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 Switzerland

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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?

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)

Yes, Swiss employment law allows an employer and an employee to contractually agree on post-employment non-compete clauses.

The conditions of validity of such clauses, the restrictions, the consequences of infringement and the extinction are detailed in article 340 to 340c of the Swiss Code of Obligations (CO). Other laws, such as the Federal Act against Unfair Competition (UCA), also play an important role.

As the CO only provides general rules, case law is very important for determining what kind of restrictive covenants are valid and enforceable. Case law for instance provides that post-employment non-compete clauses may in principle not be imposed on employees working in liberal professions (e.g., lawyers, doctors).

According to the Federal Act on Personnel Recruitment and Posting of Employees, an employee employed by an agency and posted or leased to a company may not be restricted from working for such company after the end of his employment agreement with the agency.

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-employment non-compete clauses may be agreed upon at any stage in the employment relationship, i.e. in the initial employment contract, in an subsequent amendment or at the time of termination.

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?

In the absence of an express post-employment non-compete agreement, a general obligation of non-compete derives from the principle of loyalty as defined at Article 321a CO:

"[...]
[3]During the employment relationship, the employee shall not perform work for third parties against compensation to the extent such work violates his duty of loyalty, and, in particular, to the extent it competes with his employer.
[4]In the course of an employment relationship, the employee shall not make use of or inform others of any facts to be kept secret, such as, in particular, manufacturing or business secrets that come to his knowledge while in the employer's service. Also, after termination of the employment relationship, he shall continue to be bound to secrecy to the extent required to safeguard the employer's legitimate interests."

During employment, employees may not compete against their employer. However, if no specific remedies are stipulated in the employment agreement, employers may only terminate the employment and claim damages, unless the competitive behavior also qualifies as unfair competition under the UCA or constitutes a criminal offense.

Employees are prohibited from disclosing or making use of confidential information or trade secrets. This prohibition remains valid even after the end of the employment as long as the employer has a valid interest in the confidentiality of such information (see below 1.1.5).

As of today, there is no specific regulation on *whistleblowing*. A draft amendment of the CO has been prepared by the Federal Department of Justice. As it is quite debated among the scholars and the politicians, it is still difficult to forecast how this issue will be dealt with in the future[1].

In the absence of any clear regulation, and although some companies have implemented internal rules to encourage *whistleblowing*, an employee should be very careful in this respect and divulge facts regarding his/her employer or colleagues to the media only as an *ultima ratio*, after having divulged in vain such facts to the employer himself and to the competent civil, administrative or criminal authorities. If a denunciation is disproportionate, it may be considered

[1] Details on the status of the discussion can be found at https://www.bj.admin.ch/bj/fr/home/wirtschaft/gesetzgebung/whistleblowing.html

as a breach of the principle of loyalty and lead to sanctions such as the termination of the employment agreement.

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 post-employment non-compete agreement, there are no specific obligations on the employer's side.

It is generally admitted that, to some extent, the obligation of the employer to protect the employee's individuality according to Article 328 CO (see below) still exists after the termination of the employment contract and that the employee may file a lawsuit for payment of damages on this basis (see below 1.1.11.) [2].

"[1]In the course of the employment relationship, the employer shall respect and protect the employee's individuality, pay due regard to the employee's health, and care for the preservation of morality. He shall, in particular, make sure that the employees are not sexually harassed and that victims of sexual harassments are not further disadvantaged.

[2]For the protection of the employee's life, health and personal integrity, the employer shall take those measures which are necessary according to experience, applicable according to the current stage of technology, and adequate according to the circumstances of the enterprise or the household, to the extent that he may reasonably be expected to do so, taking into consideration the individual employment relationship and the nature of the work."

1.1.5. What kind of different restrictive covenants 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.

a) Non-competition covenant

According to Article 340 CO, an employee may enter into an obligation towards the employer to refrain from any competitive activity after termination of the employment relationship (see below 1.1.6. and 1.1.7. for the conditions and the scope of such obligation).

[2] Judgment of the Federal Supreme Court of 7 September 2004, ATF 130 III 699 = SJ 2005 I 152

b) Non-solicitation of Clients and Customers (non-dealing covenants)

During employment, employees may not solicit clients and customers, even if a notice of termination has been issued and the notice period is running.

A specific post-contractual non-solicitation covenant relating to clients and customers is subject to the same restrictions as a general post-employment non-compete agreement (see below 1.1.6. and 1.1.7.).

In practice, it may be quite difficult for an employer to efficiently prohibit an employee from soliciting any clients and customers as the evidence of such solicitation is not easy to bring.

According to case law, if a client or customer does business with an employer solely because of very specific knowledge or specific capabilities of an individual employee (e.g., lawyers, doctors), then a non-solicitation covenant can be void.

c) Non-solicitation of Employees (non-poaching covenants)

The question whether non-solicitation covenants are subject to the same restrictions as non-competition covenants is debated. Some case law considers that such covenants are not licit[3].

According to the UCA solicitation of employees is allowed as long as it is not based on unfair means or behavior. Article 4 UCA prohibits in particular the enticement of an employee to breach his or her employment contract (e.g. to provide client lists or other confidential information).

d) Confidentiality and Trade Secrets

Article 321a(4) CO prohibits employees from disclosing or making use of confidential information or trade secrets. This prohibition remains valid even after the end of employment as long as the employer has a valid interest in the confidentiality of such information.

Confidential information is not defined by the CO, but by case law as information which (i) is only known by a limited group of persons, (ii) is not publicly available and cannot be retrieved by general research, (iii) the employer has a legitimate interest to keep confidential and (iv) a third party can easily recognize that the employer wants to keep confidential.

The use of confidential information and trade secrets by third parties can also qualify as unfair competition under the UCA.

Employers often try to extend the confidential status to a wide range of information in confidentiality covenants. However, such broad definitions may prove to be counterproductive as courts apply their own test in order to determine whether or not information is confidential.

[3] Judgment of the Federal Supreme Court of 20 February 2004, ATF 130 III 353 = JdT 2005 I 12

If confidentiality covenants are so strict that employees are *de facto* prohibited from working in a competing environment, courts may consider that they constitute a hidden non-competition covenant and apply to such covenants the same restriction as to non-competition covenants.

e) Others

Other ways for employers to protect themselves more efficiently against the consequences of headhunting include for instance longer notice period than those provided by Article 335c CO (one, two, or three months), bonus rules or stock options plans providing that the rights of the employee depend on the continuation of their employment.

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.

The conditions for a valid post-employment non-compete agreement are provided for at Article 340 CO:

"[1]An employee who has full legal capacity may bind himself in writing to the employer to refrain from engaging in any competitive activity after termination of the employment relationship, in particular neither to operate a business for his own account which competes with the employer's business, nor to work for nor participate in such a business.

[2]The prohibition against competition is only binding if the employment relationship gives the employee access to the customers or to manufacturing or business secrets, and if the use of such knowledge could significantly damage the employer."

and 340a CO*:*

"[1]The prohibition shall be reasonably limited in terms of place, time, and subject, in order to preclude an unreasonable impairment of the employee's economic prospects. It may exceed three years only under special circumstances.

[2]The judge may in his discretion limit an excessive prohibition against competition taking into account all circumstances, and he shall give due consideration to the employer's contributions, if any."

Because of the written form requirement, non-competition clauses in general employment conditions are not enforceable.

In general, courts tend to uphold restrictions on managers more than on normal employees.

An important feature of Swiss law is that a consideration is not a condition of validity of post-employment non-compete agreements. It is only one element

of appreciation among others as courts are generally more reluctant to restrict agreed prohibitions where the employee receives consideration.

According to Article 340c CO:

"[1]The prohibition of competition is extinguished once the employer demonstrably no longer has a substantial interest in its continuation.

[2]The prohibition is likewise extinguished if the employer terminates the employment relationship without the employee having given him any good cause to do so, or if the employee terminates it for good cause attributable to the employer."

Ordinary reasons, such as an economic reason, are therefore not sufficient. On the contrary, the employee must have breached an obligation under his employment agreement.

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.

As indicated in Article 340a CO (see above 1.1.6), the post-employment non-compete agreement must be reasonably limited in terms of place, time, and subject in order to preclude an unreasonable impairment of the employee's economic prospects. The maximum duration of a post-employment non-compete agreement is three years. A judge may limit an excessive prohibition (blue pencil modifications) against competition, whereas due consideration to the employer's contribution, if any, must be given.

Courts tend to limit post-employment non-compete agreements with regard to subject (products, services), place (market), and time, particularly if they are drafted as "catch-all" clauses. It is therefore important to draft post-employment non-compete agreements in a way that protects the employer's legitimate business interests, without unreasonably preventing the employee to continue his career. Post-employment non-compete agreements should thus only cover the main products or services for which the employee was responsible and the main geographic markets in which such products and services were sold. A non-competition period should only be as long as the employer needs to reestablish a customer relationship with a successor of the former employee.

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.

In case of breach of the loyalty obligation, an employer may file a lawsuit for payment of damages based on Article 321e CO or on Article 41 paragraph 1 CO (obligations originating from tort), according to which *"Whoever unlawfully causes damage to another, whether wilfully or negligently, shall be liable for damages"*. He may also file a criminal complaint against the employee.

Under specific circumstances, the employer may file an urgent request for provisory measures to prevent irreversible damage.

According to Article 340b CO:

"[1]An employee who infringes the prohibition of competition must provide compensation for the resultant damage to the employer.

[2]Where an employee who infringes the prohibition is liable to pay a contractual penalty, unless otherwise agreed he may exempt himself from the prohibition by paying it; however, he remains liable in damages for any further damage.

[3]Where expressly so agreed in writing, in addition to the agreed contractual penalty and any further damages, the employer may insist that the situation that breaches the contract be rectified to the extent justified by the injury or threat to the employer's interests and by the conduct of the employee."

The remedy of specific performance (compliance with the post-employment non-compete agreement) requires a specific enforcement clause in the written agreement, without which the employer may only claim damages (but no punitive damages). An employer may request the court to issue a court order to comply with the restrictive covenant (the breach of which is sanctioned by a fine and/or imprisonment) or a court order to hand over documents or materials such as documents relating to trade secrets and client lists.

As the burden of proof for damages requires real factual evidence of damage, it is often difficult for an employer to claim damages. It is therefore highly recommended to provide for an adequate agreed penalty in the agreement, which the courts may reduce if they are excessive.

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?

As there is no contractual relationship between the former employer and the new employer, an action against the latter is hardly conceivable, unless he/she has acted unlawfully in the sense of Article 41 CO (see above 1.1.8.).

Competing with a former employer is not prohibited by the UCA. Any action under the UCA against the former employee or the new employer is only possible if the competition is based on unfair means, such as using confidential data or trade secrets or copying the business model or the work results of the former employer.

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 only little case law on this issue, but it is generally admitted that an employer who has invested money in an employee's training may get a refund from the employee, in case of termination of the employment contract.

The conditions for such obligation of the employee to reimburse the employer must have been contractually agreed in advance and may not unreasonably prevent the employee from his right to terminate the employment contract, for instance due to an excessive amount to reimburse or to an excessive duration of this obligation.

1.1.11. What are the possibilities of lawsuit for the employee in case of the employer's disadvantagous 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)?

If an employer breaches his/her obligation to protect the employee's individuality, even after the termination of the employment contract, the

employee may, to some extent, file a lawsuit for payment of damages based on Article 328 CO (see above 1.1.4.). [4]

The judge may order a party to stop acts of disloyal actions. In order to force this party to follow the order, he/she may threaten a fine or detention pursuant to Article 292 of the Swiss Criminal Code for non-compliance with the order.

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?

Yes, the concept of "garden leave" exists in Switzerland.

The minimum length of the notice period applicable to individual employment is set forth in the CO and depends on the length of service. However, the parties may reduce the notice period to not less than one month, subject to any longer periods set forth in collective bargaining agreements.

Once the notice of termination has been served, the employer may in principle release the employee from duties immediately or at any time before the end of the notice period (garden leave).

Under certain circumstances, such as a very long garden leave and a profession in which the value of an employee on garden leave decreases (e.g. professional athletes, artists or surgeons), such employee may argue the garden leave is a breach of his/her personal rights and terminate his/her employment contract with immediate effect for cause.

An employee on garden leave retains all contractual entitlements to remuneration, including pension entitlements. Both the base salary and the variable salary must be paid. The calculation of variable salary is however often difficult. For example, an employee is in principle entitled to on-target variable pay, but if he/she was always over target in the past, he/she may be entitled to be paid on the basis of past performance.

On the contrary, an employee on garden leave is not entitled to receive a fully discretionary bonus.

[4] Judgment of the Federal Supreme Court of 7 September 2004, ATF 130 III 699 = SJ 2005 I 152

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?

As already indicated (see above 1.2.1), some specific categories of employees (e.g. professional athletes, artists or surgeons) may argue that the garden leave imposed on them is a breach of their personal rights. The consequence of such breach is however not a claim to be actively employed by the current employer, but the right to terminate their employment contract with immediate effect for cause and to start a new employment with a new employer before the end of the garden leave.

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 order to protect his interests at the end of an employment contract, an employer may for instance adopt a stock option plan according to which the vesting of equity rights is subject to conditions, such as:

- Absence of notice of termination;
- Compliance with contractual obligations; and
- Fulfillment of performance criteria.

If the grant of equity is qualified as variable salary and not as discretionary bonus, an employee may however challenge the validity of such vesting conditions. The qualification depends among other criteria, on the percentage of total compensation, the frequency of grants, the position of the employee, the granting entity, etc. It is therefore important to consider the global compensation structure to assess whether a vesting condition is valid or not.

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?

(…)

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?

(…)

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?

(…)

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?

(…)

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?

(…)

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?

(…)

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?

(…)

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.

(…)

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