INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

Commission(s) in charge of the Session/Workshop:
Employment Law Commission
IBLC Sports Law Subcommission

London, 2015

National Report of Spain

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Feldfunktion geändert

Formatiert: Englisch (USA)

Feldfunktion geändert

February 3, 2015

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)

Spanish labor law allows post termination restrictive covenants to be enforced in employment relationships.

However, as this kind of covenant implies a restriction of the employees' constitutional right to work, parties can only be bound by this obligation if certain requirements are met.

Specifically, the Workers' Statute Act ("WSA"), containing the main regulations governing employment relationships in Spain, establishes the possibility to agree to a **post contractual non competition restriction** (defined as the limitation of an employee to compete or engage in activities considered competitive with the former employer during a given period of time).

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 can be **mutually agreed at any time** while the employment relationship is valid. They are often agreed when the employee is hired, as this employment condition is usually subject to discussion at the employment offer stage. These kinds of limitation are often agreed during the negotiation of the terms and conditions of an employment promotion too.

A restrictive covenant can be also agreed on terminating the employment relationship, although this is less common, unless the termination is implemented by an agreement between the parties because it cannot be unilaterally imposed.

In Spain, since the non competition agreement involves rights and duties affecting both parties, **neither the employer nor the employee can unilaterally revoke the agreement** (even if the post contractual non competition agreement allows either party —usually the company— to unilaterally revoke this obligation). Supreme Court case law has stated that, as this restriction is a contractual obligation under the Spanish Civil Code, the fulfillment of an obligation cannot be left to the will of either party.

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?

Employees have the legal duty not to compete with their employer while the employment relationship is valid, based on the fact that this would imply a breach of the employee's implied duty of trust.

Post contractual non compete obligations are **only enforceable if they have been expressly agreed between the parties** during the employment relationship. Therefore, if there is no express agreement, the employee will not be bound by any non compete obligation.

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?

As mentioned above, post termination restrictive covenants are only enforceable if they have been expressly agreed between the parties.

However, if the employee was subject to a specific confidentiality obligation during the employment relationship, the use of any sensitive information obtained for a third party during that relationship could lead to a legal action if the company proved that the information used was covered by a confidentiality obligation and that the company has suffered specific damages.

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 WSA establishes the possibility to agree a post contractual restrictive obligation, described as the obligation "not to compete with the employer," but there is **no specific distinction between the different areas of competition** (such as non-solicitation, non-dealing, and non-poaching).

As a generic obligation, the labor courts consider that post contractual restrictions can validly limit:

- the former employee's access to a professional activity (carried out as an employee or self-employee) that can be considered to compete with the activity developed by the previous employer;
- the employee's engagement with the previous employer's clients or customers; and
- hiring other employees of the previous employing company.

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.

Article 21 of the WSA provides specific requirements that bind all post contractual non compete agreements:

1. The company must have a <u>real and effective interest</u> in avoiding competition by the employee. Courts have interpreted this requirement as the connection between the limitation (scope, geographical area, business, etc.) and the employing company's activity.
2. <u>Maximum duration:</u> The length of the limitation cannot exceed two years in the case of qualified employees, and six months for other employees.
3. <u>Economic compensation:</u> The prohibition to compete after termination must be adequately compensated. Spanish law does not specify what "adequate compensation" means, but it must be reasonable considering the employee's salary, the length of the restriction and the scope of the limitation. Although there is no unified criterion regarding suitable compensation, case law sets it at 50% to 70% of the fixed gross remuneration for the non compete period.

Alternatively, compensation for this restriction can be paid on a monthly basis during the period of employment instead of agreeing on a payment during the restricted period. However, it is important to contractually ensure that the employee receives a suitable compensation when making it enforceable (a minimum compensation provision is advisable to ensure that the restriction is enforceable even if the relationship is terminated at an early stage of employment).

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.

Spanish law does not provide any specific limitation to the scope of a post termination limitation except those specified in section 1.1.6 above (duration, economic compensation, etc.).

Thus, if the company has a specific commercial interest, parties can agree on a post contractual non compete restriction valid in Spain or abroad, and covering numerous activities if they are linked to the company's business.

However, the broader the limitation, the higher the risk of a court declaring that the compensation paid to the employee is not enough to remunerate the limitation imposed by the company (and therefore, the risk of the restriction being declared null and void).

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 breaches the post contractual non competition agreement, the employer can sue the employee for **damages**, which the employer must prove. As this is an implied remedy, it is not necessary to establish the employer's right in the agreement.

Besides obtaining damages, it is also possible to include a **penalty clause** in the post contractual non compete clause to be claimed by the company. This would be an independent amount, foreseen as a deterrent for the employee's

breach. An amount linked with the compensation paid for the non-compete limitation (for example, two times the compensation paid) would be a good practice.

The infringement of the non-compete restriction by the employee does not automatically entail the termination of the parties' contractual obligation. Thus, it may be advisable to include a specific provision stating that, in the case of breach of the non compete obligation by the employee, the obligation to pay the outstanding compensation will automatically cease.

1.1.9. What are the possible sanctions against the new employer in the event of a breach of a post termination restrictive covenant by the employee of the former employer? Is it a matter of unfair competition in your jurisdiction?

As a general rule, the employee —and not the new employing company— directly assumes the consequences derived from the employee's breach of a post termination restrictive covenant.

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?

If an employer has invested money in an employee's training, entailing the professional specialization of the employee to carry out a specific task within the company, it is possible to agree on an **employee's retention for up to two years**. If the employee breaches this obligation, the employer is entitled to compensation for damages (usually the part of the employee's training costs proportional to the period of the limitation breached).

Additionally, if the parties agree on a post contractual non compete obligation, this amount could be included in a penalty clause to ensure the refund in the case of breach of the obligation.

1.1.11. What are the possibilities of lawsuit for the employee in case of the employer's disadvantagous actions during a period covered by a restrictive covenant (e.g. the employer prevents the employee from finding a new job by spreading out rumours)?

It would be difficult for the employee to defend this kind of lawsuit before Spanish courts, considering that he may have to prove that he is unable to find a new job because of the company's actions. The fact that the employee is subject to a restrictive obligation during this period (limiting his possibility to work for a potential competitor) may also weaken this position in court.

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?

Spanish labor regulations do not foresee the concept of garden leave, as employment relationships are based on two main elements: the employee's right to work, and the employer's obligation to provide the employee with effective occupation.

1.2.2. Talking about garden leave provisions: do employees – or certain types of employees – have a right to be "actively employed" in your jurisdiction, e.g. so that a garden leave provision would not – or not be fully – be enforceable for an employer and the employee would have a "right" to continue working until the end of the employment? What is the respective legal framework in your jurisdiction?

As indicated above, under Spanish law, an employer cannot impose a garden leave, as the employee has the right to remain actively employed until the termination date. However, a paid leave of absence is an option if the employee agrees to this (for example, during the notice period of termination).

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

In case the employee had access to sensitive information during his/her employment relationship that could affect to the company's interests in case it is used by third parties; it is possible to include a specific confidentiality obligation in order to limit the employee's use of such information after the

termination of the employment relationship. In this regard, it may be essential to clearly delimit the information subject to such confidentiality obligation and the damages derived from any unauthorized use of information, in order to ensure that the company has enough justification to sue the employee in case of an infringement.

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?

Employment law applies to **athletes** who, on a regular basis, practice sports **voluntarily**, **under the organization and direction** of a sporting club or association, and they **are paid** by this club or association for doing so. When these circumstances are met, then, **Royal Decree 1006/1985** (hereinafter RD 1006/1985), which governs the special labor relation of professional sportsmen or women, applies. Yet, in those matters not covered by the RD 1006/1985, the **Workers' Statute Act** (WSA) applies.

Where the sports practice is not done under the organization and direction of a club or association, the athlete will be **self-employed**, even if the club or association pays the athlete for services rendered. Consequently, in that case, there is not a labor relation, nor is the RD applied.

The **difference** between professionals and amateurs is **the economic compensation** for practicing sport. Should the compensation **cover or exceed the expenses** related to the practice, the athlete will be deemed a **professional** (then RD 1006/1985 is applied); meanwhile where the compensation is lower than these expenses, the athlete will be an amateur. Therefore it must be analyzed the amount of economic compensation and the expenses related to the sports practice to determine whether the athlete is professional or an amateur.

With regard to the above, the lack of dependence between the club and the sportsman or sportswoman in some sports practices leads to most of being self-employed. This happens in sports such as golf or tennis.

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 pointed out above, RD 1006/1985 applies to **athletes** who, on a regular basis, practice sports **voluntarily**, **under the organization and direction** of a sporting club or association, and they **are paid** by this club or association for doing so; and the WSA, which applies to the **matters not covered by RD 1006/1985**, are the **main employment law sources for athletes' legal regulation**. Apart from that, there are different provisions related to professional athletes.

On one hand, **collective agreements** of some sports disciplines develop RD 1006/1985. Each collective agreement complements the above mentioned laws introducing provisions **related to the specifications of its sports practice**. In that sense, there are collective agreements for football, basketball, handball or cycling. These collective agreements specify minimum wages, working time, or minimum resting period, among other matters.

On the other hand, each **national and international sports federation** has established **different provisions on professional athletes' regulation who participate in its competitions**, such as license transfer period, license transfer prohibitions or consequences related to the termination of the relationship between the athlete and the club.

With regard to the post termination restrictive covenants, **RD 1006/1985 does not foresee such limitation**. Nevertheless, there are some provisions in that sense in the regulations of the sports federation.

- Players cannot play for two different clubs in the same division during the season: the Football and Basketball Federations forbid the alignment of athletes transferred in the same season if the vendor and the buyer are in the same division and the athlete has been aligned by the vendor in a certain number of matches before the transfer(art. 126 FEF General Regulation and 36 FEB General Regulation).

- Coaches cannot coach two different clubs in the same division during the season: the Football and Basketball Federations prohibit a coach

to work for another club of the same division if the former relation has been terminated in the same season, with a few exceptions (art. 162 FEF General Regulation and 51.3 FEB General Regulation).

- In case of temporary assignment of players between clubs, it is a common practice in Spain to agree that the assigned player will not be aligned against its club of origin in case of matches between the two clubs.

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?

Employment disputes between athletes and clubs are resolved by the **ordinary social courts after a compulsory attempt to conciliation** between parties.

Additionally, there are **specific conflict resolution systems put in place by the corresponding federations**. Nevertheless these systems have a scope that goes beyond employment matters.

The club and the athlete can also resolve the dispute though **arbitration**, but the arbitration agreement must be reached after the dispute has arisen. Agreements stating that future claims will be solved in an arbitral court instead of a social court would not be enforceable, as waiving ordinary social courts may only take place by mutual agreement when the conflict exists.

In any case, **those proceedings are voluntary**, so the athlete and the club must agree on submitting a specific case before the specific federation court or the arbitration procedure.

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 entailed granting **equal rights to EU Member States' athletes and to Spanish athletes**, based on **freedom of movement** for European workers. Consequently the nationality of these athletes cannot impede their movement between EU Member States' clubs or sports associations. Additionally, it led to **removing all differences that could alter intra-European athletes' mobility**, in relation to taxation or any other extra cost.

In that connection, the different national sports federations modified their rules to allow non-Spanish EU member States' nationals to be part of a squad without any limitation other than the ones affecting Spanish nationals. Therefore, the limitations introduced in the federative regulations regarding the athlete's nationality could only affect non-EU members' athletes.

Notwithstanding the above, there are some federative regulations that draw a distinction between Spanish nationals and other EU member States' athletes. Such is the case of FIFA and the Spanish Football Federation regarding the Regulations on the Status and Transfer of Players, where international **transfer of minors within the EU territory** is forbidden unless the athlete is aged between 16 and 18, and the new club fulfils minimum obligations on the athlete's integral education. These requirements are not required if the minor is a Spanish national. Despite this may seem like a minor difference in regulation, this provision on international transfer of minors in football is having very serious consequences for non-performing clubs (i.e. F.C. Barcelona).

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?

With regard to regulations dealing with the termination of athletes' employment contracts, **RD 1006/1985** foresees **nine different causes for terminating the employment relation**:

a) Mutual agreement between the club and the athlete.
b) Expiration of the term of the contract.
c) Full performance of the contract.

d) Athlete's death or injury provoking permanent total or absolute disability, or severe disability.

e) Club's dissolution or liquidation.

f) Economic crisis of the club or sports association that justifies the restructuring of the squad.

g) Valid causes foreseen by the contract.

h) Dismissal of the athlete.

i) Termination at the athlete's will.

If the contracts ends due to the **expiration of the term of the contract,** and a different club or sports association hires the athlete, RD 1006/1985 allows the collective agreements to introduce a **training or formation compensation** to the club of origin, to be paid by the hiring club or sports association. Compensation is foreseen in the Professional Football Players Collective Agreement, as well as in different regulations of the Basketball and Handball's Spanish Federation.

Apart from the above, upon the termination of the fixed-term contract, the athlete will be entitled to **compensation equal to twelve days' pay per year worked**.

Furthermore, RD 1006/1985 provides that in the event of an **unfair dismissal**, the athlete is entitled to receive an **economic compensation.** Unless the **parties have reached an agreement** on the compensation, it will be **judicially established** and it has to be equivalent at least to two monthly payments plus the proportional part of the quality and quantity's work complements of the last year, per each year of service.

RD 1006/1985 also foresees an economic compensation in favor of the club or sports association's if an **athlete's breach of contract** occurs. The compensation's amount may be **agreed or judicially determined**, and in any case, it must be paid by the athlete. Should the athlete be hired by another club or association within the first year after the termination, the club will hold subsidiary liability for the economic compensation.

RD 1006/1985 establishes that the professional athletes' contract will run **for a fixed term**. Therefore, as it is regulated, athletes could be hired for a certain period of time or for a specific number of sporting events, but always for a fixed term.

Despite not existing legal restrictions for fixed-term contracts in Spain, the **national sports associations' regulations** are subject to the **international federations' provisions**, which **may limit the duration of the fixed-term contracts**. For instance, FIFA prohibits contracts to last over than 5 years; while FIBA sets a maximum of 4 years.

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?

Switching the club during the term of the employment contract can be **temporary or definitive**.

The **definitive switch** has been explained in the answer above. According to what it has been exposed, athletes are entitled to switch clubs without the consent of the former club, provided that the athlete –or the new club– pays the **compensation agreed or the amount judicially established** if there is not an agreed compensation.

The **temporary switch** is expressly recognized in RD 1006/1985. In general terms, the switch requires the **express consent of the parties**: the former club, the athlete and the new club. However, if the former club has not used the athlete to take part in any official competition during an entire season, **the former club must consent to the temporary switch** of the athlete to a new club.

The transfer fee **is not compulsory** in temporary switches. However, clubs **can agree on an economic compensation** in favor of the former club. In such cases, the athlete is entitled to receive at least the **15% of the 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?

If a player switches the club during the term of the employment contract without the consent of the former club and without the payment of an

agreed transfer fee, the former club is entitled to **seek legal action against both**, the athlete and the new club, to obtain an economic compensation. Before the judiciary procedure, the parties are obliged to attempt a mandatory **conciliation** stage and meeting.

If the contract with the former club foresaw an economic compensation –considered as a **penalty clause**–, this provision will set the amount to be paid by the athlete and the new club. However, the economic compensation agreed in the contract could be deemed as **abusive** by courts. In that case, courts would be **entitled to reduce** such amount according to the circumstances.

If the contract with the former club did not foresee an economic compensation, this compensation will be considered as a **compensation for damages**, and the labor court will set damages compensation's amount, according to the following criteria: sports circumstances, damage caused to the former club or breach of contract's reasons, among others.

Additionally, some national sports federations allow the former club to claim before **specific courts** linked to these national associations. Finally, parties could agree on resolving their disputes by **arbitration**, but this agreement is only valid if the submission to arbitration takes place upon the existence of the conflict.

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.

2.3.1. Fixed-term contract compensation

The Supreme Court's Resolution, dated on March 26, 2014 (cyclists fixed-term contract compensation), decided whether cyclists are entitled to receive the compensation foreseen in the WS for ordinary workers upon the contract's expiration.

The Court held that athletes are entitled to receive a final compensation pay of twelve days' pay per year worked, as foreseen by the WS for fixed-term contracts. According to this court decision, athletes would receive such payment if the expiration of the contract, or an eventual extension of contract's refusal, is attributable solely to the club or sports association.

This decision, although issued in the cycling domain, is applicable to any other professional athlete in an equivalent situation.

2.3.2. The Baena case.

The **Supreme Court's Resolution, dated on February 5, 2013 (Raul Baena case)**, despite issued in a civil-case and not an employment case, has been considered a significant decision on professional athletes and their employment contracts. This judgment decided whether, after the athlete's breach of contract due to switching clubs, the €3 million penalty clause foreseen in the contract was enforceable. The penalty clause had been agreed between the club and the father of the player, as he was a minor at the time.

The resolution established that the contract was null and void. With regard to the penalty clause, it was deemed null and contrary to the public order in the field of recruitment of minors. The Court acknowledged the superior interest of the minor to decide his professional future and deemed that the agreed penalty clause impeded his free choice.

The judgment does not forbid the former club to claim for damages against the new club, but it forbids doing so against the minor.

This resolution has been particularly relevant for Spanish football clubs, because contracts between clubs and minors are in the ordinary course of business.

2.3.3. Abusive clauses.

The **Resolution dated October 17, 2006, of the Basque Country Supreme High Court**, addressed the questions of whether the economic compensation agreed in a professional athlete's employment contract for the employee's breach of contract could be deemed abusive.

With respect to this case, the Court held that the economic compensation agreed in the contract must conciliate two rights: (i) the athlete's right to voluntarily terminate the contract; and (ii) the club's right to foresee the athlete's decision by agreeing on an economic compensation.

In that sense, the judgment stated that the penalty clause set – amounting to €30 million– was abusive and disproportional in the club's favor. The decision to consider the clause as abusive was based on several facts: sports circumstances, athlete's age, position (defender), salary, contract's duration, competition where he played, and participation of the athlete in the national team. Consequently, the Court held that the penalty clause reflected the club's dominance over the athlete, and concluded that it was unlawful.

In addition, the resolution considered that the latter statement had to be deemed as if there was no penalty clause. Therefore, the Court had to set the economic compensation's amount considering the following elements: sports circumstances, damage caused to the club, and breach of contract's reasons, among others.

Despite this judgment, we still see incredible high penalty clauses in professional athletes' contracts, especially in football. Such high economic compensations are an incentive to interested clubs to negotiating with the club of origin before hiring the athlete.

ROYAL DECRE 1006/1985

Professional sportsmen's special labor relation

According to the Workers' Statute Act, article 2.1.d), the labor relation of the professional sportsmen and women is deemed as a special labor relation. The reasons for this are linked to the activity that these professionals develop.

In general, the professional sport requires a high physical level, which diminishes with age. Therefore, the sportsmen and women professional life is shorter than an ordinary worker.

In addition, the employer in such labor relations is a club or association, instead of an ordinary company. So it will be registered in a federation, as well as the sportsmen and women, to be able to participate in different competitions. Therefore, the labor relation and the license to compete are linked.

Given the above, it became necessary to approve a special law ruling the professional sportsmen's labor relation: the Royal Decree 1006/1985 (hereinafter, the Royal Decree).

The Royal Decree is applicable only to professional sportsmen and women hired by a sporting club or entity. A sportsman is deemed as professional when the expenses linked to his professional activity are lower than the wage received. Therefore there are some professional sportsmen and women not covered by this law, such as tennis or golf players (art. 1 RD). Moreover, the employment contract will be on writing and will run for a fix term (arts. 3 & 6 RD).

According to the relevance of the physical conditions required by the sport, the sportsmen and women are obliged to practice the sport with a specific diligence regarding their physic and technical conditions. Besides, the professional athletes have the right to freely express their own thoughts (art. 7 RD).

The Royal Decree provides for the possibility of an athlete to be temporarily transferred to another club if the athlete and the clubs concerned have reached an agreement. The temporary transfer period will not be longer than the duration of the contract between the athlete and the lender (art. 11 RD).

With regard to the contract's termination, there are some specific provisions.

(i) If there is an agreement between the athlete and the club to transfer the sportsman to another club, the athlete is entitled to receive at least the 15% of the amount agreed between the clubs.

(ii) If the contract expired, the collective agreement could provide a training compensation that would be paid by the athlete's new club.

(iii) In case of termination at the athlete's will, the former club is entitled to receive compensation. Its amount could be agreed by the parties, or fixed by a court. This compensation will be paid by the sportsman and in the alternative, by the athlete's new club if he is hired within a year after the termination.

Finally, the Royal Decree establishes the application of the Workers' Statute Actin those matters not regulated by the Royal Decree.