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

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1. Employment Law

1.1. Restrictive covenants

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

There are different types of post termination restrictive covenants under German law: (i) non-competition, (ii) non-solicitation, (iii) confidentiality. All of them aim at protecting the business and business interest of the former employer.

Non-competition covenants aim in particular at protecting employers from **competitive activities** of the employees

Under German law, the post termination non-competition covenants must, however, follow a strict mandatory legal regime in order to be valid and enforceable.

The general rule is that employees/executives are free to compete with their former employer's business by accepting a position offered by a competitor or by pursuing competitive activities without any explicit agreement. This rule is based on the principle of freedom of competition applicable upon termination of employment relationship. An employer will therefore try to impose a post termination competition obligation on a departing employee/executive by concluding a post termination non-competition agreement in advance.

The rules on post termination non-competition covenants are contained in the German Commercial Code (cp. Secs. 74 et seqq.) and further specified in the court practice of the Labour courts. Further, these rules are considered to encompass overriding mandatory principles of public interest within the meaning of Article 9 of Regulation (EC) No 593/2008 on the applicable law (Rome I). The rules apply to all employment relationships. Post termination non-competition covenants for executives (i.e., managing directors and board members), who do not have an employee status under German law, are not direct subject to the rules of the German Commercial Code, but they must comply with the principles laid down in the German Commercial Code.

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

Post termination non-competition covenants are normally agreed prior to the termination of the employment relationships (most often in conjunction with the establishment of the employment relationship or prior to the establishment of the employment relationship). The conclusion of a post termination non-competition agreement between the issuance of termination notice and the formal termination of the employment relationship is rather seldom in practice).

1.1.3. Once the employment contract is signed, is there a general obligation of non-compete also in the absence of an express agreement after the termination of the employment? Are there specific statutory provisions or precedents referring to this? Could whistle blowing be regarded as a part of the employee's post termination restrictive covenant?

In comparison with non-competition obligations during the employment relationship, a valid post termination non-competition obligation requires an explicit written agreement (a separate one or as a part of the employment agreement), an original counterpart of which needs to be handed out to the employee (cp. Sec. 74 para. 1 of the German Commercial Code). If the agreement is not in writing, the covenant is null and void; by contrast, if the employee has not received the agreement in original, the enforceability of the covenant depends on the choice of the employee of whether to comply with or not.

Whistle Blowing

It is the prevailing legal opinion in Germany that post termination non-competition covenants do not protect from unlawful competitive activities. A former employer does not have a recognized legitimate interest in refraining employees from competitive activities which are unlawful.

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?

Without any explicit agreement, the employee is free to compete with the former employer as long as his/her activities do not constitute an unlawful and culpable violation of the business of the former employer (Secs. 823, 826 of the German Civil Code) and/or prohibited unfair competition (Sec. 3 of the Act on Unfair Competition).

Further obligations may arise from the so called post termination loyalty and respect duty for both employer and employees pursuant to Sec. 242 para. 2 of the German

Civil Code which does not, however, reach so far to constitute a post termination non-competition obligation outside the legal framework of the German Commercial Code.

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, there are different types of post termination restrictive covenants under German law: (i) non-competition, (ii) non-solicitation, (iii) confidentiality. All of them aim at protecting the business and business interest of the former employer.

Non-competition covenants aim in particular at protecting employers from **competitive activities** of the employees. While non-competition obligations during the employment are implied into the employment relationship and form part of the duty of loyalty (employees) or fiduciary duty (executives), post termination non-competition obligations must be explicitly agreed and fulfil the requirements below in order to be valid and enforceable.

Non-solicitation covenants "only" prevent the (former) employees to entice the remaining employees away from their former employer. It is a minus to a non-competition covenant. It is unclear to which extend employer and employee can agree on a post-contractual non-solicitation covenant without having to agree on non-competition covenant.

Post contractual confidentiality obligations protect the business and trade secrets of the 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.

Post termination non-competition covenant

The main requirements for a valid post termination non-competition covenants are: (i) written agreement and handing-over of the original; (ii) limitation of the post termination non-competition period up to maximum 2 years; (iii) compensation of minimum 50% of the most recent contractual remuneration of the employee (in case of executives the minimum compensation could be less), (iv) legitimate interest of the employer with regard to scope and geographical reach of the post termination non-competition obligation.

The non-compliance with the aforementioned requirements may trigger: (i) invalidity of the covenant and its unenforceability (e.g., in case of no granted compensation payment), (ii) enforceability of the covenant in dependence on the choice of the employee to comply with or not (e.g.; the agreed post termination non-competition period exceeds 2 year) and/or (iii) partial enforcement upon adjustment of the covenant (e.g., extensive scope of the covenant beyond the legitimate interest of the employer).

There is no prerequisite for a minimum salary. Given the considerable financial burden for the employer resulting from the obligation to pay compensation during the post termination non-competition period, a post termination non-competition covenant is normally agreed with senior employees or employees with special know-how and expertise.

There is no required minimum employment period. However, the parties are free to agree that the post termination non-competition covenant should only apply if the employment relationship has been existing for a certain period of time.

By contrast, the German Commercial Code provides for explicit rules regarding the impact of way of termination on the post termination non-competition agreement. In the event of employer's termination due to operational reasons as well as in the event of employee's summary resignation, the employee can either choose to comply with the post termination non-competition covenant and claim the compensation payment, or choose not to comply. In the latter case, the employee must notify the employer within one month of the date of the termination/resignation. The right of choice is granted also to the employer in case of employer's termination for good cause.

Post termination non-solicitation covenant

According to the majority of legal commentators in Germany, a post termination non-solicitation covenant may be concluded validly without the requirement of a compensation. However, such non-solicitation obligation only binds the former employee as long as he himself is not self-employed and thus possible employer. Sec. 75f of the German Commercial Codes prohibits non-solicitation agreements between employers. Accordingly, as long as the former employee is not himself an employer, a non-solicitation covenant is valid. The maximum duration of such an agreement is two years.

Post termination confidentiality obligation

According to the case law of the Federal Labour Court in Germany, an employee has to maintain confidentiality regarding business and trade secrets of his employer also after termination of the employment relationship, even without express agreement. This information must not be used by the employee for his own purposes nor may he disclose these to third parties. However, this confidentiality obligation does not prevent the employee to compete with the former employer. An employee will have

to keep confidentiality regarding customer lists of his former employer. This does not lead to the obligation to not contact the employer's customers.

An agreement which extends the employee's confidentiality obligation further would have to be considered as a post termination non-competition covenant.

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.

Post termination non-competition covenant

Duration

The post termination non-competition obligation is binding for a maximum period of 2 years upon the end of the employment relationship.

Scope

A post termination non-competition covenant covers usually employee's competitive activities as well as any activities for competitors. The scope of the post termination non-competition covenant must be justified by legitimate interest of the employer. This is the case, if

- the employee has had the opportunity to gather knowledge and information with the former employers which are relevant for competitors
- the competitive activities are connected with the activities for the former employer
- the non-competition covenant does not entirely hinder the employee to continue his/her professional development.

Geographical reach

The same applies in case of the geographical scope of the non-competition clause. A non-competition obligation without any geographic restriction is meant to apply worldwide which could turn out to be too far-reaching and not justified.

Pitfalls

While the requirements on the form of the agreement, minimum compensation and maximum duration can be easily complied with, a great portion of uncertainty, in particular for employers, exists with regard to the appropriate scope of the non-

competition covenant. Non-competition covenants reaching beyond the business sector and activities of the former employer as well as covenants without any geographic restrictions are often deemed to be too broad and non-transparent which can result in adjustment of the covenant and limited enforceability of the initial agreement. In order to avoid this pitfall, employers are well advised to explicitly specify the competitive activities as well as their competitors subject to the non-competition while considering the task duties of the employee. Given the fact that the activities of the employer and the employee may change over time, specifications made in agreements at the beginning of the employment relationship may not reflect entirely the actual competitive situation at the time of termination of the employment relationship. To mitigate the risk of not covering all relevant competitive activities or competitors, the post termination non-competition agreement may define the competitive activities by considering the most recent activities of the employee. At the same time, the agreement should contain general clauses covering potential competitors while granting the right to the employee to be exempted from the non-competition obligation if the activities for the competitor are proven to be not competitive.

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.

Breach of Non-Competition

According to German Law there are different sanctions against the employee in the event of a breach of a post-termination non-competition covenant. There are statutory sanctions against the employee, like cease of compensation payments (a) and damage claims (b). The most common contractual sanction is a penalty (c). A penalty has to be explicitly agreed on.

Even when the parties do not agree on restrictive covenants unfair competition law limits the principle of freedom of competition applicable upon termination of employment relationship.

Naturally the employer has a claim for injunction of competition against the employee in case of a breach of a post-termination non-competition covenant. This claim can be asserted also by injunctive relief.

In case of suspicious facts evidence the employer has a claim for information against the employee to check whether there are any claims against the employee. The claim for information is targeted on the nature and scopes of the activity, the name of the new employer.

a. For the duration of the breach of the post-termination restrictive covenant the employee is **not entitled to compensation**. If the employer has paid compensation although there has been a breach of the restrictive covenant during this time, he can claim the refund of these payments. If the employee starts complying with the restrictive covenant again he is entitled to compensation again.

b. Since the employee has breached a duty arising from the post-termination restrictive covenant, the employer may demand **damages** for the damages caused thereby. The difficulty regarding damage claims is that the employer has to prove the amount of his damages. This can be rather difficult.

   - **Do:** To avoid these difficulties the parties shall agree on a penalty (see below).
   - **Do:** In case the amount of the damage is in dispute among the parties and cannot be clarified properly, the court has the possibility to rule on the amount of the damages at its discretion and conviction, based on its evaluation of all circumstances (Sec. 287 German Code of Civil Procedure).

c. According to the fact that the statutory sanctions protect the interests of the employer inadequately or depend on high requirements regarding the proof of damages a restrictive covenant is usually subject to a **penalty**. Further a penalty has a deterrent effect to ensure that the employee complies with the post-termination restrictive covenant. Based on the above mentioned difficulties the employer has a justified interest in taking up a penalty clause. Penalties are specific features of labour law, but a penalty agreement must follow a strict mandatory legal regime in order to be valid and enforceable. A penalty securing a post-termination restrictive covenant has to be in writing. The penalty clause has to be clear and comprehensible and must not be surprising and ambiguous (Sec. 307 para 1 sent. 2, 305c para.1 German Civil Code) A penalty is invalid, if it is contrary to the principles of good faith or if it unreasonably disadvantages the employee (Sec. 307 German Civil Code). There is no unreasonable disadvantage, if the penalty is payable only in case of intention and negligence[1] and if the amount of the penalty is reasonable[2]. Which amount of a penalty is reasonable is rather difficult to define. It should bear a reasonable relation to the expected damages.

   - **Do:** A penalty with an amount of (a multiple of) a gross monthly salary most recently received by the employee is advisable.
   - **Don't:** If a penalty is disproportionately high, the clause as a whole will be ineffective!

[1] German Federal Supreme Court, Decision of March 20, 2003, file number I ZR 225/00

[2] German Federal Labour Court, Decision of March 3, 2004, file number 8 AZR 196/03

- **Don't:** In an employment contract do not set up the penalty clause in the "miscellaneous".
- **Don't:** A penalty in a contract with an apprentice is invalid (Sec. 12 Vocational Training Act).

Breach of Confidentiality Covenants and non-solicitation covenant

The sanctions against the employee in case of a breach of a confidentiality covenant or non-solicitation covenant are rather similar. Damage claims and penalty follow the same legal regime as non-competition and non-solicitation covenants. Since a confidentiality covenant is valid without compensation payment (see above), the sanction "cease of compensation" naturally does not apply. In case of suspicious facts evidence the employer has a claim for information against the employee as well. The claim for information is targeted - in case of non-solicitation - on the names of the customers or colleagues poached.

The sanctions against the employee are supplemented by the regulations of unfair competition, with further damage claims as well as criminal law. They do apply, if an employee for the purposes of competition, for personal gain, for the benefit of a third party (e.g. the new employer), or with the intent of causing damage to the owner of the business (the former employer), acquires or secures, without authorisation, a trade or industrial secret (Sec. 17 Act Against Unfair Competition). This is for example the case, if an employee reveals a business secret contained in a document that he has kept after the termination of the employment although he was obliged to return it to the employer.

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

In general it is permitted to approach other employees while they are still employed or subject to a restrictive covenant. But in some cases there may be sanctions against the new employer as well. Sanctions against the new employer can be based on tort law (a) or unfair competition law (b).

a. Sanctions against the new employer are possible in cases of inducing the employee to breach the restrictive covenant or in case of intentional damage in an unethical/ immoral way and against the principle of good faith. The simple

knowledge of a restrictive covenant is not enough to reason the induced breach of contract or the intended damage.3

b. In case the new employer induces the employee to reveal trade or business secrets the former employer has damage claims against the new employer and criminal law of unfair competition law also applies. If the new employer poaches the customers in an unfair way unfair competition law may apply as well, e.g. the customers are pressured, mislead or induced to breach the contracts with the competitor.

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?

Claiming a refund of money invested in the employee's training in case of breach of the post-termination restrictive covenant is rather unusual under German law. A refund of money is usually agreed in case the employee terminates the employment contract. The refund clause has to be clear and comprehensible and must not be surprising and ambiguous (Sec. 307 para 1 sent. 2, 305c para.1 German Civil Code). A refund clause is invalid, if it unreasonably disadvantages the employee contrary to the principles of good faith (Sec. 307 German Civil Code).

The clause is not clear, if the amount of the refund is not assessable.[4] A refund clause is possible only in cases when the training is of some kind of monetary value for the employee. The pitfall of refund clauses is the commitment period, i.e. after which period an employee can terminate the employment contract without risking the refund. If the period binding the employee is unreasonable the whole clause is ineffective.[5] According to the judgment of the German Federal Labour Court the following commitment periods are reasonable:

- Training period up to 1 month → commitment period up to 6 months
- Training period up to 2 months → commitment period up to 12 months
- Training period from 3 to 4 months → commitment period up to 24 months
- Training period up to 6 months to 1 year → commitment period up to 3 years
- Training period more than 2 years → commitment period up to 5 years (absolute maximum)

[3] German Federal Supreme Court decision of January 11, 2007, file number 1 ZR 96/04

[4] German Federal Labour Court, Decision of August 21, 2012, file number 3 AZR 698/10

[5] German Federal Labour Court, Decision of September 15, 2009, file number 3 AZR 173/08

The refund of money in case of a termination of the employment is only possible, if the initiating event of the termination is in the employee's sphere, e.g. the employee gives termination notice himself or there are conduct-related reasons for the employer's termination notice.

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)?

Spreading out rumours can be Defamation according to Sec. 186, 187 German Criminal Code and can infringe the general right to protection of personality ("Allgemeines Persönlichkeitsrecht"). Besides criminal prosecution the employee may have a claim for injunction of spreading rumours and correction of the rumours. Further there can be damage and compensation claims.

The employee can bring an action for injunction against the employer. The claim for injunction can be asserted also by injunctive relief.

To avoid such disputes parties may agree on a consensual version regarding the reasons and circumstances of the termination of the employment.

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 "garden leave" does exist in German law (ger. "Freistellung"). The respective right of the employer to release the employee from his working obligation should be laid down in the employment contract. Without such explicit provision in the employment contract, the employer's possibilities to release the employer are restricted.

The reason for this is the employee's general entitlement to be "actively employed". Accordingly, a general provision which allows the employer to release the employee from his working obligation at any time without any further requirement would be deemed void. Contrarily, a provision which allows to release the employee after issuing a termination notice for the rest of the notice period has been deemed valid by the Federal Labour Court.

Without a valid contractual basis, the employer is only allowed to release the employee from his working obligation if he has a factual reason. In practice the Labour courts will have to balance the interests of both parties, i.e. the employee's interest to be actively employed and the employer's interest of not having to actively

employ the employee. Good reasons for the employer which may overweight the employee's interest are in practice braches of contract by the employee. If the employer's interests do not overweight the interests of the employee, the latter has a right to continue working until the end of the employment which he can enforce at the Labour courts.

Two types of "garden leave" have to be distinguished: the irrevocable release and the revocable release. If the employer irrevocably releases the employee from his duties, he has no possibility to withdraw this decision and the respective declaration. The employee must not expect to be called to work again. As a (positive) consequence for the employer, vacation and other free time entitlements can be set off against the garden leave period. Contrarily, if the employer only revocably releases the employee from his duties, the latter has to expect to be called to work each moment. Accordingly, vacation and other free time entitlements cannot be set off against the garden leave period and would have to be paid out.

As a consequence, employers should integrate "garden leave" provisions in their standard employment agreements. These clauses should provide for the employer's possibility to release the employee in case of a termination for the rest of the notice period. Does such a provision not exist in the employment agreement, the employer's possibilities to put the employee on garden leave are quite restricted.

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 described above, employees do have a right to be "actively employed" in Germany. This does not prevent the parties to validly agree on a "garden leave" provision in the employment contract. Only if no such contractual provision exists, a balance of interests will have to be made. If the employer's interests do not overweight the interests of the employee, the latter has a right to continue working until the end of the employment which he can enforce at the Labour courts.

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.

There are no other specific means to protect the employer's interest under German law.

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 national employment law has become a significant issue in the world of professional sports. The employment law and especially the specific and strict provisions protecting and ensuring the rights of employees apply to those athletes that are considered employees of their respective clubs.

Under German law the term of an employee is not legally defined in a statute. The jurisdiction has developed a definition which is broadly accepted. Under this definition a person is deemed to be an employee, if he or she is employed under a private law contract and has the contractual duty to follow directions of the employee while offering his services to the employee.

In general speaking all professional team athletes, playing and thus working for a certain club are considered to be employees of their clubs.

Thus all football players, playing for clubs in the Bundesliga, 2 nd Bundesliga (Second Division) or 3. Liga (Third division) are considered to be employees under German law.

Athletes that are not involved in team sports are generally not employed by a club but are considered to be self-employed. In most of these cases there is no contractual relationship between the individual athlete and a club, due to which the athlete would have to render his services to the club. The athlete can still be a member of the club and compete for the club in competitions. As long as the club does not have the contractual right to give directives to the club, an employment relationship does not exist.

If amateur athletes are employees of their respective hand depends on the fact, whether or not they receive a financial compensation for their services rendered to the club.

In general an amateur athlete does not perform the sports for financial benefits. In all cases, in which an athlete is not directly financially compensated by his or her club, an employment relationship does not exist.

More difficult are the cases of semi-amateur athletes that are involved in team sports, particularly in lower division football leagues (4th and 5th division). In these cases the clubs will often pay their athletes a small monthly salary as well as performance related bonuses. If the clubs have entered into a private law contractual relationship

with these athletes and are exercising their right to give directives to the players, the players are considered to be employees if they receive a salary in return for their services and the salary is more than a mere reimbursement for their expenses. In order to be considered to be an employee an amateur athlete must perform the sports at least partially as a profession to support his or her own living expenses. The amount of the salary granted to the player by the club is not the decisive factor to determine whether or not an employment relationship exists.

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?

In Germany a specific sports law or a sports employment law does not exist. The world of sports has to adapt to the national law. A professional sports club is an employer and has to deal with the same employment law issues as any company. The specific problems resulting in employment relationships with athletes have to be measured by the same provisions as any normal employment relationship.

With respect to post termination restrictive covenants, this means that such a clause would have to be specifically agreed upon by the parties and would only be valid, if the club offers the player a compensation for this covenant of at least half a month's gross salary. For this reason post termination restrictive covenants are very unusual in employment contracts with athletes.

Garden leave provisions also do not have a significant impact in employment contracts with athletes. Most of the time the contracts are concludes as fixed term contracts. A contract is rarely ended by notice of termination. The contract either ends due to the agreed time limit or the parties agree on an earlier termination against a transfer fee, due to the transfer of a player to another club.

German labour courts have had to deal with the right to continue work in the past years. A player's right of employment and hence his right to continue work have been subject of numerous decisions of German labour courts. In the past clubs have had an interest in moving certain players from their professional squad to their second team in order to make room for more talented players or for disciplinary reasons. In Germany, the athletes have argued that by dropping them from the first team, clubs have infringed their right to continue work. Labour Courts have ruled that such an infringement does in fact occur, when a club drops the player for an indefinite period of time and does so without having agreed upon this possibility specifically in the employment contract. Even if such a clause is integrated in the contract it is only valid if the working and practise conditions with the second team are comparable to those of the first team and the player is given the opportunity to take part in professional competitions.

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 an athlete has the right to seek proceedings in front a labour court regarding employment matters. It is not obligatory to seek arbitration proceedings before taking the matter to a regular labor court.

Specific arbitration courts for sports issues due however exist. All major sporting associations have organized their own arbitration systems. In some cases an arbitration clause is integrated in the employment contract, due to which both the player and the club agree to undergo arbitrational proceedings before taking the matter to a regular court. It is legally possible to agree upon such a clause, as long as it is not denied to take the matter to a labour court after such proceedings.

In other than employment law matters associations and clubs or associations and individual athletes often agree to an arbitrational system as the sole possibility to deal with the proceedings. For example it is agreed upon that conflicts between an athlete and the association are to be dealt with solely in front of the CAS (Court of Arbitration of Sports). It is currently highly disputed if such a clause is in accordance with mandatory German law, specifically if the sporting association has a market dominating position.

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 has had a huge impact on the world of professional sports, especially professional football, regarding the system of transfer of players from one club to another and the possibility of claiming transfer fees. Before the Bosman Case the Clubs tended to agree upon rather short fixed term contracts with a maximum duration of 2, sometimes 3 years. This was for the reason that a club was deemed to be eligible to charge a transfer fee for a transfer of a player to another club, even if the fixed term contract had run out. In other word for the possibility to charge a transfer fee it did not matter, whether the fixed-term employment contract with the player was still within the agreed duration or had run out. The question of whether or not the club still had a valid contract with its player did not affect the possibility of charging transfer fees.

This procedure was not in accordance with German law even before the Bosman Case. However since no explicit statute exists under German law regarding the issue of the transfer of player, but the transfer system was only regulated by the governing German Football Association (DFB), the German jurisdiction, especially civil or labour courts never had to deal with these issues.

In the Bosman case, it was ruled, that a transfer fee could only be charged, if the club still had a valid employment contract with the player, thus the duration of the contract had not yet ended. As a result a player is free to change the club without a transfer fee having to be paid once the fixed-term contract ends.

Neither the legislation nor the jurisdiction of civil and labour courts made specific adjustments to this legislation as it was in accordance with German labour law.

In their daily practice professional football clubs had to make huge adjustments as they are only holding the "transfer right" of a player for the duration of the employment contract with that player.

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?

Employment contracts between clubs and professional athletes are usually fixed term contracts and run for a duration between two and four years. Fixed-term contracts are governed by a specific law in Germany, which allows fixed term contracts with a duration of up to two years. Fixed-term contracts exceeding this maximum period of two years need a specific reason for the fixed term. Such reasons are laid out in the fixed term law and can also be developed by jurisdiction. For athletes it is broadly accepted that the possibility of fixed term contracts is necessary, as an athlete is not capable to deliver a maximum performance for an indefinite period of time due to physical reasons.

During the duration of the fixed term contract, it is not possible for neither athlete nor club to terminate the contract without an important reason. Such an important reason is only given in special circumstances, for example if the athlete is not granted his monthly salary or the club fails to comply with the statutes of the football association and is therefore not granted a license to compete in the national league. A player's wish to switch the club does not stipulate such an important reason. Therefore a player cannot terminate his contract with one club and switch to another club without the club's consent.

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?

A transfer during the duration of a fixed term contract is only possible with the consent of the former club. However club and player can agree on a fixed transfer fee. If another club is willing to pay that sum, the former club is bound to agree to a termination of the fixed term contract with the player against the agreed transfer fee.

It is not obligatory that fixed term contracts contain such a clause. Such an obligation would not be in compliance with mandatory German law.

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?

When explaining the remedies it has to be differentiated between the civil law level and the rules and regulations governing the relationships between the clubs, especially the UEFA, FIFA and national Football Association rules and regulations.

In national civil law a player switching the club without the consent of a former club will be held liable and can be sued for damages by his former club.

The former club can also file a complaint to the national football association (DFB), the UEFA and /or the FIFA resulting in the player getting banned from all national and international competitions and his license being revoked. The new club will also be held liable and can be excluded from both national and international competitions.

FIFA, UEFA, and national associations have their own system of justice for such cases. As FIFA is the only international football organization operating worldwide and almost all national football associations are a member of the FIFA their rules and regulations are applied worldwide.

It is however in dispute if all of their regulations are in accordance with mandatory national and European law.

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

In the amateur sports area possible conflicts could arise due to the new German minimum wage law, granting a minimum wage of EUR 8,50 per hour to each

employee. It is not clear so far under which circumstances amateur athletes, competing for clubs in lower leagues and receiving only small salaries are deemed to be employees of their respective clubs.

It is as well highly doubtable whether or not it is legitimate to agree on fixed term contracts with professional and semiprofessional coaches, as there is no legitimation for a fixed term clause, which however is necessary to conclude such a fixed term contract for longer than two years.

Law regulating working times for minors has also affected the world of sports, as players of minor age (under18) have played in the Champions League competition. However in that case the player was working after 10 pm which is forbidden for a person under the age of 18 according to German law.

A lot of more problems can arise and are widely discussed. However in many cases these are not actually decided by a labor court, as the parties agree otherwise or do not decide to begin legal proceedings.