INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

How to protect the employer's interests after the termination of employment contracts – aspects of labour law in general and sports law in particular

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National Report of Czech Republic

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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.)

Czech law recognizes the principle of a post-termination restrictive covenant, which can be defined as a covenant between parties to fulfill a certain obligation even after the agreement between the parties terminates. These covenants primarily deal with one party's obligation to restrict its actions in order to protect the other party's information, business secrets, know-how etc. that the first party obtained during the contractual arrangement.

In terms of employment law, Czech Law (Labour Code) only expressly recognizes non-compete covenants. Other types of covenants may be contractually agreed by parties, but their enforceability is uncertain.

Other, similar post-termination restrictions that the law recognizes may be found in business relationships, in particular the regulation of relationship between companies and its statutory board members and the regulation concerning commercial representatives.

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?

These types of covenants may be agreed upon at any stage of the employment relationship and therefore may constitute a part of the employment agreement or be agreed upon within a separate written agreement concluded between the employee and employer during the employment relationship. In practice, post-termination restrictive covenants are usually agreed on in the employment contract prior to employment.

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?

No, a non-compete obligation after termination of an employment relationship exists only if so agreed between the employer and employee. However, a general, statutory non-compete obligation exists during the course of the employment relationship. With regards to other statutory restrictions related to unfair competition, please see the answer to question 1.1.7 below.

As mentioned above, Czech employment law only expressly recognizes non-compete covenants and does not recognize the concept of whistle blowing. An employer may conclude non-disclosure agreements with employees in order to protect its business secrets, know-how, work procedures etc. These agreements may be valid even after termination of an employment relationship, but no such agreement may prevent an employee from notifying relevant state authorities of illegal acts committed by the employer or its employees, so any agreement prohibiting an employee from informing the authorities of an illegal act is invalid.

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

There are no specific statutory provisions regarding post-termination restrictive covenants on the employer's side.

The only possible statutory provision restricting the employer after termination of an employment relationship deals with disclosing information about the employee. The employer may only disclose information about an employee's qualifications, capabilities, work evaluations and other facts related to work performance. Other information may only be disclosed with the employee's consent.

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 mentioned above, the only statutory post-termination restrictive covenant in Czech employment law is a non-compete obligation, which exists only if so agreed between the employer and employee.
- Czech law does not expressly recognize the existence of other post-termination restrictive covenants. An employer and employee may agree upon such covenants (e.g. non-solicitation covenant), but enforceability of such covenants is uncertain due to the strict nature of Czech employment law, and has not yet been confirmed by Czech courts. In order to increase enforceability, it is generally recommended that the employee receive reasonable compensation in return for observing such covenants, and that the rights and obligations of both parties be fairly balanced.
- With regards to other statutory restrictions related to unfair competition, please see the answer to question 1.1.7 below.

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.

Regarding non-compete obligations, these may only be established by written agreement between the employer and employee and must contain the term of the covenant and amount of compensation. It is more than recommended that a non-compete covenant specifies the precise restriction of activity and territory in which the covenant applies. A non-compete covenant may be concluded with any employee regardless of age, salary, employment period or manner of termination of the employment relationship.

A non-compete clause may be concluded only if its performance can be justifiably required from the employee with regard to the nature of the information, knowledge or operational and technological know-how the employee obtains during his/her employment relationship, the use of which could substantially encumber the employer's activities.

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.

- An employer and employee may, by written agreement, establish a non-compete obligation that applies even after termination of the employment relationship, however it may only apply for a maximum period of one year after termination. Under such a covenant, the employee is obligated to refrain from any gainful activity that is identical to the scope of the employer's activity or that competes with the employer's business (e.g. in an employment relationship, as an entrepreneur, as a member of an executive or controlling body a company, etc.). It is not legal requirement to specify the restricted activity in detail; it is however to recommend it if the employer operates in various business areas. Also it is not possible to extend the scope of restricted activities to cover activities of other companies of the employer's group that the employer itself does not engage in (the scope of business activities registered and performed by the employer is the decisive factor here), regardless whether the employee in practice also works for another business unit/area within the employer's group of companies. A non-compete covenant may also specifically state the competitive enterprises in which the employee is prohibited from being engaged, but this is not an obligatory requirement.
- The geographical scope of the covenant may not be so extensive that it unnecessarily encumbers the employee in his/her activities.
- The employer is obliged to pay the employee reasonable compensation at least in the amount of one half of the employee's average monthly salary for each month of this obligation. A contractual penalty payable by the employee in case of breach of his/her non-compete obligation may be agreed on to secure fulfillment of the covenant, however, the non-compete covenant terminates by payment of such contractual penalty. The employer may only terminate a non-compete covenant during the employment relationship (and only for agreed, objective reasons), whereas an employee may terminate the covenant if the employer fails to pay compensation.
- Please note that due to conservative Czech case law, regulation of non-compete covenants is very rigid, and contractual freedom, especially in terms of compensation and unilateral termination of the covenant, is highly restricted.
- Also, even though enforceability of other restrictive covenants is uncertain under Czech employment law due to very rigid employment regulations that strictly limit contractual freedom, behavior such as poaching clients or employees from a former employer may, under certain circumstances, be interpreted as unfair competition (general unfair competition, breach of business secrets,

etc.) and an injured employer may defend itself by the means of civil law. However, the injured employer has to prove that these acts have been committed against good morals in business relationships and are liable to harm competitors or consumers.

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.

A post termination restrictive covenant may be concluded for a maximum of one year after termination of the employment. The employer may sue the former employee in court for damages if the employee breaches the post-termination restrictive covenant.

Moreover, the covenant may also include a contractual penalty. The amount of the penalty must be proportional to the significance of the information and know-how the employee receives during his/her employment. If the employee breaches the post-termination restrictive covenant, the employee is obliged to pay the stipulated penalty, at which point the post-termination restrictive covenant ceases to exist. If not stated otherwise in the post-termination restrictive covenant, agreeing on a contractual penalty excludes the possibility of claiming damages.

Since specifying the amount of damages may be problematic, it is recommended to agree on a contractual penalty.

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?

The former employer can rely on the regulation of unfair competition and may sue the new employer for damages, as well as for reasonable satisfaction.

To qualify as unfair competition, the situation must meet three conditions of the general clause of unfair competition:

- the act must be performed by a competitor within public competition
- it must be a violation of the good morals of competition
- it must be capable of creating harm to the former employer

Based on case law, merely employing the former employee of a competitor is not considered unfair competition.

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?

The employer may only claim a refund of money invested in an employee´s training if the employer and employee have concluded a qualification agreement. The qualification agreement may be concluded for a maximum of five years (not including maternity leave, service of a sentence, etc.). The employee is obliged to either continue his/her employment for the employer during the period stipulated in the agreement or to reimburse the qualification expenses. The reimbursement decreases if the employee partially completes the period of employment.

The qualification agreement must be concluded in writing and must include:

- type of qualification
- how it will be improved
- the period of time for which the employee is obliged to continue working for the employer after the qualification
- the time and amount of costs agreed to be paid by the employee in case of termination.

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)?

An employee may take legal action against his/her employer for breach of his/her personal rights and claim for reasonable satisfaction or pecuniary damages caused by a rumour. The employee may also sue the employer for a rumour by appealing to public criminal law. The employee may claim for both of the above possibilities regardless of whether a post-termination restrictive covenant was concluded.

Moreover, at the employee's request the employer is obliged to provide the employee with a work reference within fifteen days. The work reference may only contain information about the employee that relates to the employment, such as his/her qualifications, abilities, experience, work assessment, etc. The information other than that which can be used for the content of the work reference may only be disclosed by the employer with the employee's

consent. Within three months after an employee ascertains the content of the work reference or any other information provided to the third parties by an employer, employee may apply to a court for the work reference / information to be adequately corrected. An employee may also claim for damages caused by an improper job assessment.

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?

The concept of the "garden leave" is not specifically regulated in the Czech legal system.

The employer is obliged to provide work for the employee according to his/her employment contract. If the employee is not allotted any work, the employee has the right to claim for compensation of his/her average wage. The employee may theoretically also claim for his/her right to employment, however there is no precedent for such practice.

On the other hand, the generally accepted practice is to ask the employee to stay at home during his/her statutory notice period, during which time he/she does not have to work but still receives his/her average wages. This practice probably stems from the fact that the only sanction for not assigning work to the employee is the obligation to compensate the employee for his/her average wages (which the employer has to pay anyway).

The only court decision that is close to this topic is case 21 Cdo 2048/2003 issued by the Czech Supreme Court in 2004, which referred to the duty of the employer to assign work to the employee, however this was only theoretical as the main issue of the dispute was a claim for compensation of wages, not a claim for the right to work.

If the employer cannot assign work to the employee (e.g. when the employment was terminated due to organisational reasons), the employer is naturally not obliged to assign work to the employee, however the employee is still entitled to his/her average wage.

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?

See 1.2.1.

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.

Only the confidentiality clause. It is useful to include a confidentiality clause in an employment contract that extends even after termination of the 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 relationship between an athlete and a sports club is regulated by a contract. It can be either a business contract or an employment contract. The system of contracts, which will be described below, results from the fact that there is hardly any legislative regulation of sports in the Czech Republic. There is only one legislative act devoted specifically to sports, Act no. 115/2001 Coll., on the support of sport, which regulates the role of sports in society and the roles of authorities in support of sports. Hence, general provisions of law, including either business law or employment law, apply to the relationship between an athlete and a club. Some rights and duties between an athlete and a club might be regulated by the rules of the sports associations if the contract refers to them or if there is no other regulation.

Employment contract

Employment contracts are very rare in relationships between athletes and sports clubs. When they exist, the scope of contractual freedom between the parties is very limited since Czech labour law is very rigid and does not allow for any departures from it.

Business contract

The majority of relationships between athletes and sports clubs are based on business contracts, which regulate in detail the rights and duties of the parties. The business contract is usually called a "contract on sports activity" and treats the athletes as independent contractors.

Even though business contracts predominate in the area of sports, it is necessary to highlight that this practice is legally questionable. Why?

Employment law in the Czech Republic applies to any work that is *carried out in the employer's name and according to the employer's instructions (orders) and performed in person by the employee for his/her employer in a relationship in which the employer is superior and the employee subordinate.* This work is called "dependent" and may be carried out exclusively within a basic labour relationship unless otherwise regulated by other statutory provisions. Basic labour relationships include

employment relationship and legal relationships based on agreements on work performed outside an employment relationship.

Just by studying the definition of dependent work one could conclude that there are many reasons why the relationship between athletes and sports clubs could fall within the definition of dependent work according to the Labour Code. The situation awaits clarification by the jurisprudence, which needs to decide whether or not the special character of sports enables it to fall out of the scope of dependent work.

Types of sports, professionals and amateurs

There are no relevant differences between types of sports and between professionals and amateurs. However, professionals and amateurs are often distinguished in the rules of the sports clubs, e.g. the Directive on the registration of professional and non-amateurs contracts of the Football Association of the Czech Republic (FACR) distinguishes between (a) professional players – players who perform based on a professional contract on sports activity for a first or second league team and for whom it is their main occupation; (b) non-amateur players – players who receive remuneration for their performance based on non-amateurs contracts; (c) the rest.

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?

As mentioned above, the relationship between an athlete and a club is mostly governed by business contracts and employment law provisions do not apply to them.

If the relationship between an athlete and a club is based on an employment contract, which is the exception, all the general rules, including the rules on post-termination restrictive covenants and/or garden leave provisions and/or the right to continue to work, apply. There are no specific employment law provisions in the Labour Code applicable to athletes. This situation is clearly not comfortable.

Sports clubs and associations tend to create their own internal rules in this area (e.g. regulation on the length of a contract on sports activity, repetition of contracts by FACR). The internal rules are binding on the relationship between a club and the athlete if the business contract refers to them and if they are not in breach of employment law provisions.

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?

No, there is no specific court or arbitration system for employment matters between athletes and clubs in the Czech Republic.

However, sports clubs and associations tend to have their own Commissions, which have the authority to resolve or mediate disputes between members or the club and the athlete, e.g. Article 29 of FACR Statutes states: *Members of FACR shall resolve disputes arising from the FACR Statutes, rules and regulations through FACR bodies; they may approach other bodies only after the means set by FACR have been exhausted. Breach of this provision is subject to penalties.*

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 Bosman case only partly affected the system of transferring football players in the Czech Republic. In the Czech Republic it is necessary to distinguish between national transfers and cross-border transfers of players (this concerns football and hockey players in particular).

(a) National transfers

After a player's contract terminates, no matter whether he is a Czech citizen or a foreigner, the player cannot transfer to another club in the Czech Republic unless his club of origin receives a compensation fee, the amount of which is prescribed by the national association (the so-called "table compensation").

(b) Cross border transfers

After a player's contract terminates, no matter whether he is a Czech citizen or a foreigner, the player may transfer abroad freely. No compensation fee is required. This best describes the Czech Republic's reaction to the Bosman case. However, if the player wants to transfer back to the Czech Republic, he would have to register again through the club of origin, and the compensation fee would apply for any further national transfer.

Many athletes criticize the Czech system of compensation fee tables. The Czech Association of Football Players is very active in this matter and claims that the system is in breach of EU law. We agree that the national compensation fee system potentially discourages foreign players from approaching the Czech football market, since it is later more complicated for the player to change clubs.

As far as national quotas on players are concerned, article 51 of the FACR competition regulations stipulate that for the purpose of a match there may be a maximum of five foreign citizens playing on the team. The limitation does not apply to first and second league teams, where there is no limit on the number of players from the EU, EFTA, etc., but there is a limit of five non-EU foreign citizens. Young footballers competition does not have any quotas.

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?

Sports clubs and associations tend to create their own internal rules in this area (e.g. regulating the length of a contract on sports activity, repetition of the contracts by FACR).

Contracts on sports activity are usually for a fixed term. FACR allows fixed term contracts, which may be concluded for a maximum of five years in accordance with article 18 of the FIFA Regulations on the Status and Transfer of Players. FACR also proceeds in line with FIFA Regulations on the Status and Transfer of Players, which regulates due termination of contracts, due termination of contracts for sports reasons, the prohibition against terminating a contract during the season and the consequences of undue termination of a contract.

However, as mentioned above, the internal rules are binding on the relationship between a club and an athlete if the business contract refers to them or, in the case of an employment contract, if they are not in breach of employment law provisions.

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?

If the relationship between an athlete and a club is based on a fixed-term employment contract, employment law would allow an athlete to terminate the contract during its term without the prior consent of the club. The duty to pay a transfer fee would be in breach of employment law.

However, as mentioned above, the reality of business contracts allows for transfer fees and the clubs, based on their internal rules or the agreements between them, also allow for other limitations on transfers, e.g. according to article 6 (4) of the FACR Directive on registering professional and non-amateur contracts, a player cannot transfer during the term of the registration (contract).

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?

There is no regulation in this area in the Labour Code or any other legislative act. The remedies would be regulated by the internal rules of the clubs or by the agreements between the clubs.

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.

There are two major conflicts, which were partly described above:

(a) the clash between sports activity as dependent work regulated by the Labour Code and a business activity performed by a contract worker

The Supreme Administrative Court held in its judgement no. 1 Afs 73/2011 – 167 in 2011 that *the activity of a professional athlete cannot without further consideration fall under the term „dependent work" as used by the Income Tax Act,* and that *it is generally not illegal to conclude contracts other than employment between clubs and athletes*. However, the Labour Code was amended after this judgement and the definition of dependent work has changed more activities now fall within it. So called "black work" or "švarc system" is now subject to administrative penalties for both the "employer" and the "employee" and is punishable not only by the Tax authorities but also by the Labour Inspection. It will be interesting to see the new case law on this.

(b) compensation fee system for national transfers

See 2.2.1. The problem is best exemplified by the case of the hockey-player Martin Podlesak. Podlesak played for Hradec Kralove Hockey club, Czech

Republic, which notified him that it would not conclude a new contract with him. Podlesak found a new hockey club in Kladno, Czech Republic, but according to the compensation tables, the transfer fee would be 900,000 CZK (approx. 32,000 EUR), which neither Kladno nor any other club wanted to pay for Podlesak. As a result, Podlesak could not play. Unfortunately the case did not proceed to court.