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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IBLC Sports Law Subcommission

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INTRODUCTION

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

1. Employment Law

What are restrictive covenants?

Information is key for the success of every business.

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

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

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

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

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

Garden leave

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

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

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

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

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

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

Transfer Fees

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

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

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

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

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

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BIBLIOGRAPHY

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

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1. Employment Law

1.1. Restrictive covenants

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

Post termination restrictive covenants are known and – within limits of reasonableness – enforceable under the Swedish legal system. A general statutory regulation curtailing the use of post termination restrictive covenants on non-competition applies under the Swedish Contracts Act according to which no such undertaking shall be enforceable to the extent such an undertaking is to be regarded as unreasonable. Additional regulations on application of and limits of post termination restrictive covenants applies with respective to collective bargaining agreements (if applicable) and principles established through case law by the Swedish labour Court.

1.1.2. At what stage in the employment relationship between employee and employer are post termination restrictive covenants agreed upon in your jurisdiction? Is there any relevant case law?

Post termination restrictive covenants may be agreed upon between the employer and the employee at any stage during the employment agreement, including in a termination agreement. However, it most common that such restrictive covenants are agreed upon when the employment agreement is negotiated and agreed, as the time prior to entering the employment agreement normally allows the best opportunity for the employer to negotiate regarding such undertakings.

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?

Even though not formalized under statutory law, the general duty of loyalty is a central legal principle under Swedish labour law. The duty of loyalty implies that employee has a general duty to promote the interests of the employer and to refrain from any acts or omissions which could be harmful to the employer's interests, including a prohibition on competing activities. The general duty of loyalty is considered to apply regardless whether the duty of loyalty is explicitly mentioned in the employment agreement, and it applies throughout the employment term.

In the absence of any valid agreed post termination restrictive covenants, the duty of loyalty expires when the employment terminates, and the employee is thereafter, as a general principle, at liberty to engage in e.g. competing activities.

In Sweden, matters relating to whistleblowing are normally not subject to post termination restrictive covenants. However, employers that feel that it is important that the employees' duty of confidentiality is extended beyond the termination date regularly enters into such confidentiality undertakings which are valid post termination.

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?

Generally, in the absence of any agreed post termination covenants, the employee's duty of loyalty expires at the time of termination of the employment, and the employee is thereafter free to engage in e.g. competing activities. With respect to sensitive trade secrets there is a certain protection under statutory law (the Swedish Act on Protection of Trade Secrets) which under certain circumstances may entitle the employer to damages if the former employee makes use of trade secrets in a competing activity. As this statutory protection only provides limited protection for the employer, it is common that employment agreements include more extensive post termination confidentiality undertakings.

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.

The most common types of post termination restrictive covenants in Sweden are (i) non-competition undertakings, (ii) non-solicitation undertakings and (iii) confidentiality undertakings.

Non-competition undertakings prohibit the employee during a limited period of time post termination from engaging in competing activities, normally both as an employee of or as a consultant to a competitor or by engaging in own competing business activities, that would be detrimental to the previous employer.

Non-solicitation undertakings prohibit the employee during a limited period of time post termination from soliciting or encouraging customer and clients of the former employer and/or encouraging other employees of the former employer, to discontinue their respective relationship with the former employer for the benefit of a competitor.

A confidentiality undertaking valid post termination protect sensitive information from being spread to competitors and other outside parties to the detriment of the former employer.

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.

Apart from general legal principles as set out under general contractual law on prerequisites for valid agreements, there are no specific conditions set out under statutory Swedish law for post termination restrictive covenants to be regarded as valid. Instead, it follows from a general regulation under the Swedish Contracts Act according that such restrictive covenants are enforceable to the extent such an undertaking is not to be regarded as unreasonable, and this may vary depending on the individual circumstances in each case.

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.

Non-competition undertakings: Swedish law takes a comparatively strict view on the application on non-competition restrictive covenants valid post termination. Such undertakings are generally only enforceable if they are

intended to protect sensitive company specific knowledge regarding products or services which are unknown to competitors and if it would harm the company if such knowledge became known to competitors. Furthermore, such undertakings are not enforceable if required of employees that do not have necessary experience of education to make use of such sensitive information. As a non-competition restriction covenant valid post termination implies a disadvantage for the concerned employee, enforceability also requires a reasonable compensation (normally at least 60 % of the regular salary level) during the restrictive period. The restrictive period post termination should in normal cases not exceed 12 months and not be more than 24 months in very sensitive cases. A non-competition restriction covenant valid post termination is not considered as valid if the true purpose of the restriction is to create a lock-in for the employee rather than to protect company specific knowledge. The scope of the non-competition undertaking in terms of geography or competing activities should not be greater than justifiable given the individual circumstances.

Non-solicitation undertakings: If an employer can objectively justify a need to protect its existing clients, customers and/or employees, the employer may require its employees to enter into a non-solicitation restriction covenant valid post termination. Such undertakings should generally not be valid for an unreasonable long time, but there is no firm case law in this regard. Compensation is not considered as mandatory for enforceability. Such undertakings may however not be enforceable if the employer has a very dominant role and has established customer relationship with a majority of the total possible customers in the relevant market segment. In such a case, the non-solicitation may be considered as equal to a non-competition undertaking which requires additional considerations for enforceability (see above).

Confidentiality undertakings: As a general principle, the term of the post termination restriction should not be longer than objectively justifiable, but an individual assessment must be made in each case. It is in practice not uncommon with confidentiality undertakings valid post termination without any specified end date. However, such undertakings will not be enforceable for a longer period of time than consider necessary to reasonably protect the concerned information, as sensitive information normally gradually becomes less sensitive over time.

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.

If the employee commits a breach against any agreed post termination restrictive covenant, the employer may, as a general principle, sue the employee for any incurred and verifiable damages. The employer may also ask the court to issue a restrictive order against the employee prohibiting any further breaches against an existing post termination restrictive covenant.

As the employer may experience considerable challenges to adequately verify actual incurred damages in case of breach against an agreed post termination restrictive covenant, it is often in the best interest of the employer that the restrictive covenant should be paired with an agreed undertaking by the employee to pay liquidated damages in case of breach. Such liquidated damages may not be unreasonably high, but liquidated damages equal up to six monthly salaries for the employee is consider as standard practice.

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 principle, it is the employee party to the post termination restrictive covenant that is to be held responsible in case of breach, and not the new employer. The previous employer cannot direct any claims against the new employer for breach of the post termination restrictive undertaking as such.

However, under certain circumstances, it has been established by case law that if a competitor acts in a qualified improper way toward a non-contractual party, such a competitor may be held liable to pay damages to the injured party. Therefore, it cannot be ruled out in a severe case that if a competitor were to act in complicity with an employee of the old employer and thereby deceiving the old employer and causing serious harm, such a competitor could be held liable to pay damages to the old 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?

An employer and an employee may enter into a binding agreement that any fees invested in employment related training course or educational course

should be reimbursed by the employee if the employee chooses to terminate the employment within a certain period of time after having completed the course or training. The period during which the reimbursement obligation applies should not be unreasonably long, and the obligation should be proportionate in relation to the value of the training or course.

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 general principle of loyalty which applies during the employment is a of a mutual nature. This means that both the employee and the employer should behave loyally towards each other, and the employer should therefore not act in any disparaging way against the employee. The general principle of loyalty does however cease to apply once the employment expires, and without any specific contractual undertaking on continued discretion or confidentiality on the employer's part, there is no particular obligation for the employer to refrain from making the employer' opinion of the former employee known, at least if asked. In case of contractual undertaking from the employer to refrain from derogatory behaviour, a breach by the employer could lead to a liability to pay damages for verifiable consequences for the former employee.

Of course, even without a specific contractual undertaking by the employer valid post termination, in severe cases of derogatory behaviour on the part of an employer representative, such a person could be held criminally liable for actions qualified as slander or defamation, subject to legally prescribed prerequisites for such crimes. If guilty, such a person could under certain circumstances also be held liable to pay damages for verifiable damages incurred by the targeted person.

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?

Under Swedish employment law, as a general principle, an employer is able to unilaterally decide to put the employee on paid leave, i.e. garden leave at any time during the employment, including during the notice period or during

part thereof. Under statutory law, if an employer decides to put an employee on garden leave during any remaining employment period in connection with termination, the employee is entitled to receive salary and all other employment benefits as applicable under the relevant employment terms throughout the garden eave period.

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 a situation where an employee is terminated, and where the employee notifies the employer that the employee intends to challenge the termination and sue for reinstatement under statutory law, certain regulations apply according to which the employee has right to remain employed throughout the legal proceeding despite the employer's previous termination, and the employer is not entitled to remove the employee from the working place, unless there are very specific reasons, such as strong suspicions of or manifest disloyal or criminal behavior.

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.

Apart from ensuring that proper contractual undertakings are in place, an employer should also, as soon as it learns of a key employee's intent to resign or give notice of termination, take all practical necessary steps that may be necessary to protect the employer's interests (depending on the circumstances), including to

a) gain control of IT equipment containing critical information and sensitive data,

b) gain control of copies of important or sensitive documents,

c) secure contact with client and customer representatives that may have been managed by the departing employee to prevent solicitation or loss of important relationships and

d) in case of suspicions on disloyal behavior, review and monitor IT servers etc. to prevent loss of sensitive data.

2. The World of Sports and Employment Law

2.1. General questions

2.1.1. Does employment law apply to the relation between athlete's and sports clubs/Associations in your jurisdiction? Are there relevant differences between the kinds of sports and between professionals and amateurs?

In principle, employment legislation applies to athletes that are employed as professionals by their clubs or associations. Amateurs that may not be considered as exercising their sport professionally for the benefit of their club or association in return for remuneration are not considered as employees, and are therefore generally not subject to employment legislation. In such cases, they are considered as members that are subject to the statutes of the club or association.

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?

If considered as professionally employed athletes, general employment legislation applies. Some clubs and associations (e.g. within the fields of football and ice-hockey) have entered into collective bargaining agreements with certain trade unions and regulations under these collective bargaining agreement may apply in addition to statutory legislation (to the extent that statutory legislation allows for deviation prescribe by such collective bargaining agreements).

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 general, for employed athletes, the general court system for employment related disputes applies. It is possible for a club or an association and an employed athlete to enter into an agreement regarding dispute resolution and to defer any dispute to settlement through or arbitration under rules of arbitration as set out by either statutory law or another alternative set of rules for arbitration (e.g. arbitration rules of the Arbitration Institute of the

Stockholm Chamber of Commerce). Such agreements are binding in principle, unless a court would find that it would be unreasonably burdensome for a party (e.g. the employed athlete) to get access to justice, something which could be the case unless the employer club or association is prepared to bear the costs for the arbitration institute in case of dispute resolution.

Some sport associations have adopted specific rules for arbitration, but these rules are normally intended for dispute resolution related to internal matters within the association and member related issues, rather than for dispute resolution in case of employment related disputes. Such rules are therefore normally not applicable, unless the concerned club or association and an employed athlete explicitly have agreed to apply such specific rules for dispute resolution in case of an employment related dispute.

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.

(…)