maximize his monthly income so far as the test of reasonableness is satisfied. The Court has previously held that where such employment impacts adversely on the quality of the work, appropriate action can be taken at that stage and that such concerns of the employer cannot restrict a person's reasonable right to seek employment at multiple establishments.

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.

As per the likely currently applicable principles and decided cases it is likely that a Court would not refer to specific explicit conditions, (pre-requisites of the nature mentioned), in order to determine whether or not a post termination restrictive covenant is valid but such considerations may be implicit or inherent in an evaluation by the Court of whether or not the restrictive covenant is reasonable and justifiable.

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.

Sri Lankan Courts have held that covenants in restraint of trade, are *prima facie* void and unenforceable unless the test of reasonableness can be proved.

To enforce a restrictive covenant in an employee agreement the Court must be satisfied that the employee was using trade secrets or canvassing customers of the employee to its detriment. The restraint must also be reasonable in respect of the area within which the employee could work, its duration, and whether or not the covenant is too restrictive of the activities restrained.

Courts have also held that in ascertaining the reasonableness of any covenant alleged to be in restraint of trade, the extent of the prohibition and the time period which the prohibition is operative are important considerations.

Courts have held that a restraint against competition by an employee is justifiable if its object is to prevent the exploitation of trade secrets learned by the employee in the course of his employment. In such trade secrets cases the employer would have to prove definitely that the employee has acquired substantial knowledge of some secret process or mode of manufacture used in the course of business.

The Courts have also held that the interests of the employer will only be protected within proper limits as to the period of time and geographical area.

Following English case law precedent, it is likely that an agreement not to trade in a particular place for a period of time would not be considered to be an unreasonable restraint as to be void if the trade is unique/extraordinary to that particular place. However, a condition which limits the space but does not fix the time may be held to be valid if reasonable in the circumstances.

As observed in the response to question 1.1.5 a restraint protecting the employer's customers being enticed away by a former employer would be considered to be enforceable only if it is reasonable so as to permit freedom of trade and the ability for the employee to use his skills.

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.

Sri Lankan law follows the English remedy for a breach of a restrictive covenant which is injunctive relief. A Court in Sri Lanka may issue either an interim or final injunction. Enjoining orders are also available under certain circumstances. A Court in Sri Lanka would have to be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief in order to issue an injunction.

The Court would also take into consideration whether the circumstances are such that a decree which may ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction is not issued. It should be noted that, Courts here have long followed English law authority that an injunction will not be allowed against an employee if the consequences of that injunction would be to put the employee in a position that he could have to go on working for the former employer or starve.

Further, the remedies available for breach of a contract under contract law would also be applicable.

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?

It could be argued that in as much as the new employer is not a party to the contract of employment entered into between the employee and the former employer, that as a matter of the law of contract, there are no possible sanctions against the new employer.

However a Court may view the acts of the former employee and/or the current employer as amounting to unfair competition. Unfair competition is defined by section 160(1) of the Intellectual Property Act No. 36 of 2003 ("the IPA") as any act or practice contrary to honest practices in trade or industry and, in particular, in terms of section 160(2) of the IPA as any act or practice carried out or engaged in, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion with respect to another's enterprise or its activities, in particular, the products or services offered by such enterprise.

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?

Whether or not an employer could obtain a refund from an employee for any expenses the employer has borne for any employee training, would likely depend on the facts of each case. If the employee had represented that he or she would continue employment subsequent to the training provided at the employer's expense and then changes his or her mind and ends the employment relationship, or if the employee deliberately misrepresented in the aforesaid manner to the employer and then ends the employment relationship, causing the employer loss and damage, (arising out of the fact that the employer incurred expenses on the training, but the employee did not provide his or her services), a cause of action may arise based on breach of representation or misrepresentation. However, any prudent employer would insist that a bond be entered into with the employee whereby the employee would agree to continue employment for an agreed period and could, should such employer so wish, sue on the bond in the event of a breach of the obligations undertaken by 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 rumours)?

The remedies available to the employee, if any, would depend on the precise factual circumstances. For example if the rumors were defamatory, then an action seeking damages for defamation could be instituted.

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?

There is no express statutory provision as a matter of Sri Lankan law in regard to garden leave.

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?

The question of whether or not, as a matter of Sri Lankan law, there is an implied obligation to provide work in the context of the master – servant (employer – employee) relationship or just to pay the salary of the employee has been discussed by an eminent Sri Lankan author on employment law, S. R. De Silva, (whose works have even been cited in Supreme Court judgments), in chapters / sections in two of his books:

1) the section titled "Right to work or wages?" at page 119 in his book "Some Concepts of Labour Law (1977), and
2) more fully in section D: "Right to Work" in his book "The Contract of Employment (Monograph No. 4)", 1998 revised ed.

In a nutshell, the said Sri Lankan author refers to the approach followed in the UK and states that the same approach would be applicable in Sri Lanka. He states that "an employer's basic obligation in a contract of employment is to pay remuneration, while the employee's basic obligation is to perform services. As such, an employer who pays remuneration while at the same time refusing the service cannot be said to be in breach or to have affected a termination of the contract." This is however subject to certain exceptions recognized in the UK law, where the Courts would imply a duty to provide work, based on the nature of the employment. Examples include:

(a) contracts with performers such as singers and actors, who need to remain in the public eye

(b) employees on piece-rate or commission basis

(c) highly skilled employees who need to work in order to maintain or develop their skills, e.g. a surgeon

There do not appear to be any locally reported judgments wherein the issue of the right to work has been examined.

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.

Section 160(6) of the Intellectual Property Act ("the IP Act") provides for the protection of "undisclosed information". This section could be used to prevent a former employee from using such information in an industrial or commercial context. In addition, the employer may institute a common law action for breach of confidence. The right to bring such action at common law is specifically reserved by section 160(9) of the IP Act.

The contract of employment should have a confidentiality clause, or alternatively, the employee should be made to sign a non-disclosure agreement at the time of commencing employment. The clause/agreement should clearly define what information is restricted.

The employer could also require the employee to sign a bond with sureties undertaking not to join a competitor and/or not to use confidential information after leaving employment. If the employee breaches the undertaking, the employer could then have recourse against the sureties.

1. The World of Sports and Employment Law

1.1. General questions

1.1.1. 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?

The practice of sports clubs in Sri Lanka is generally such that athletes will play for the respective sports club or association on a voluntary basis / upon gaining membership. The relationship between the athlete and the sports club or association is not necessarily governed under a contract of employment.

However, athletes will be bound by the rules and regulations that are applicable to the members of the respective sport clubs or associations.[2]

It would appear that the only sports body which employs players who represent Sri Lanka at an international level is Sri Lankan Cricket. When we contacted Sri Lanka Cricket, we were unable to obtain any information in regard to employment contracts as this information is said to be confidential.

1.1.2. 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 aren't any statutory provisions. We do not have any information in regard to the provisions which Sri Lanka Cricket may be imposing in its contracts with cricketers. It is likely that a garden leave provision could be challenged by a sportsman who is a former employee since there could not conceivably be an overriding interest of the employer to prevent the sportsman from pursuing his or her vocation.

1.1.3. 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?

As per the National Sports Policy of Sri Lanka[3] it is proposed to institute an independent Tribunal and an Arbitration Board to inquire to in disputes regarding sports with the objective of settling disputes arising in the sports field and disciplinary matters. However it should be noted this proposal has not yet been implemented. At present there is no specific court or arbitration system currently functioning in Sri Lanka

1.2. Transfer Fee System and termination of contracts

Given the general absence of an employer-employee relationship between the athletes and the sport club/association, we are not aware of a transfer fee system operating in Sri Lanka.

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[2] We have not been able to obtain copies of the constitutions of the numerous clubs and associations in Sri Lanka and this information is based on what we were told by a legal officer of one of the Associations.

[3]The National Sport Policy of Sri Lanka, can be accessed through the internet and is available at: http://www.sportsmin.gov.lk/main/images/documents/sports_policy/Sports_Policy_English.pdf

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

N/A

1.2.2. 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 the general absence of employer-employee relationship between athletes and sports clubs or associations in Sri Lanka, we are not aware of any specific provisions in the constitutions of sports associations dealing with the termination of the employment contracts of athletes in Sri Lanka.

1.2.3. 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?

Does not arise.

1.2.4. 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?

Does not arise.

1.3. 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 judgments.

Not applicable in the general absence of an employer employee relationship between athletes and sports clubs/associations in Sri Lanka.