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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1. Employment Law

1.1. Restrictive covenants

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

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

Such restrictive covenants can be defined as any statutory and non-statutory (contractual) restrictions of the performance of work applied by operation of the law or imposed by the former employer to/on the former employee in order to protect the legitimate interests of the former employer. Such restrictions – however – cannot be excessive for the employee in question (in other words, such covenants cannot result in the inability/impossibility in the performance of work in general, as it may be considered as the violation of the freedom of work rule).

Basically, it can be distinguished between:

1. statutory restrictive covenants and
2. contractual restrictive covenants.

As regards statutory restrictive covenants, they shall be applied by virtue of law and are specified in the law: in the Labour Code and in the Act on the Counteracting of the Unfair Competition.

The contractual restrictive covenants are based on the freedom of contracts rule. Pursuant to the rule in question, the parties to a contract may arrange their legal relationship as their discretion, so long as the content or the purpose of the contract is not contrary to the nature of the relationship, the law or the principles of the community life.

The law recognizes also the third group of the covenants – i.e. the covenants that are generally described in the law, but – in order to be binding as regards the specific legal relationship – they have to be described in details in the contract between the parties to the relationship in question (the non-competition clause after the expiry of the employment relationship).

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?

In my jurisdiction there is – as a rule - no particular moment in which the post termination restrictive covenants have to be agreed between the employer and the employee.

The statutory restrictive covenants (i.e. the confidentiality obligation regarding the business secret of the employer and the obligation of non-solicitation of former colleagues or customers) are binding by virtue of law – regardless of whether or not they are agreed upon between the parties to the employment relationship.

The pure contractual covenants are based – as indicated in point 1.1.1. above – on the freedom of contracts rule. Therefore, if only the parties to the employment relationship agree on the specific provision/covenant – it can be added to the content of the employment relationship at any time (while executing of the employment contract and during the employment relationship). Besides, such covenants may be introduced also after the effective date of the termination of the employment relationship.

It has to be noted, however, that – as described in point 1.1.1. above - there is also such covenant (i.e. the non-competition clause after the expiry of the employment relationship) that is recognized by the law but – in order to be applied to the specific employment relationship - has to be agreed in details in the contract concluded between the employer and the employee. The Labour Code indicates that the covenant in question shall be agreed between the employer and the employee. As a consequence, in order for the parties to the covenant to be deemed "the employer" and "the employee" – such covenant shall be concluded before the effective date of the expiry of the employment relationship.

Nevertheless, it is possible to conclude the same or the similar provision (covenant) on the basis of the freedom of contracts rule. In such case, the covenant is question will not be governed by the Labour Code provisions and – consequently – the consistency of the wording of such covenant with the Labour Code provisions is not necessary for such covenant to be valid and binding.

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?

The Labour Code recognizes the non-competition agreement during the employment relationship between the employer and the employee. Pursuant to the relevant article of the Labour Code: To the extent determined in an agreement, an employee may not perform activity that is competitive towards an employer, or perform work under an employment relationship or any other basis, for the benefit of an entity conducting such activity. An employer who suffers damage because an employee has violated the prohibition on competition provided for in the agreement, may claim compensation for the damage from the employee in accordance with the principles determined in

the Labour Code. Moreover, the employment contract of such employee may be terminated with or without notice – through the fault of the employee.

Notwithstanding the foregoing, the Labour Code specifies that one of the basic obligations of the employee towards the employer – during the employment relationship – is to respect the interest of the work establishment and keep confidential any information that could cause damage to the employer – if disclosed.

As a consequence, the disclosure of the confidential information or conduct of the competition activity by the employee may be deemed as the breach of the obligation specified above and – consequently – result in the termination of the employment relationship of such employee without notice through the fault of the employee, regardless of whether or not any non-competition agreement during the employment relationship between the employer and the employee has been concluded. The aforementioned has been confirmed by some decisions of the Supreme Court.

For a general obligation of non-compete after the termination of the employment relationship - in the absence of an express agreement – see point 1.1.4. below.

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

In the absence of an express agreement, there are no obligations of the employer regarding post termination restrictive covenants.

As there is freedom of economic activity and freedom of work in Poland both parties: the employer and the employee are entitled - in the absence of an express agreement – to undertake and to perform their own business activities/works without being obliged towards each other (except from the statutory covenants). In particular, there is no general non-competition obligation after the expiry of the employment relationship specified for in the law and applicable by operations of law.

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

As described under 1.1.1. it can be – as a rule - distinguished between the statutory restrictive covenants and the contractual restrictive covenants.

As far as statutory covenants are concerned, it has to be underlined that in the Polish law there are the following statutory restrictive covenants concerning the employment law – i.e.: the confidentiality obligation regarding the business

secret of the employer and the obligation of non-solicitation of former colleagues or customers.

The confidentiality obligation regarding the business secret of the employee is specified in the Act on the Counteracting of the Unfair Competition. Under the aforementioned Act, the former employee is forbidden to transfer, disclose, use and/or acquire the confidential information that constitute the business secret of the former employer – for three years form the effective date of the termination of his/her employment contract (unless agreed otherwise or unless the information is no longer confidential) - provided that such action threats or violates the commercial interests of the former employer.

The business secret of the employer shall mean any technical, technological, organizational and any other information that have business value for the employer, provided that:

- such information is not disclosed to the public, and
- the employer took the appropriate steps in order to keep the information in confidence.

The other statutory covenant is the obligation of the non-solicitation of former colleagues or customers – also specified in the Act on the Counteracting of the Unfair Competition.

Under this covenant, it is forbidden to:

- encourage a person performing work to breach his/her duties in order to gain benefits for himself/herself, third parties or to harm the employer, and/or
- encourage the employer's customers to terminate contracts with the employer or not to perform or perform such contracts improperly in order to gain benefits for themselves, third parties or to harm the employer.

As regards the statutory covenant that has to be specified in details in the contract between the employer and employee – i.e. the non-competition covenant of the employee after the effective date of the termination of the employment contract between the employer and such employee - the Labour Code specifies as follows:

To the extent determined in the agreement the employer and the employee with access to particularly important information, the disclosure of which could expose the employer to damage an employee may not perform the competitive activity towards the employer after the expiry of an employment relationship. The agreement in question must include provisions on the period of prohibition of competition, as well as the amount of compensation due to the employee form the employer.

The compensation in question cannot be lower than 25% of the remuneration received by the employee before the expiry of the employment relationship for the period corresponding to the period of the prohibition on competition.

The prohibition on competition becomes invalid prior to the expiry of the period for which the contract has been concluded if:

- the reasons justifying the prohibition cease to exist, or
- the employer does not pay the compensation.

Any other post termination restrictive covenants are the matter of the freedom of contracts rule and – as a consequence – may be construed at the discretion of the parties to the employment relationship. Consequently, it has to be indicated that – in particular - such covenants as:

- non-disclosure and non-use of the information covenant;
- non-dealing covenant;
- and non-poaching covenant

- may be established.

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 specific conditions regarding the non-disclosure of the trade secret of the employer:

- the inside-information constituting the trade secret of the employer (as defined in point 1.1.5. above) is not disclosed to the public, and
- the employer took the appropriate steps in order to keep the information in confidence.

The specific conditions regarding the non-competition covenant after the expiry of the employment contract are:

- the access of the obligated former employee to particularly important information, the disclosure of which could expose the employer to damage (otherwise, the agreement is null and void);
- the conclusion of the agreement regarding the non-competition obligations in writing (otherwise, the agreement is null and void);

- the specification of the time period in which the former employee is not entitled to perform the competitive activity (otherwise, the agreement is null and void);
- the specification of the activity (both: the territory and the scope) that is covered by the non-competition clause (otherwise, the agreement is null and void).

The contractual covenants do not require specific conditions to be valid (as they are based on the freedom of contracts rule) as long as the content or the purpose of the covenant is not contrary to the nature of the relationship, the law or the principles of the community life.

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

The scope of the statutory non-disclosure of the trade secret of the employer covenant in the context of time: 3 years from the expiry of the employment relationship, unless agreed otherwise or unless the information is no longer confidential (trade secret). There are no other restriction regarding the scope of the covenant in question.

The scope of the statutory non-competition clause (after the expiry of the employment relationship) in the context of:

- time: the time period of the non-competition obligation has to be specified in the agreement; there is no minimal or maximal period of admissibility of the covenant in question; please note however that the market standard in Poland is: from 6 to 18 months; regardless of the foregoing, if the time period of the non-competition covenant is too long, it may be considered ineffective by the court (as it is contrary to the freedom of work rule);
- geographical scope: the geographical scope of the application of the non-competition clause shall reference to the territory of the actual economic activity of the employer; it can be defined narrower than the actual territory of the economic activity of the employer; it cannot be however – as a rule – specified broader than the actual territory of the economic activity of the employer (in such case, the provision regarding the definition of the geographical scope of the clause is invalid – to the extent that such definition exceeds the actual territory of the performance of the activity by the employer);
- activities: the scope of activities indicated in the non-competition clause after the expiry of the employment contract shall make reference to the actual scope of activity of the employer; the same as regarding

the geographical scope: the scope of activities can be specified narrower but no broader – as the scope of activities of the employer;

- remuneration: cannot be lower than 25% of the remuneration received by the employee before the expiry of the employment relationship for the period corresponding to the period of the prohibition on competition.

The contractual covenants do not require specific scope to be valid (as they are based on the freedom of contracts rule) as long as the content or the purpose of the covenant is not contrary to the nature of the relationship, the law or the principles of the community life.

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

The sanctions against the employee in the event of a breach of a non-disclosure obligation of the trade secret of the employer are both: civil and criminal.

In case if the former employee breaches the obligation in question, the former employer is entitled to demand that:

- the actions of the former employee are ceased;
- the former employee performs all actions necessary to remove the effect of his/her unlawful acts;
- the former employee makes a declaration (or declarations) of the appropriate form and substance;
- the damage is remedied – in accordance with general principles;
- the benefits from such unlawful acts are refunded by the former employee to the former employer;
- an appropriate amount of money be paid to a specific public cause.

Besides, the aforementioned action of the former employee may be deemed as a criminal offence and is subject to a restriction of liberty or imprisonment up to two years.

The civil sanctions against the employee in the event of a breach of a non-solicitation clause are identical with the abovementioned civil sanctions concerning the non-disclosure of the trade secret. There are no criminal sanctions.

The sanctions against the employee in the event of a breach of a non-competition clause (after the termination of the employment contract) and any contractual covenants are:

- the claim regarding the remedy of the damage suffered – in accordance with the general principles, i.e. the employee is obliged to remedy any

damage resulting from the non-performance or the improper performance of an obligation unless the non-performance or improper performance of the obligation is due to circumstances for which the employee is not liable;

- the liquidated damages (if specified); it has to be underlined that a demand of compensation in excess of the stipulated liquidated damages – in accordance with the general principles (i.e. as specified above) is allowed solely if the parties agreed thereon.
  Please be informed that the stipulation of the liquidated damages and the excessive compensation is a market standard in the described agreement.

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?

In general, if the covenant is violated by the former employee – without the persuasion of any other entity (including, the current employer of such employee), solely the employee in question shall be held liable for such violation. Consequently, there will be no adverse consequences for the current employer of such employee.

Nevertheless, in accordance with the Act on the Counteracting of the Unfair Competition, as the unfair competition act shall be deemed any act contrary to the law or inconsistent with the principles of the community life which threatens or violates the interest of another entrepreneur.

As a consequence, if any act of the unfair competition is committed by the former employee – as a result of the persuasion of the current employer of such employee – the current employer may be sued under the Act on the Counteracting of the Unfair Competition.

In such case the injured former employer is entitled to demand that:

- the actions of the new employer are ceased;
- the new employer performs all actions necessary to remove the effect of his/her unlawful acts;
- the new employer makes a declaration (or declarations) of the appropriate form and substance;
- the damage is remedied – in accordance with general principles;
- the benefits from such unlawful acts are refunded by the new employer to the former employer;
- an appropriate amount of money be paid to a specific public cause.

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 general, there is no possibility for the employer to get a refund from the employee (born during the employment relationship of such employee), in case of breach of the post termination restrictive covenant by the employee.

From my point of view, the only one way to get such a refund is to conclude an agreement in which the parties specify that the refund in question will be made by the employee, should he/she infringe the agreed covenant. In exceptional cases, it may be also possible to receive such refund as part of the compensation – in accordance with the general rules.

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)?

The possibilities of lawsuit for the employee against the former employer in case of the disadvantageous actions do not depend on the restrictive covenants and shall be considered in the light of the general rules.

If the rumours spread by the former employer infringe (or threat to infringe) the personal interests of the employee (in particular: his/her dignity or image), such employee may demand that the actions of the former employer are ceased (unless they are not unlawful). In the case of infringement he/she may also demand that the former employer committing the infringement perform the actions necessary to remove its effects, in particular that the employer in question make a declaration of the appropriate form and substance. The employee may also demand monetary recompense or that an appropriate amount of money be paid to a specific public cause.

If, as a result of infringement of a personal interest of the former employee, financial damage is caused to such employee, the employee in question may demand that the damage be remedied in accordance with general principles (i.e. under the article, in accordance of witch: anyone who by a fault on his/her part causes damage to another person is obliged to remedy it).

1.2. Garden Leave

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

Yes, the concept of "garden leave" exists in the Polish jurisdiction. Under the Labour Code, an employee is obliged to use all outstanding leave within the

period of notice of termination of an employment contract, as long as the employer grants leave within this period.

Taking the foregoing into account, it has to be indicated that the Polish law foresees the following scope and prerequisites concerning the garden leave:

- The garden leave applies solely to the termination of the employment contract with the notice period – regardless of the party to the employment contract initiating the termination (i.e. the employer or the employee); as a result, the garden leave shall not be applied to the termination of the employment contract without notice and the mutual consent regarding the termination of the employment contract;
- The decision concerning the garden leave is at sole discretion of the employer; as a consequence – the decision in question does not have to be agreed between the employer and the employee; moreover, the employee has no legal means to oppose or to unilaterally change the decision of the employer;
- The scope of the garden leave cannot exceed the unused holiday leave for previous years and the holiday leave proportional to the period worked at this employer - in the year when that employment relationship ends, unless the employee has used up or exceeded the leave he/she is entitled to prior to the relationship ending; in other words – if the employee in question fully uses his/her holiday leave days, the employer is not entitled to grant him/her the 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?

There are no types of employees who have the right to be "actively employed", subject to the prerequisites indicated in 1.2.1 above.

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

The aforementioned covenants, i.e.: the non-competition clause, the non-solicitation clause, the non-use and non-disclosure of the confidential information (including the trade secret of the employer) and the garden leave regulation constitute the entire market standard regarding the protection of the employer's interest at the end of an employment contract.

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 employment law may apply to the relation between a professional athlete and a sports club.

As regards football, pursuant to the regulations of the Polish Football Association, the contract between a professional player and a football club may be based – at the discretion of the parties – on the employment law (i.e. employment contract) or on the civil law.

As far as amateurs are concerned, they cannot – as a rule – conclude an employment contract, since they – as amateurs - do not have the right to the remuneration (other than the reimbursement of their actual expenses) against their performance of work (and the payment of the remuneration is the basic obligation of the employer in the employment relationship).

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

There are some provisions regarding the content of the professional football players included in the regulations of the Polish Football Association.

The football player can be employed either on the basis of the employment contract or on the basis of the civil law contract. Nevertheless, in both cases, his contract has to be executed on the template delivered by the Polish Football Association and shall include:

- The fixed period – not shorter than till the end of the current league season and not longer than five years;
- The basic remuneration of the player – for the whole period of the validity of the contract;
- Signatures of the player and the authorised representatives of the club;
- Has to be made in writing in three counterparts – one for the player, one for the club and one for the Football Association.

The contract that is inconsistent with the abovementioned conditions is null and void.

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

There is the Arbitration Tribunal for Sport at the Polish Olympic Committee in Poland. In the past (from 1994 to 2010), the proceedings before the Tribunal were obligatory as regards the settlement of the disputes concerning the specific sport issues (listed in the law). The decisions of the Tribunal relating to the aforementioned disputes might have been appealed against to the Supreme Court – in the event of the serious violation of the provisions of the law by the Tribunal.

As of 16th October 2010 (the day of coming into force the Act on Sport) there are no obligatory arbitration proceedings in the sport issues (including regarding the disputes between athletes and clubs).

Regardless of the foregoing, the Tribunal is (and was from 1994) able to settle any and all other disputes regarding the sport issues which may be subject to a court settlement, if:

- agreed in the arbitration agreement (clause); or
- as decided by the parties to the dispute after its occurrence.

It has to be underlined that – in accordance with the Act on the Civil Proceedings – the disputes regarding the employment matters may be subject to an arbitration proceedings solely in case of a written arbitration clause agreed after the occurrence of the particular dispute. The abovementioned restriction applies solely to the employment contracts and not to the contracts of the civil law.

Regardless of the foregoing, it has to be indicated that the Polish Football Association requires that the contracts concluded between the footballer and the football club are consistent with the template of the contract (employment or civil) delivered by the Association.

One of the provisions specified in the template of the civil law contract indicates that any property disputes arising out of the contract in question shall be settled by the Football Arbitration Court.

The provision specified for in the template of the employment contract foresees that any property disputes arising out of the contract in question shall be settled by the competent labour 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?

The regulations regarding the rules of the transfer of the players are not specified in the common law but are provided for in the regulations of the Polish Football Association.

The Polish Football Association has implemented into its regulations all of the agreements made among UEFA, FIFA and the European Commission, i.e. in particular regarding:

- the admissibility of the transfer fees concerning the players under 23 – as the equivalent for the professional training of such player – regardless of whether or not such players are under the binding contracts;
- the inadmissibility of the transfer fees concerning the players over 23 – if they are not under the binding contracts with the clubs demanding the fees in questions;
- the admissibility of the termination of the football contract by the player – after 3 years of its validity (if the player is under 28) and after 2 years of its validity (if the player is over 28), with the sole obligation of the payment of the compensation by the player in favour of the football club being the other party of the terminated contract (without the application of the sports penalties).

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?

As regards football players, the regulations of the Polish Football Association specify that the contract between the football club and the football player may by concluded for a fixed term. Such fixed term cannot be shorter than till the end of the present league season and longer than 5 years.

Solely a contract of a football player who is under 18 (but at least 15) may not be concluded for a period exceeding three years (and solely upon the consent of his statutory agents).

The football contract may be terminated solely upon the mutual written consent of the club and the player.

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 accordance with the regulations of the Polish Football Association, the player may conclude a contract with another football club solely if:

- his current contract has expired or expires within 6 months, or

- his current contract was terminated upon the mutual written consent of the club and the player in question.

Regardless of the foregoing, the player cannot switch the club during the term of the employment contract without the consent of the former club. Such switch is admissible solely upon the written agreement of three parties, i.e.: the player, the current club of the player in question and the prospective club of the player.

Besides, the player has to be authorized by the Polish Football Association – in order to be able to play in the league and national cup matches. The authorization may be made solely in one of the following periods:

- 1st July – 31st August, or
- 1st February – 28th February.

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?

As indicated in point 2.2.3. above, the switch of the club by the footballer – during the validity of his contract may be made solely upon the written agreement of three parties, i.e.: the player, the current club of the player in question and the prospective club of the player.

If the switch was made with the violation of the aforementioned rules, such switch shall not be valid. Moreover, the Polish Football Association shall not authorize such player in the new club.

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

I do not know any further conflicts.