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:
Employment Law Commission
IBLC Sports Law Subcommission

London, 2015

National Report of Hungary

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22 March 2015

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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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 RESTICTIVE COVENANT is well known and widely used legal instrument in the Hungarian legal system. Primarily this principle is governed by the Act I of 2012 on the Labor Code

The Labor Code governs the non-competition agreement among the Chapter titled Agreement Related to Employment Relationships as follows:

"(1) By agreement of the parties, the employee shall not engage in any conduct - for up to two years following termination of the employment relationship - by which to infringe upon or jeopardize the rightful economic interests of the employer.

(2) In exchange for honouring the obligation defined in Subsection (1) the employer shall be liable to pay adequate compensation. In determining the amount of such compensation, the degree of impediment the agreement has on the employee's ability to find employment elsewhere - in the light of his education and experience - shall be taken into consideration. The amount of compensation for the term of the agreement may not be less than one-third of the base wage due for the same period.

(3) The employee shall have the right to withdraw from the agreement if having terminated his employment according to Subsection (1) of Section 78.

(4) In the case of transfer of employment upon the transfer of enterprise, the rights and obligations arising from the agreement shall be transferred to the receiving employer."[1]

In the light of the above referred non-competition, or also called as excluding or eliminating competition agreement between the parties, it basically provides rules for the termination of the employment relationship, and aims to govern the following several years when the employment relationship ends. At the same time obviously aims to set up rules what kind of acts shall be avoided by the employee and therefore provide certain protection for the former employer and its economic interest when the employee enters into a new employment relationship.

[1] Section 228 of the Labor Code

It worth to note that not only the Labor Code determines this legal instrument, but as even the Labor Code refers – in more details – this instrument as an agreement between the parties governed by the Act V of 2013 on the Civil Code. Before the new Labor Code entered into force with the date of 1 January 2012 and restrictive covenant clause became available for the parties under the labor law rules, certainly the legal instrument was also available under the – previous[2] – Civil Code.

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?

There is no time limit when the parties may agree upon post termination restrictive covenant. It can be in their agreement by which they establish the employment relationship, but they also might enter into a separate agreement or modify the employment contract any time keeping the other provisions of the contract in force with the original content.

Nevertheless, it always depends on the parties whether to include such clause into their agreement, since beside the above referred labor code provision, the origin and the details of such statutory provisions could be found among the rules of the civil code. Mutual agreement of the parties is emphasized, however in case the employer intends to introduce certain restrictions for the purpose of protecting its economic interest, these restrictions enter into force providing that they are properly and timely communicated – in written form – to the employee.

Regarding the case law, since the Hungarian Labor Code has recently entered into force, therefore the relevant case law is still to be formed.

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 absence of an express agreement between the parties, there is also a general obligation of non-compete under the Section 8 of the Labor Code as follows:

(1) During the life of the employment relationship, workers shall not engage in any conduct by which to jeopardize the legitimate economic interests of the employer, unless so authorized by the relevant legislation.

[2] Act IV of 1959 on the Civil Code of the Republic of Hungary

(2) Workers may not engage in any conduct during or outside their paid working hours that - stemming from the worker's job or position in the employer's hierarchy - directly and factually has the potential to damage the employer's reputation, legitimate economic interest or the intended purpose of the employment relationship. The actions of workers may be controlled as defined in Subsection (2) of Section 9. When exercising such control, the workers affected shall be informed in writing in advance.

(3) Workers may not exercise the right to express their opinion in a way where it may lead to causing serious harm or damage to the employer's reputation or legitimate economic and organizational interests.

(4) Workers shall maintain confidentiality in relation to business secrets obtained in the course of their work. Moreover, workers shall not disclose to unauthorized persons any data learned in connection with their activities that, if revealed, would result in detrimental consequences for the employer or other persons. The requirement of confidentiality shall not apply to any information that is declared by specific other legislation to be treated as information of public interest or public information and as such is rendered subject to disclosure requirement.

At first hand this provision is governing the terms and conditions, rights and obligations of the parties during the employment relationship, however in subsection (4) of this section refers to general obligation of maintaining confidential information not only during the term of the agreement between the parties, but even for the period when the employment relationship terminates. Beside the general rules, Article 228 of the Labor Code provides express detailed protection as mutually agreed by the employer and the employee following the employment relationship between the parties.

The provision can be found in the very first part of the Civil Code, among the General Provisions – Chapter One, following the Introductory Provisions covering the Objective and Scope of the Act itself, as well as the Interpretation principles under the title of Common rules of conduct.

Section 8 of the Labor Code provides the fundamental obligations of the employee aiming to collect those general norms by which the frame of the rules of conduct is defined. Using general instead of exhaustive list of norms, this refers to the basic protection of the employee, primarily from the economical point of view as one of the, if not the most important interest of the employee. Also taken into account principles such as the protection of the good repute, data - , private business information and trademark, we can conclude that these principles also covers the economic interest of the employee and its role and position on the market, in the competition and economic area, noting that the possible consequences of breaching such obligation and general expectation is governed among the rules of terminating – for example with immediate effect – the relationship.

In strict terms according to the above referred statutory provisions the conduct and behaviour of the employee could be limited during and after the term of the employment relationship, however it goes without saying that the terms and conditions

of the non-competition agreement shall not mean an inappropriate and unlimited restriction.

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?

Beside the above referred Section 8 of the Labor Code, the obligation of keeping secret is set up among the same statutory provisions, however the definition of the trade secret is regulated in a separate legal source, namely the Section 2:47 of the Civil Code under the title of right to commercial secrecy; Know-how:

(1) Trade secrets shall include any fact, information and other data, or a compilation thereof, connected to economic activities, which are not publicly known or which are not easily accessible to other operators pursuing the same economic activities, and which, if obtained and/or used by unauthorized persons, or if published or disclosed to others are likely to imperil or jeopardize the rightful financial, economic or commercial interest of the owner of such secrets, provided the lawful owner is not subject to actionability in terms of keeping such information confidential.

(2) Commercial secrecy shall also apply to technical, economic and other practical knowledge of value held in a form enabling identification, including accumulated skills and experience and any combination thereof (hereinafter referred to as „know-how"), if acquired, used, disclosed or published in violation of the principle of good faith and fair dealing. This protection shall not apply where a person obtains the know-how, or any knowledge which essentially has the same attributes:

a) by means of development independent of the proprietor; or

b) by way of testing or analysing a lawfully acquired product or lawfully received service.

(3) Breach of commercial secrecy shall not be relied on as against a person who has obtained trade secrets or know-how from third parties in good faith, in the course of trade for consideration.

In the light of the above we need to emphasize that the non-competition, confidentiality clause and provisions of keeping and protecting trade secret are not the same legal instruments therefore they are defined in different sections of different Acts and Codes but definitely they are in connection with each other. Most of the cases the restrictions are applying to the employees and not the employers since the employees are getting into the position of receiving special knowledge about the interest of the employee during the employment relationship.

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.

According to several case law, the employee is in the breach of the economic interest of the employer in case as a head of the sales and marketing department learns that a competitive business association enters into the market, and he fails to disclose this information to his employee, however he is indirectly – through his wife – interested in the business association. [*EBH 2069/2009*.]

Regarding the restrictive covenants, first of all according to the statutory provisions the employee shall not work or support the competitive entity on the market, cannot deliver and disclose trade secret and information during the term of the employment relationship.

After the relationship is terminated even without an express non-competition clause the ex-employee shall not disclose to third parties any trade secret, for example list of clients, documents, protected information and also shall not detriment the good repute of the former employee. The frame and list of the protected information and secret is defined not only in the Labor and Civil Code but also in the Criminal Code as well as follows:

Invasion of Privacy – Section 223

(1) Any person who reveals any private secret he has obtained in a professional or official capacity without due cause is guilty of a misdemeanour punishable with custodial arrest.

(2) The penalty shall be imprisonment not exceeding one year if the criminal offense causes a substantial injury of interest.

Breach of Trade Secrecy – Section 413

(1) Any person who has been committed to confidentiality with respect to bank, securities, fund, insurance or occupational retirement secrets, and who makes available any bank, securities, fund, insurance or occupational retirement secret to an unauthorized person for financial gain or advantage, causing financial loss to others is guilty of a misdemeanour punishable by imprisonment not exceeding two years.

(2) Breach of trade secrecy shall not apply to any person:

a) who conveys information in discharge of the statutory obligation prescribed in connection with information of public interest or public information; or

b) who conveys information subject to the statutory reporting obligation prescribed by law in connection with the prevention and combating of money laundering and terrorist financing, insider dealing, market manipulation and the fight against terrorism, or who initiates such action, even if the report he filed in good faith has proved to be unfounded.

Breach of Business Secrecy – Section 418

Any person who illegally acquires, uses, or discloses a business secret for financial gain or advantage, or makes it available to others or publishes such information, causing pecuniary injury to others is guilty of a felony punishable by imprisonment not exceeding three years.

No matter the employer makes the employee sign a non-disclosure agreement or not, certain general rules are applicable.

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 for the written non-disclosure provisions the following principles shall be taken into account:

- the restriction shall be proportional to the protected economic interest of the employer;
- the restriction shall not mean an unreasonable limitation of the fundamental rights of the employee;
- shall have a mutual agreement between the parties;
- having a non-competition clause could be a condition of entering into an employment agreement; however it cannot be a condition of continuing an already existing relationship between the parties;
- the restriction could last for the maximum of two years;
- compensation and proper, reasonable consideration shall be used having in mind the education and experience of the employee;
- the amount of the proper compensation for the term of the agreement means **not less** than one-third of the base wage due for the same period, consequently for examples in case of 1 year restriction 4 months of base wage and 2 years of restriction 8 months of base wage;
- the amount shall be paid upon the termination of the employment relationship as a lump sum;
- upon transfer of employment, the rights and obligations arising from the agreement shall be transferred to the receiving employer;
- the terms and conditions shall be interpreted according to the civil law provisions beside labor law;
- such agreement could be cancelled or withdrawn.

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 the above 1.1.6. answer, term, proper consideration and mutual agreement of the parties are the main points. However there are some other circumstances that shall be taken into account as well.

In case of Transfer of Employment Contracts Upon the Transfer of Enterprise, as the rights and obligations arising from employment relationships, existing at the time of transfer of an economic entity (organized grouping of material or other resources) by way of a legal transaction are transferred to the transferee employer, therefore the non-competition restrictions – if there is any beside the general rules – shall be applicable as well noting that according to the Section 37 of the Labor Code "*before the time of transfer the transferring employer shall inform the receiving employer concerning the employment relationships involved, and also on the rights and obligations arising from non-competition agreements and study contracts. Failure to provide the information shall have no bearing as to the enforcement of rights arising from such covenants on the receiving employer's part.*"

There are further specific rules regarding the employment relationships with public employers according to the Subsection (3) and (4) of the Section 207 of the Labor Code:

"(3) A non-competition agreement may be concluded with the executive employees referred to in Section 208 for a period up to one year, subject to approval by the entity exercising ownership rights. The entity exercising ownership rights may define the jobs in respect of which a non-competition agreement can be concluded, and may prescribe further conditions.

(4) The consideration stipulated in the non-competition agreement may not - for the duration of the agreement - exceed fifty per cent of the absentee pay due for such period."

Governing on statutory provision level the scope of the restrictions was justified based on the judicial experience and various case law in the recent years. For instance, the amount concluded in the contracts - if they were proper and proportional – was decided by the courts, and sometimes this resulted in various and different outcome. Therefore the new Labor Code was instructed to include at least the framework of the non-competition clauses.

For example, under the effect of the previous Labor Code, the non-competition clause on one hand contained 20% of the salary as compensation, however on the other hand contained 10.000 USD for breaching such obligation, which is not balanced at all considering the circumstances as terms of such restriction, possible damages, value of the protected trade secret and information.

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 the event of a breach of a post termination restrictive covenant, the possible sanctions are the ones stipulated mutually by the parties in their agreement, with the maximum of two years limitation and the minimum amount of one-third of the base wage due for the same period.

In practice it means the parties – while entering into an employment relationship – conclude a non-competition clause with the consequences of its breach into the same agreement. They might include a list of information and activities which is allowed or not allowed to do by the parties. Usually the restrictions are applicable to the employer, since he is the one who receives additional information about the employee during performing his tasks and duties.

In practice, after the relationship ends between them in case it turns out that the employee was in breach of the non-competition clause, for example has disclosed confidential information to third party, especially to the competitive business entity on the market, the employer is entitled to the amount of money agreed by the parties. Obviously many times a legal proceeding needs to be launched by the claiming party, since the breaching party is disputing the breach itself.

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 it was mentioned in the above answers, in case of Transfer of Employment Contracts Upon the Transfer of Enterprise, as the rights and obligations arising from employment relationships, existing at the time of transfer of an economic entity (organized grouping of material or other resources) by way of a legal transaction are transferred to the transferee employer, therefore the non-competition restrictions – if there is any beside the general rules – shall be applicable as well noting that according to the Section 37 of the Labor Code *"before the time of transfer the transferring employer shall inform the receiving employer concerning the employment relationships involved, and also on the rights and obligations arising from non-competition agreements and study contracts. Failure to provide the information shall have no bearing as to the enforcement of rights arising from such covenants on the receiving employer's part."*

In case there is no transfer of employment, the breaching party is not the new employer, but the employee. The new employer was not the contracting party of the

previous agreement concluded between the former employer and employee, accordingly the new employer cannot be bound such obligation, however it can be proved that it was in its interest and also it has contributed to the breach of the clause, for example the new employer has turned to the employee – while he was still working for the previous employer – to switch job and at the same time hand over certain information.

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?

In the same chapter as the non-competition agreement, study contracts are regulated in the Labor Code as follows:

"(1) In a study contract the employer undertakes to provide support for the duration of studies while the employee undertakes to complete the studies as agreed and to refrain from terminating his employment by way of notice following graduation for a period of time commensurate for the amount of support, not exceeding five years. In the absence of an agreement to the contrary, the length of time spent in employment shall be calculated according to Subsection (2) of Section 115.

(2) No study contract may be concluded:

a) for providing any benefits which are due on the basis of employment regulations; furthermore

b) if the employer ordered the employee to complete the studies.

(3) Study contracts may only be concluded in writing.

(4) In the case of transfer of employment upon the transfer of enterprise, the rights and obligations arising from the study contract shall be transferred to the receiving employer.

(5) In the event the employer severely breaches the study contract, the employee shall be relieved of his obligations set out in the study contract.

(6) The employer shall have the right to withdraw from the study contract and may demand repayment of the support provided if the employee breaches the study contract. Breach of contract shall also cover where the employment relationship is terminated for reasons in connection with the employee's conduct in connection to the employment relationship. The obligation of repayment shall apply in proportion to the length of time that has elapsed from the term of the contract.

(7) The study contract may be terminated by either of the parties effective immediately in the event of subsequent major changes in the party's circumstances whereby carrying out the commitment is no longer possible or it would result in unreasonable hardship. In the event of termination by the employee the employer may demand repayment of the support provided. The employer's right to demand repayment of the support shall apply in proportion to the length of time that has elapsed from the term

of the contract. Where employment is terminated by the employer, repayment of the support may not be demanded."[3]

According to this provision – together with the non-competition clause – when the employer has invested money in an employee's training, there is a possibility for the employer to get refund or other compensation in case of breach of the post termination covenant. The employer not only has invested money, but also has provided the possibility and time for the employee to take part at the trainings, prepare and take the exams. It has to be noted that there is a limitation of terminating the agreement on the side of the employee in exchange for the invested money.

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 employee is entitled to turn to court and the possibilities and the outcome of the case depend on whether the parties has kept and taken into account the conditions defined in Section 228 of the Labor Code. In case the former employer acts as given in the example, the employee is – beside the fact that he is an unpleasant situation and has to face finding a new job among difficult circumstances – entitled to turn to court and claim damages and request the court to order the former employer finishing the disadvantageous actions.

[3] Section 229 of the Labor Code

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 the Hungarian legal system garden leave do exist as follows:

According to the Sections 68, 69 and 70 of the Labor Code the garden leave is governed among the termination rules of the employment relationship.

Section 68

The notice period shall begin at the earliest on the day following the date when dismissal is communicated.

(2) Where employment is terminated by the employer, the notice period shall begin at the earliest on the day after the last day of the following periods:

a) duration of incapacity to work due to illness, not to exceed one year following expiration of the sick leave period;

b) absence from work for the purpose of caring for a sick child;

c) leave of absence without pay for providing home care for a close relative.

(3) Subsection (2) shall apply in connection with collective redundancies if the conditions specified in Subsection (2) exist at the time when the notification referred to in Subsection (1) of Section 75 is given.

Section 69

(1) The period of notice is thirty days.

(2) Where employment is terminated by the employer, the thirty-day notice period shall be extended:

a) by five days after three years;

b) by fifteen days after five years;

c) by twenty days after eight years;

d) by twenty-five days after ten years;

e) by thirty days after fifteen years;

f) by forty days after eighteen years;

g) by sixty days after twenty years

of employment at the employer.

(3) By agreement of the parties the notice periods referred to in Subsections (1)-(2) may be extended by up to six months.

(4) For the purposes of notice periods, the duration specified in Subsection (2) of Section 77 shall not be taken into consideration.

(5) The period of notice for the termination of a fixed-term employment relationship by notice may not go beyond the fixed term.

Section 70

(1) In the event of dismissal the employer shall excuse the employee concerned from work duty for at least half of the notice period. Any fraction of a day shall be applied as a full day.

(2) The exemption from work duty shall be allocated in not more than two parts, at the employee's discretion.

(3) For the period of being excused from his duties the employee shall be entitled to absentee pay, except if he would not be eligible for any wages otherwise.

(4) If the employee was excused from his duties permanently prior to the end of the notice period, and the circumstance precluding payment of wages occurred subsequent to having the employee excused from his duties, the wages already paid out may not be reclaimed.

The main reason why an employee is not contracting to the competitive partner is that during the notice period he employee is still employed by the employer, the employee is entitled to absentee pay and also the payable taxes and other contributions are covered by the former employer. So even if the employee spends its notice period, he is still employed and paid by the former employee. On the other hand, under the Labor Code the employee is entitled to – rather say it is not excluded – to enter into a new employment relationship while he is still spending his notice period. Given the fact that the employee cannot be different places at the same time this case applies to the situation, when the employee is excused from his duties. However, the employee is not given the statement and certification until the end of the relationship, he might have interest in terminating the relationship with mutual agreement with the date as the parties wish to do so, since *"the employee upon termination (cessation) of employment, shall relinquish his position as ordered and settle accounts with the employer. The employer shall sufficiently provide for the conditions of job transfer and accounting. Also upon termination of the employment relationship by notice, the employee shall be paid his work wages and other emoluments from the last day of work, in any case on the fifth working day after the termination of employment relationship, and shall be supplied the statements and certificates prescribed by employment regulations and other relevant legislation. n case the employee wants to be employed at another place the employee and the employer should rather try to agree as terminate their employment relationship with mutual consent with the agreed date as stipulated in their agreement. It opens the possibility for the employer to enter into a new employment relationship."*[4]

[4] Section 80 of the Labor Code

According to the Section 85 of the Labor Code, the notice period stipulated in the collective agreement may be longer than what is contained in Subsection (1) of Section 69.

It worth to not that notice period is in principle 30 days. So the described purpose of requiring the employee to spend all or part of the notice period at home whilst the employer continues to pay the regular remuneration and at the same time aiming to that while the garden leave ends the information known by the employee will become out of the date could be achieved - in practice – with a longer notice period stipulated by the parties. It also means at the first sight a bigger and more serious burden on the employer, since he is the one paying the employee without active work, however if we approach from the point of view that it is actually the interest of the employee to keep at home and hereby keep away the worker from the competitive partners for a while, this is not a burden on the employer at all.

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 case the employee terminates he is required to spend his notice period at work. However, in case the termination is initiated by the employer, under the Section 70 of the Labor Code, the employer shall excuse the employee concerned from work duty for at least half of the notice period. In the first case the employee has the "Right" to continue working until the end of the employment, but in the second case, providing that the employee lives with this opportunity and requests the employer, the employee would have a right not to continue working until the end of the employment. Either the full, but at least the half of the notice period shall be given for the employee.

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.

To tell the truth, the Hungarian Labor Code is quite employee protective. By ending the employment as a general principle, based in Section 66 of the Labor Code the employers are required to justify their dismissals, considering the requirement of that an employee may be dismissed only for reasons in connection with his/her behaviour in relation to the employment relationship, with his/her ability or in connection with the employer's operations.

Beside the referred specific means in this report, probably the whole Code is defined as aiming to give enough protection to the weaker party in the employment relationship. No matter the employer wants to integrate protective clauses for itself, in case they are in contradiction of any of the binding fundamental principles set up in the Labor Code – which cannot be modified or altered by the parties – shall be considered as null and void.

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?

The relationship between athletes' and sports clubs/ Associations is governed primarily by the Act I of 2004 on Sports, Act I of 2012 on the Labor Law and on certain terms – e.g. sponsor contracts – by the Act V of 2013 on the Civil Code.

Based on the Section 1 of the Act on Sport professionals and amateurs are defined as follows:

"(1) Athletes are natural persons engaged in sports activities.

(2) Sports activity shall refer to physical workout performed under specific rules as part of spending leisure time without any constraints or in any organised form, and to activities performed competitively or within the branch of intellectual sports, which aim to preserve or improve physical condition and intellectual capacity.

(3) Competitive athletes (hereinafter referred to as competitors) are natural persons participating in competitions or competition systems invited, organised or licensed by a sports federation. Competitors are either amateur or professional athletes.

(4) Professional athletes are competitors engaged in sports activities as an occupation, with a view to earning income. All other competitors shall be regarded as amateur athletes."

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?

The Act I of 2004 on Sports and Act I of 2012 on the Labor Law are applicable and are governing the employment relationship of the athletes.

The Labor Code provides the general protection as employees and Act on Sport provide the special and unique statutory provisions for their athletic career.

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?

In Hungary there is an operating Sports Standing Arbitration Court. As a general nature of the arbitration courts it is not mandatory. This Alternative Dispute Resolution System is used only upon the mutual and express agreement of the parties.

According to the Section 47. of the Act on Sport *the Sports Standing Arbitration Court shall proceed pursuant to the provisions of Act LXXI of 1994 on arbitration court proceedings with the deviations resolved in this Act – with the aim of reaching an agreement based on the mutual binding statements of the parties – in the following sports-related matters:*

a) sports-related legal disputes between sports federations and members thereof, between members arising within the scope of their activity pertaining to sports federations;

b) sports-related legal disputes between sports federations, athletes and sports specialists;

c) sports-related legal disputes between sports organisations, athletes and sports specialists.

(2) The Sports Standing Arbitration Court may proceed, on request from the relevant athlete, sports specialist, sport organisation or sport federation, in matters related to issuing and withdrawal of competition licenses, recruitment and transfer, sports disciplinary actions and starting rights if judicial proceedings are available in such matters pursuant to Paragraph (6) of Article 3, Paragraph (2) of Article 14, or Paragraph (4) of Article 33.

(3) The provisions of Act LXXI of 1994 on arbitration court proceedings are applicable in matters specified under Paragraph (2) unless otherwise stipulated in this Act, save for the mutual binding statements of the parties.

(4) In matters specified under Paragraph (1), the Sports Standing Arbitration Court must hold a hearing within thirty (30) days reckoned from the election of the arbitration panel (single arbitrator) and must complete the case with the adoption of a decision within fifteen (15) days reckoned from the closing of the hearing.

(5) The chairman of the Sports Standing Arbitration Court must designate the arbitrator or the arbitration panel of three proceeding in matters specified under Paragraph (2) within eight (8) days reckoned from the receipt of the relevant application. The Sports Standing Arbitration Court must hold a hearing within fifteen (15) days reckoned from the designation of the arbitrator, and within fifteen (15) days reckoned from the closing of the hearing must a) annul or alter the sports federation's decision if sustaining the application (with or without ordering new proceedings), or b) overrule the application.

(6) The Sports Standing Arbitration Court is affiliated with the National Sports Federation. Chairman and at least fifteen (15) members thereof are elected by the National Sports Federation's executive body for four (4) years from attorneys with legal national examination possessing at least five years of legal and sport experience. Two members of the Sports Standing Arbitration Court are elected by the executive body on the proposal of the HOC.

(7) The Sports Standing Arbitration Court adopts its own rules of procedures. The entry of such rules into effect calls for prior approval by the National Sports Federation's executive body based on the opinion of the minister in charge of justice.

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?

As an EU Member State we have adopted the rules introduced by the Bosman case. Given the fact that Hungary joined the European Union in 2005 and the European Court of Justice ruled its decision concerning freedom of movement for workers, freedom of association, and direct effect of article 39 (2) of the EC Treaty in 1995, we implemented the rule as an already existing rule for ten years. Our legal system was required to respond not only the Bosman ruling but at the same time the whole European Union legal environment was introduced as well. Undoubtedly the case effected widely the transfers of football players within the European Union as well as provided principles for the freedom of movement.

As a Hungarian it is suggested to be aware of there was a so called "Bosman B" case in 2000. Balog Tibor, the Hungarian football player, member of the Hungarian national team as well, turned to the European Court of Justice after his previous Club, the Belgian Charleroi wanted to receive 5, and 3 million Francs for transferring him to another club. The agreement was never concluded, therefore the player has turned to the ECJ for the purpose of requesting the court to order the effect of the Bosman rule for the non-EU member states players as well. The player – very smartly – has turned to Jean-Louis Dupon, the former lawyer of Bosman, and their claim in front of the Court was not only about the freedom of movement, but the freedom to compete as well. Since the Commission just entered into negotiations with the FIFA and UEFA around the same time, Balog enjoyed the support of the Commission as well. Eventually, the case ended in an agreement and Balog received significant damages as compensation, we do not really what the outcome and ruling would have been of the European Court of Justice, but for the freedom of the non-EU Member States players this case contributed as the first steps for sure. During the negotiations between the parties the Commission and the FIFA entered into an international agreement 5 March 2001.

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?

Beside the general rules in the Labor Code, the athletes' employment contracts can be terminated with immediate effect according to the Section 8 of the Act on Sport as follows:

"Should a sports organisation be incapable of taking part in or become disqualified subsequently from the competition system (championship) for any public debt or any other reason, that shall be regarded as employer's severe breach of contract, for which the athlete may terminate the employment by extraordinary cancellation. After the cancellation, the athlete shall become forthwith transferable, irrespective of any prevailing transfer period. This rule shall be applied to amateur athletes with sports contracts mutatis mutandis."

Having regard the term of the contracts, the contract of the players are usually for fixed terms, usually is in the line with the seasons and the transfer window.

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

In case a player is still bound to a club under the terms of an existing contract, without the consent of the former club the player is not able to switch the club.

The term is usually fixed of the agreements, from the beginning of the season until the end of the season. Even if a player contracts to a club during the season, for example in the middle of the championship, the term of the contract is typically lasting until the end of the season. It is the interest of both of the parties, to have a contract for the relevant season period. The transfer fee, as a certain type of insurance and investment element, is included in the agreement. However, in case the fixed term of the contract is over, the player is able to contract to anywhere without restrictions.

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?

The player is not able to switch clubs during the term of the employment contract without the consent of the former club basically due to the following statutory

provisions in connection with the competition licenses of the athletes regulated in the Act on Sport:

"9. § (1) Professional athletes must hold professional athlete competition licenses. Competition licenses shall be issued by the sports federation upon application from professional athletes.

(2) Athletes may conclude professional athlete work contracts with sports organisations only in possession of professional competition licenses.

(3) Professional athletes shall concede their license rights to the sports organisation for the term of employment in the work contract concluded with the sports organisation. Provision of the license right to a sports organisation shall be regarded as the professional athlete's recruitment, which the sports organisation must notify to the sports federation, in the manner stipulated in the sports federation's regulations. The sports federation shall register the recruitment. Professional athletes may claim special equivalent of their license rights as determined in their work contracts.

(4) Upon expiry of the term of the work contract or in case of any lawful termination of the work contract, the license right shall return to the professional athlete. Any agreement to the contrary shall be void.

(5) Any contract aimed at alienating or encumbering the license as a personal right of property value shall be void. This provision is applicable to the licenses of amateur athletes as well.

10. § (1) During the term of the work contract, the sports organisation obtaining a license right, by the professional athlete's prior written consent, may transfer this right to another sports organisation temporarily or finally. Professional athletes may claim an agreed equivalent from the transferring sports organisation for granting their consent.

(2) Temporary transfers pursuant to Paragraph (1) are without prejudice to the professional athlete's work contract; it shall be regarded as detailing under the Labour Code with consideration given to Section g) of Paragraph (2) of Article 8.

(3) The sports organisation may claim an equivalent from the other sports organisation for the temporary or final transfer of a license right pursuant to Paragraph (1), the extent of which shall be resolved in the agreement between the two sports organisations. Such agreement shall be put in writing and shall be notified to the sports federation, which shall register the transfer."

Otherwise the Club can turn to the competent authorities, the Federal Association or the competent court for breaching contract and the club is able to claim damages.

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.

In Hungary there are several ongoing cases regarding the delayed payment of the players.

The contract of the players contains provisions such as 60-90 days of payments are agreed by the parties. Obviously the "weaker" party in the relationship while entering

into the agreement does not pay attention to the fact that this is not in line with the statutory provisions of the Labor Code. Not to mention that none of the employees desire to receive their salaries only after 2-3 months, or sometimes even later. Under Section 157 of the Labor Code wages shall be paid by the tenth of the month following the month to which it pertains. However, since among the other provisions of the same Code there is no such rule which would expressly exclude any derogation, even based on the agreement between the parties, or only to the benefit of the employee, the parties might enter into agreements containing such rules, which is quite disadvantageous for the players. It is quite limiting the rights of the players especially in case we consider the fact that in general terms the non-payment of the salaries might constitute as a just cause for termination of the agreement between the parties, since one of the main – if not the most important obligation of the club is to pay the employees' salaries, and players are not exceptions under such rules, unless they have previously entered into an agreement expressly allows the club to be in delay with the payment of the player up to 60-90 days.

Also we have ongoing cases regarding the payments when the players suffered occupational accident and they are required to rehabilitate for a long period. Some of the – mostly having financial difficulties – clubs during the term of this period fails to pay the full salary.

Under the Subsection 5 of the Section 8 of the Act on Sport *accidents of professional athletes occurring in the course of sports activities pursued within the framework of their employment shall be regarded as occupational accidents. Employers are obliged to take out life and sports accident insurance policies for their professional athletes if prescribed by the relevant sports federation's regulations.*

The problem occurs when the club is entering into a very minimum level of the insurance which do not cover the salary of the players. Also the problem goes back to the fact that in the area of sport a special taxation system is available, which is very positive for the parties on the one hand, however not as positive on the other hand. At this point a provision[5] of the Labor Code helps to settle the disputes, namely the employer shall compensate the employee for all his losses in full, especially when the loss, i.e. the accidents is suffered by the employee on the football field, during the court and perform the tasks and obligations of the players. Otherwise the players could not be expected to step on the football field with all of their knowledge and 100% performance even jeopardize their health or risk a broken leg when upon a suffered accident they might not receive their full payment. Not to mention the fact that medical treatments are everything but inexpensive and the player might not be able to be part of the team for quite a long period.

[5] Section 167 of the Labor Code