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

General Report

General Reporters

Dr. Hans Georg LAIMER, LL.M. (LSE) zeiler.partners Rechtsanwälte GmbH Stubenbastei 2 // Entrance Zedlitzgasse 7 A-1010 Wien // Vienna Phone: +43 1 8901087-81 E-mail: hans.laimer@zeiler.partners	Dr. Stephan DITTL SALGER Rechtsanwälte PartGmbB Darmstädter Landstraße 125 D-60598 Frankfurt am Main Phone: +49 (69) 66 40 88 251 E-mail: dittl@salger.com

10 July 2015

Introduction

The main purpose of the General Report is to provide you an overview of the different aspects of labour law in general and sports law in particular regarding the protection of the employer's interests after the termination of employment agreements.

Obviously, post termination restrictive covenants are amongst the most sophisticated contractual instruments in employment law today. This is even truer in a global work environment, where employees choose their workplace in an increasingly international context and employers' interests in discouraging former employees from engaging in competition or soliciting customers run the risk of infringing employees' fundamental rights to professional freedom on a large geographic scale. Thus, restrictive covenants must be carefully drafted to meet the requirements of the different jurisdictions.

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

To give you an overview of the different jurisdictions, we examined the National Reports and carved out the aspects which are common and those which are different between the jurisdictions. Now we are delighted to introduce a General Report, which explains the essential principles and rules of post termination restrictive covenants (e.g. formal requirements, and principles regarding compensation, scope and permissible duration) and garden leaves on the one hand, and transfer fee systems on the other hand.

Many thanks to the efforts of the following National Reporters with the help of who we were able to complete this General Report: Stefanie Tack (employment law) and Sven Demeulemeester (sports law) for **Belgium**; Boriska Ferreira Rocha (employment law) and Rodrigo Milano Alberto (sports law) for **Brazil**; Marie Janšová (employment law), Petr Veselý (employment law) and Klára Havlíčková (sports law) for the **Czech Republic**; Riikka Autio (employment law) and Matti Huhtamäki (sports law) for **Finland**; Clémence Colin (employment law) and Anne Salzer (sports law) for **France**; Sachka Stefanova-Behlert (employment law), Eric Kessler (employment law), Rebekka Stumpfrock (employment law) and Roland Czycholl (sports law) for **Germany**; Stefanos Tsimikalis (employment and sports law) for **Greece**; Klaudia Fabian (employment and sports law) for **Hungary**; Ramesh K. Vaidyanathan (employment law) for **India**; Emiliano Ganzarolli (employment law) and Antonella Carbone (sports law) for **Italy**; Elina Girne (employment and sports law) for **Latvia**; Nicky de Groot (employment law) and Jordi Rosendahl (sports law) for the **Netherlands**; Bartlomiej Liber (employment and sports law) for **Poland**; Ilsen Rodríguez (employment law) and Lara Vivas

(sports law) for **Spain**; John Wilson (employment and sports law) for **Sri Lanka**; Fredrik Gustafsson (employment law), Fredrik Roos and Elin Welin (sports law) for **Sweden**; Jerome Nicolas (employment law) for **Switzerland**; Chris Cooper (employment law), Hester Jewitt (employment law) and Clare Hedges (sports law) for the **United Kingdom** and Bonnie Puckett (employment and sports law) for the **United States**.

The table of contents (based on the questionnaire)

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.)

Despite of some differences, in general the principle of a post termination restrictive covenant is known in all legal systems of the National Reporters. This principle is often based on a contractual agreement between employer and employee which is typically designed to prohibit an employee from competing with his or her (former) employer for a certain period after the employee has left the business.

Furthermore, in many cases it aims to prevent former employees 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 mentioned by the National Reporters, are:

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

In this context, the National Reporters have stated the following:

- In **Germany** the rules of post termination restrictive covenants are contained in the German Commercial Code (sections 74 and following) and further specified in the court practice of the labour courts. The rules apply to all employment relationships. Apart from that, executives (e.g. managing directors or board members), who do not have an employee status under German law, are not directly subject to these rules. However, they must also comply with the principles laid down in the German Commercial Code.
- In **Hungary** the post termination restrictive covenant is primarily governed by the Act I of 2012 on the Labour Code and the Act V of 2013 on the Civil Code. However, due to the fact that the Hungarian Labour Code has only recently entered into force, the relevant case law is still to be formed.
- In **Spain** the post termination restrictive covenant has its origin in the Workers' Statute Act. According to this act a post termination restrictive covenant is 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.
- In **Switzerland** the rules of a post termination restrictive covenant are regulated in articles 340 to 340c of the Swiss Code of Obligations. Given that the Swiss

Code of Obligations only provides general rules, case law is very important for determining what kind of restrictive covenants are valid and enforceable. In this respect Swiss case law determines that post termination non-compete covenants can generally not be imposed on employees working in liberal professions (e.g. lawyers, doctors, etc.).

- In **Sweden** the post termination restrictive covenant is contained in the Contracts Act. According to this act a post termination restrictive covenant is enforceable to the extent in which it is reasonable. Moreover, additional limitations could be found in collective bargaining agreements (if applicable) and in Swedish case law.
- In **Finland** only the non-compete covenant has its origin in the Finish Employment Contracts Act. However, according to Finnish case law other restrictive covenants like non-solicitation covenants, etc. have, in some cases, been considered as forms of non-competition. Thus, in such cases the regulations about non-compete covenants apply. (Supreme Court 2003:19, concerning non-dealing and non-solicitation).
- In **Latvia** the post termination restrictive covenant has its origin in the Constitution of the Republic of Latvia. Pursuant to article 116 of the Constitution of the Republic of Latvia rights of an individual in respect to freedom of employment may be subject to restrictions if the restriction is duly established by law, it has a legitimate purpose and is commensurate. In this respect article 84 of the Labour Law determines the rules of a non-compete covenant.
- In the **Netherlands** the post termination restrictive covenant results mainly out of the principle of freedom of contract, which defines the content of such a covenant. Except for non-competition covenants, Dutch law does not provide for legislation or regulation that specifically regulates post termination restrictive covenants. The exception for non-compete covenants is regulated in article 7:653 of the Dutch Civil Code.
- Similarly, in **Belgium**, the **Czech Republic** and **Italy** only non-compete covenants are expressly recognized in the law (e.g. labour law). Other forms (e.g. non-solicitation covenants, etc.) may be contractually agreed by parties, but their enforceability is uncertain and often depends on the content of such agreements.
- In **Poland** post termination restrictive covenants are generally based on the rule of freedom of contract and are further determined by law (e.g. the Labour Code or the Act on the Counteracting of the Unfair Competition) and by the courts' case law. Pursuant to this rule, the parties to a contract may arrange their relationship to their discretion, as long as the content or the purpose of the contract is not contrary to the nature of the relationship, the law or the principles of the community life.
- In **Greece** no statutory provisions govern the principle of a post termination restrictive covenant. However, this principle has been elaborated in Greek case

law and has his origin in the freedom of contract pursuant to article 361 of the Greek Civil Code.

- In **France** the labour law does not define the principle of a post termination restrictive covenant. However, the origin of this principle lies in the French case law. Further to this, collective bargaining agreements may also provide formal rules applicable to post termination restrictive covenants. For example, pursuant to the collective bargaining agreement applicable to maintenance companies, distribution agricultural equipment, public works activities of 23rd April 2012, the non-competition covenant shall not exceed 6 to 18 months according to the employee's job classification.
- In **Brazil** the post termination restrictive covenant has its origin in the law of intellectual property. This law prohibits employees and contractors using information that was made available to them only due to their relationship with the company. Apart from that, other restrictive covenants are known in Brazil especially by case law.
- In the **United States** (US) post termination restrictive covenants are generally governed by state law. This means that the enforceability of such a covenant varies state by state. In this respect some states have enacted statutory provisions governing restrictive covenants, but the majority of law is state common law derived from court precedents.
- In the **United Kingdom** (UK) the principle of a post termination restrictive covenant is founded in the common law system (case law). However, an employer's ability to enforce such restrictions is heavily influenced by public policy and, in particular, by the common law doctrine of "restraint of trade". Generally, the courts take the view that it is in the public interest that employees can move jobs and make use of their knowhow/skills. Thus, covenants that restraint this movement will generally be void and unenforceable, unless such a covenant is reasonable and necessary to protect the employer's legitimate business interests (e.g. the protection of the employer's trade connections, confidential information's, etc.).
- Similarly, in **India** the enforcement of a post termination restrictive covenant is heavily influenced by the principle of "restraint of trade", which is regulated in section 27 of the Indian Contract Act of 1872 and further specified by Indian courts. According to this statutory provision an agreement (e.g. a post termination restrictive covenant) that restraints a person's right to take up any lawful profession, business and trade is void to that extent.
- Finally, in **Sri Lanka** the law of contract is a mixture of the Roman-Dutch law. However, the origin of the post termination restrictive covenant lies in the Sri Lankan Constitution, namely in article 14 of the Constitution and is further specified in the court practice of Sri Lanka, which is generally guided by English law principles. Thus, according to Sri Lankan courts it can be stated that most contracts in restraint of trade are *prima facie* void and unenforceable, unless

reasonableness can be proved. Accordingly, pursuant to Sri Lankan case law the only ground of justification is that the restraint is reasonable having regard to interests of both contracting parties as well as to the interests of the public.

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

In almost all jurisdictions a post termination restrictive covenant can be agreed upon between employer and employee at any stage during the employment agreement. In particular, this means:

- before or at the start of an employment relationship,
- during employment or
- at the end of employment.

However, according to the majority of the National Reporters it is most common that post termination restrictive covenants are agreed upon when the employment agreement is negotiated and agreed, as the time prior to entering into the employment agreement normally allows the best opportunity for the employer to negotiate such covenants.

Particularly remarkable is that in **Belgium** a distinction should be made between post termination restrictive covenants agreed upon in the course of the employment (e.g. before the termination of the employment agreement) or after the termination of the employment agreement. Thus, if the employee signs a post termination restrictive covenant in the course of the employment, the employee is deemed not to be completely free from coercion. Therefore, the validity of such a covenant is subject to a number of legal conditions, protecting the employee's interests. If the post termination restrictive covenant does not meet this conditions, it is void. In contrast, once the employment agreement is terminated, the employee is deemed to have regained his or her freedom. Thus, the employee is no longer subordinate to the employer and therefore needs no specific legal protection.

In **Greece** post termination restrictive covenants are usually agreed upon in the initial employment agreement. According to Greek case law such an agreement is valid (Areopag 1285/1984, 1591/2002, 917/2008, Zerdelis *Employment Law*, 2011, page 610, Koukiadis *Employment Law*, 2005, page 564).

In **Brazil** a post termination restrictive covenant should not be agreed upon at any time during the sustained employment relationship, as in Brazil modifications on employment terms are not usually valid (exception made when the modification is clearly favourable and accepted by the employee). In this context a recent decision from the Superior Labour Court considered a non-competition clause non enforceable as it was agreed upon two months after the parties entered into an employment agreement. Thus, it is advisable to agree upon a post termination

restrictive covenant either on hiring or during the termination of the employment agreement, but not during the employment relationship.

Contrary to this, in the **US** employment relationships are not typically governed by an employment agreement, but employee and employer have a non-contractual "at will" relationship where either party may terminate the relationship at any time without notice or payment. Thus, post termination restrictive covenants are usually agreed upon in independent agreements (e.g. in a confidentiality, non-competition and non-solicitation agreement, in an equity award agreement or in a settlement agreement).

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 whistleblowing be regarded as a part of the employee's post termination restrictive covenant?

Generally, the National Reporters have agreed that during the employment the employee is in general not permitted to enter into competition with his or her employer (e.g. in **Latvia** due to 92 of the Labour Law, in **Sweden** due to the general duty of loyalty or in **Spain** due to the implied duty of trust).

The legal situation changes if the employment is terminated. Then, in the absence of an express agreement, the employee is generally no longer restricted in his or her activities and there is no general post-contractual duty to refrain from competing. Thus, the employee is free to enter into service with any direct competitor or even start his or her own competing business. In addition, the employee will be permitted to aim at the same market and customers as those of the former employer.

However, it has to be noted that the employee may generally be liable for damages according to the law (e.g. the duty of fidelity or the general rules for claims of damages), if the employee acts unlawful against the former employer either as a self-employed person or as an employee of another company and, as a result, caused loss to the former employer. For instance, the court may deem the actions of the former employee or the employee's new employer as unfair competition if the employee systematically contacts the customers of the former employer whilst making use of the knowledge and information that the employee had gained during the employment with the former employer.

In addition, it should be noted that **Greek** case law confirms that in extraordinary cases, when the (former) employee infringes good morals, the obligation of non-compete, which is inherent in every employment relationship, survives the termination of the employment relationship, without a respective covenant having been agreed upon (Athens First Instance Court 7740/1999, Thessaloniki Appeal Court 94/1994, Athens Appeal Court 4530/2002, Leventis *Individual Employment Law*, Athens 2011, page 366).

In context with whistleblowing, which means in general the disclosure of unlawful or immoral activities, most of the National Reporters state that there are no (specific) statutory provisions for whistleblowing in their jurisdictions. Thus, general rules have to be applied. Accordingly, the National Reporters generally agree that whistleblowing cannot be subject to a post termination restrictive covenant. This means, for instance, that employers cannot prohibit an employee to notify relevant state authorities of illegal acts of the employer or his or her other employees (e.g. in connection with criminal offences). For example, according to **Greek** case law whistleblowing cannot be part of a post termination restrictive covenant (Lixouriotis *ibid*, page 276, Zerdelis *ibid*, page 605).

Moreover, it is worth mentioning that, for instance:

- in the **Netherlands** there is no specific protection for whistleblowers. For example, there is no statutory provision that provides for an exception to confidentiality for whistleblowing. However, there is Dutch case law in which the court decides that under certain circumstances employees are permitted to breach their confidentiality obligation in the event of whistleblowing (Court of Appeal of Amsterdam, November 4, 2014, JAR 2015/8, Regge);
- in **Latvia**, after the termination of the employment, the former employer has in principle no instrument to protect himself of whistleblowing. However, the employee has to act legitimate and permissible. In case an employee does not act legitimate and permissible, the employer could under certain circumstances sue for defamation;
- in the **UK** pursuant to the Employment Rights Act 1996 (ERA) any post termination restrictive covenant which tries to waive the employee's right to make a "protected" disclosure ("gagging clauses") will be unenforceable (subsection 43J(1) ERA). According to many high profile National Health Service cases in the UK, in general, the balance of the public interest falls in favour of the employee when it comes to their right to "blow the whistle";
- finally, the law of the **Czech Republic**, especially employment law, does not know the concept of whistleblowing. Thus, the employer may only conclude restrictive covenants with employees in order to protect its business secrets, know-how, work procedures, etc. However, such restrictive covenants do not prevent an employee from notifying relevant state authorities of illegal acts committed by the employer or its employees. A restrictive covenant which prohibits an employee to inform 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?

The National Reporters largely confirm that there are no obligations regarding post termination restrictive covenants on the employer's side in the absence of an express agreement. Furthermore, there are in general no specific statutory provisions or precedents governing employer's duties after the termination of the employment.

Exceptions are mainly presented by the Netherlands, Germany, Brazil and Czech Republic:

- In the **Netherlands** the employer has to act within the boundaries of being a good employer, which remains relevant to a certain extent after termination of employment. This means, for example, that the employer should not give any negative or misleading statement(s) about the employee to a future prospective employer. By making such statement the employer could act inconsistent with the principle of being a good employer but also act unlawfully towards the employee. Such unlawful act can cause damages to the employee. In such a case the employee could request damages from his or her former employer in court (District Court of Oost-Braband, November 26, 2014, JAR 2015/7).
- In **Germany** obligations on the employer's side may arise from the so called post termination loyalty and respect duty pursuant to subsection 242(2) of the German Civil Code, which however does not reach so far to constitute a post termination non-competition obligation outside the legal framework of the German Commercial Code.
- In **Brazil** obligations may arise from the legal principles of protecting employee's honour and intimacy. This means in particular that the employer must not make disparaging comments about the employee, try to hinder future employment or disclose employee's confidential information that has been provided during the employment. In this context one of the main precedents is the prohibition of employers making lists of employees who have filed labour lawsuits against them. For example, some sectors used those lists to avoid hiring employees listed on them.
- Likewise in the **Czech Republic** an obligation may arise from the statutory provision of disclosing information about the employee. Thus, the employer may only disclose information about an employee's qualifications, capabilities, work evaluation and other facts related to work performance. Other information must not be disclosed without 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? Please describe how these can be defined and how they work in your jurisdiction.

It appears that under the different jurisdictions the most frequently used types of post termination restrictive covenants are: (i) non-competition covenants, (ii) non-solicitation covenants and (iii) confidentiality covenants. All of them aim in principal at protecting the business and business interests of the former employer.

Roughly summarised

- **non-competition** covenants aim at protecting employers from **competitive activities** of the employees,
- **non-soliciting** covenants prevent the (former) employees either from soliciting or pouching employer's customers/clients or employee's colleagues or from dealing with employer's clients (**broad view**, e.g. of Finland and Sweden) or only to entice the remaining employees away from their former employer (**narrow view**, e.g. Germany and Brazil) and
- **confidentiality** covenants prohibits employees of using or revealing to third parties confidential information (e.g. business and trade secrets) which are not public available and obtained only due to the previous relationship with the employer.

Besides this, in the **Netherlands**, it is particular remarkable that there are so called "social media covenants". Such covenants restrict the use of social media by the former employee (such as, communications by and linking via e.g. LinkedIn, Facebook, Twitter, etc.). Thus, these covenants aim to restrict the employee to contact business relation in the same way as non-solicitation covenants restrict the employee. In addition, it can also be that such a covenant prohibits the employee to make negative statements about the employer, the employer's business, clients and/or products via social media.

Moreover, it should be noted that in some jurisdictions the enforceability of post termination restrictive covenants can be uncertain. For instance, in the **Czech Republic** the enforceability of restrictive covenants is uncertain due to the strict nature of Czech employment law, and depends on a case-by-case basis. So it is generally recommended to increase enforceability by the employee receiving reasonable compensation in return for observing such covenants, and that the rights and obligations of both parties be fairly balanced. In **Brazil** the courts tend to accept those covenants, provided that they are reasonable and are not considered an unfairly interference with employee's freedom of work.

In **India,** in general, a restrictive covenant can be held valid and enforceable only during the term of the employment relationship or if related to disclosure of confidential information of the employer's business or non-solicitation of the employer's clients for a reasonable time period after the termination of the employment. However, the enforceability of such a covenant depends on a case-by-

case basis. In this context Indian courts have upheld that non-compete covenants which extend beyond the term of the employment are in the nature of a restraint of trade and therefore, pursuant to section 27 of the Indian Contract Act of 1872, unenforceable.

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.

Generally speaking, and despite of some differences between the jurisdictions, the requirements which must be taken into account in order to ensure the validity of a post termination restrictive covenant are primarily determined as follows:

- **Minimum age**: Generally, a post termination restrictive covenant can be lawfully agreed only with an employee of age. However, in some jurisdictions also a minor (e.g. in some countries a person under the age of 18) can enter into such a covenant if his or her guardian consents to it.
- **Written form**: Although some of the National Reporters state that the written form is not a necessary prerequisite for the post termination restrictive covenant to be valid, it is recommended for the purpose of proof (e.g. to avoid any discussions whether the restrictive covenant is enforceable). Besides this, in some countries (e.g. in the **UK**) the post termination restrictive covenant must be incorporated into the employment contract to be valid and legally binding. Thus, in UK case law one often finds that such covenants are not enforceable because they have not been duly incorporated into the employment contract. According to UK case law this could be the case, if restrictive covenants are included in an employee handbook or separate document and have not been signed or incorporated into the employment agreement by reference.
- **Content**: Generally, there are no formal restrictions for the content. However, it is advisable to draft a post termination restrictive covenant in such way that it defines clearly and precisely what it covers. Usually it includes the activities equal or similar to those of the employer and/or its affiliated companies. It could also list that the employment with certain companies/competitors is prohibited.
- **Minimum salary**: In most countries (except **Belgium**) there are neither formal nor other clear requirements of a minimum salary of the employee regarding the validity of a post termination restrictive covenant. By contrast, in Belgium an annual salary of at least 66,406 EUR gross at the moment of the termination of the employment agreement (amount for 2015 – indexed each year) is required for a restrictive covenant to be valid.
- **Compensation**: In most countries a post termination restrictive covenant (in particular non-competition covenant) requires a (adequate) financial

compensation during the restrictive period to be valid. The adequate amount of the financial compensation differs between the countries. For example, in **Italy** the adequate amount of the compensation is 8% to 15% of the gross annual salary. In **Poland** the amount of the compensation must not be less than 25% of the remuneration (including bonuses, etc.) that the employee received during the period prior to termination of the employment, provided that period corresponds to the duration of the non-compete covenant. In **Hungary** the amount of the compensation is not less than one-third of the base wage due for the same period, in **Germany** it is at least 50% of the most recent contractual remuneration of the employee (in case of executives the minimum compensation could be less). In the **Czech Republic** the amount of the compensation is at least one half of the employee's average monthly salary for each month of the restrictive period, in **Spain** it is 50% to 70% of the fixed gross remuneration for the restrictive period and in **Sweden** it is normally at least 60% of the regular salary level.

- **Way of termination**: In some countries (e.g. Germany or Finland) the way of termination of the employment is considered decisive for the enforceability of a restrictive covenant. In other countries (e.g. France or the Netherlands) the validity of a restrictive covenant is not linked to the way of termination of the employment.

However, it appears that in some countries the applicable law is sometimes vague and does not regulate restrictive covenants in much detail. For instance, in **Brazil** or the **US** there are in principal no *per se* prerequisites for a post termination restrictive covenant to be valid, but that does not necessarily mean that there are no "restrictions" in the negotiation of such a covenant. Conditions like the salary, the amount of a compensation, employee's position level, the bargaining power of the parties, the access to confidential information or the way of termination of the employment may factor into a court's analysis of reasonableness. Thus, all these features may help the judge to appreciate the proportionality of the restrictive covenant (in particular, the balance between the protection of the legitimate interests of the employer and the possibility to work for the employee).

Apart from that, the majority of the other jurisdictions have strict requirements (mainly) for a valid post termination **non-competition** covenant, which are worth mentioning:

- In **Germany** the main requirements for a valid non-competition covenant are: (i) a written agreement and handing-over of the original document to the employee, (ii) a limitation of the post termination non-competition period of up to maximum 2 years, (iii) a compensation of minimum 50% of the most recent contractual remuneration of the employee (in case of executives the minimum compensation could be less) and (iv) a legitimate interest of the employer with regard to scope and geographical reach of the post termination non-competition obligation. Furthermore, the German Commercial Code provides for explicit rules regarding the impact of way of termination on the post termination non-

competition covenant. Instead of this, there is no required minimum salary and minimum employment period.

- In **Italy** pursuant to article 2125 of the Italian Civil Code the prerequisites of a valid non-competition covenant are: (i) a written agreement, (ii) an express indication of the prevented activities, (iii) an express indication of the geographical area where the covenant will be enforceable and (iv) an express indication of the compensation.
- In **Spain** article 21 of the Workers' Statute Act requests (i) a real and effective interest of the employer, (ii) a maximum duration for a qualified employee of 2 years and for other employees 6 months and (iii) an adequate compensation. Although Spanish law does not specify the adequate compensation, Spanish case law sets it at 50% to 70% of the fixed gross remuneration for the non-compete period.
- Beside other prerequisites in **Latvia** it is established by law that unfair and excessive non-competition covenants shall be deemed null and void (see in this context Supreme Court, 9 January 2008, case no. SKC-6, and same case, 11 March 2009, decision no. SKC-99/2009). In addition, in Latvia there are no strict guidelines referring to the amount of adequate compensation. However, according to Lithuanian case law the amount of the compensation depends on the term of the restrictive covenant, the position of the employee, the area of the professional practice as well as other aspects relevant for the specific market and professional competition (Supreme Court, 9 January 2008, case no. SKC-6 and same case, 11 March 2009 decision no. SKC-99/2009).
- Pursuant to **Greek** legal literature a post termination restrictive covenant (mainly for non-competition covenants) is valid if (i) the covenant covers a legitimate interest of the former employer, (ii) does not contravene good morals and (iii) a fair remuneration is agreed upon (Zerdelis, ibid, page 610, Koukiadis, ibid, page 5611, Lixouriotis, ibid, page 282). In this respect Greek case law varies: for instance the Highest Court has on the one hand sanctioned a two years period without remuneration (Areopag 1285/1984) and has on the other hand accepted the same period following the payment of salaries of 20 months (Areopag 917/2008). In another case the Highest Court has deemed as fair the payment of salaries of six months for a non-compete period of one year (Areopag 1591/2002).

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.

In context with the assessment of the potential scope most of the National Reporters confirm that from the employers' perspective a post termination restrictive covenant

should be drafted in a way that it has a clear and limited scope and operates within a reasonable area and timeframe necessary to protect the employers' legitimate business interests. At the same time, it should not be as strict as to prevent the employee from being able to find a new job or set out its own business after the restrictive covenant has expired.

According to the National Reporters' assessment it can be asserted that the more specific the wording of the restrictive covenant, the more likely the court will be to consider the employer's interest in enforcing the covenant as reasonable. This is especially true as it concerns the duration, the geographical scope of the restrictive covenant and the scope of the type of work. The more specific the restrictive covenant, the higher the chances that it will not be annulled in any court procedure.

However, most of the National Reporters suggest to draft a post termination restrictive covenants on a case-by-case basis taking into consideration the individual employee in question and the business in which this employee works. What is reasonable for one employee may not be for another. In addition, it should be noted that the relative bargaining power of the parties may be a factor in deciding whether restrictive covenants are reasonable. Thus, it can be said that the more junior the employee, the more difficult it may be to justify the restrictive covenant. In contrast, for senior and well-paid employees who have negotiated their contracts individually it may be easier to justify the restrictive covenant.

Given the remarks of the National Reporters, it can be seen that for the assessment of the potential scope of post termination restrictive covenant the majority have listed the following:

- **Maximum duration**

It is apparent from the different National Reports that the great majority of the jurisdictions know a maximum duration for post termination restrictive covenants, either governed by law or determined by case law. In countries where the duration is determined by case law the maximum duration can vary due to a case-by-case balance of the court between the different interests of the employer and the employee.

Based on the National Reports the following commentaries can be mentioned: in **Poland** the duration is between 6 and 18 months; in **Italy** the maximum duration for a manager is 5 years and for other employees 3 years; in **Spain** the maximum duration for a qualified employee is 2 years and for other employees 6 months; in **Greece** the case law has confirmed a 2 years' period as acceptable with a fair remuneration; in **Finland** (except of directors) the maximum duration is 6 months without a compensation and 1 year with a (reasonable) compensation; in **Sweden** and the **Netherlands** the duration should in "normal" cases not exceed 1 year and not be more than 2 years in very sensitive cases; in **Hungary**, **Germany**, **Latvia, France** and the **US** (except the highest-level employees) the maximum duration should generally be no longer than 2 years and in the **Czech Republic** no longer than 1 year.

- **Scope (geographical scope)**

Generally, according to the assessments of the National Reporters the scope (including the geographical scope) of the post termination restrictive covenant should reference to the scope (e.g. the territory of the actual economic activity) of the employer's business to avoid the risk of unenforceability. Thus, post termination restrictive covenants reaching beyond the business sectors and activities of the (former) employer as well as covenants without any geographic restrictions are often deemed to be too broad and therefore non-transparent. As consequence, this could result in adjustment of the covenant and limited enforceability of the initial agreement.

Moreover, it should be noted that one of the safest ways to comply with this requirement is to limit the scope of the covenant to precisely the type of professional activities the employee has performed or seriously and actively planned to perform during the last one or two years of his or her employment with the employer. The geographical restriction must take into account the type of business and the specialization of the activities performed within it. Generally, the geographical area should be limited to the country or region the employee was in charge of and the place where the employee actually performed his or her work during employment.

In the **UK**, under the common law system, the courts take a practical approach to the geographical scope of non-competition covenants. Thus, if there is no geographical restraint identified, the geographical scope will be considered as worldwide. For example, in the so called *Commercial Plastics Ltd. v. Vincent* case (1964) the restrictive covenant had no geographical limitation. The Company's operations were almost entirely in the UK. The court said that the covenant was wider than is reasonable and necessary. The employer only needed protection for competition in the UK. However, in contrast, if the employer operates in a worldwide market and has a legitimate interest to protect, a worldwide restraint could be justifiable. In the so called *Norbrook Laboratories Ltd. v. Smyth* case (1997) the employer traded in 46 countries in most parts of the world. A worldwide restriction was therefore justified.

Contrary to the UK, in the **Czech Republic** there is no legal requirement to specify the restricted activity in detail. However, 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, regardless whether the employee in practice also works for another business unit/area within the employer's group of companies.

- **Pitfalls for the employer**

In respect of (potential) pitfalls which have to be observed it seems to be that the requirements on the specific form of the agreement and the form of termination can be easily complied with. A greater degree of uncertainty, especially for employers, exists with regard to the **adequate scope** of the post termination restrictive covenant and the **adequate compensation** for the employee.

However, a pitfall for the employer may be that the post termination restrictive covenant is not agreed in writing and/or is not signed by the employee. In order to avoid discussions whether the covenant is enforceable, such written agreement are advisable and, in addition, in some countries are a prerequisite for a valid post termination restrictive covenant.

A further pitfall for employers may arise out of a "wrongful" termination (e.g. an unlawful termination of employment) which may result in the covenant beeing unenforceable for the employer. For example, according to subsection 7:653(3) of the **Dutch Civil Code**, a pitfall for the employer may be that the employer terminates the employment by giving notice and thereby does not respect the correct notice period. This results in an unlawful termination of the employment and the post termination restrictive covenant not being enforceable.

Other pitfalls may be:

- if the compensation is not adequate;
- if the scope, term and/or geographical area is not limited to the extent necessary to protect a legitimate business interest of the company;
- if the scope, term and/or geographical area unreasonably impede the employee's professional career.

Therefore employers are well advised to explicitly specify the scope, term and/or geographical area of the post termination restrictive covenant and (if provided) to agree upon an adequate compensation for the employee. In case the compensation is inadequate the post termination restrictive covenant may be disputed in court and after all recognized as invalid.

Moreover, the activities of the employer and the employee may change over the time. Thus, 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 in the post termination restrictive covenant, it is advisable to 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.

- **Pitfalls for the employee**

A pitfall for the employee could be seen in restrictive covenants that are too vague. In such a case an employee could have practical problems to understand his or her specific obligations. This may result in a breach of the agreement. For example, employees may not realize the full scope of the covenant they agreed upon in a post termination restrictive covenant at the start of their employment and/or not fully understand the scope of the covenant and/or the consequences if they do not comply.

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 breach of a post termination restrictive covenant by an employee may have different consequences. The National Reporters mainly confirm that there are statutory sanctions (e.g. injunctions, damage claims that arise from non-adherence to a post termination restrictive covenant or cease of compensation payments, etc.) as well as contractual sanctions against the employee (e.g. liquidated damages/penalty).

Given the fact that in the different jurisdictions statutory sanctions often protect the interests of the employer inadequately or depend on certain requirements regarding the proof of damages, it is very common that a post termination restrictive covenant is usually subject to liquidated damages. Thus, in the event the employee breaches a post termination restrictive covenant the employee is liable to pay liquidated damages. In many cases liquidated damages also have a deterrent effect to ensure that the employee complies with the post termination restrictive covenant.

Generally, in case of a breach of the post termination restrictive covenant, it is advisable that the employer confronts the employee with the fact of the breach in writing before issuing a court claim. Furthermore, it may be advisable that the employer sets out proposals for a resolution of the issues without the need for legal proceedings. In this context the employer should usually

- request the employee to stop violating the covenant immediately and
- request the employee to pay liquidated damages or
- hold the employee liable for damages.

Moreover, liquidated damages have to fulfil different (and in some countries very strict) prerequisites to be valid and enforceable. This differs between the countries as follows:

- In **Germany** liquidated damages securing a post termination restrictive covenant must be in writing. Furthermore, a clause dealing with liquidated damages has to be clear and comprehensible and must not be surprising and ambiguous to be valid. Thus, liquidated damages are invalid, if it is contrary to the principles of good faith or if it provides for unreasonable disadvantages for the employee. According to German case law there is no unreasonable disadvantage, if the penalty is payable only in case of intention and negligence (Supreme Court, 20 March 2003, file number I ZR 225/00) and if the amount of liquidated damages is reasonable (Supreme Court, 3 March 2004, file number 8 AZR 196/03). Which amounts of liquidated damages are reasonable is rather difficult to define but it should bear a reasonable relation to the expected damages.
- In **Sweden** liquidated damages may not be unreasonably high. Liquidated damages of up to six monthly salaries are considered as standard practice.

- In **Finland** the amount of liquidated damages shall not exceed the amount of the employee's salary for the 6 months preceeding the end of the employee's employment relationship. However, this restriction does not apply to directors. Directors are employees who, in view of their duties and status, are deemed to be engaged in the direction of the company, corporate body or foundation or an independent part thereof or who have an independent status immediately comparable to such managerial duties.

Based on these assessments the practical information about "dos" and "don'ts" can be summarised as follows:

- **Do**: To avoid the requirements regarding the proof of damage the parties may agree on liquidated damages for a breach of the covenant.
- **Do**: The clause of liquidated damages should be detailed and specific, particularly in respect of the amount.
- **Do**: Liquidated damages should be agreed upon for a reasonable amount. If liquidated damages are too high, there is a risk that the clause as a whole may be invalid.
- **Don't**: If liquidated damages are agreed in an employment agreement it is advisable not to set up this clause for example in the "miscellaneous-section". Instead, it should be explicitly agreed in a separate clause.

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?

Generally, the National Reporters confirm that if a post termination restrictive covenant is violated by the employee of the former employer without the influence of the new employer, solely the employee is liable for a violation of the covenant. However, certain circumstances can imply liability (e.g. based on civil law, unfair competition law, etc.) for the new employer, too.

In general, such liability may result from an unlawful act of the new employer. This could be the case in situations where the new employer knew the employee was bound by a non-compete obligation and hired the employee with the express intention of approaching the customers of the competitor by making use of the trade or business secrets that the employee gained in his or her former position. However, if the new employer is not aware of the employee's non-compete obligation and does not influence the employee's actions there would be no claim against the new employer in the event of a breach of such obligation by the employee.

Moreover, under certain circumstances there may be a risk that the new employer breaches unfair competition law. This could be the case if the new employer induces the employee to reveal trade or business secrets of the former employer or the new

employer poaches the customers in an unfair way or the customers are pressured, mislead or induced to breach the contracts with the competitor.

For this reason it is recommended to provide a provision in the employment agreement by which the new employee represents not to be a party to any restrictive covenant, or at least to any such agreement which would bar the candidate from taking the position with the new company.

1.1.10 When an employer has invested money in an employee's training, is there any possibility for the employer to get a refund from the employee, in case of breach of the post termination restrictive covenant, and under which conditions?

In most jurisdictions the breach of a post termination restrictive covenant and the refund of money invested in the employee's training are not directly linked. Thus, a refund of money is usually agreed in a separate clause (e.g. "refund clause") in case the employee terminates the employment agreement. The content of such a covenant usually implies the obligation to repay the invested money in an employee's training in the event of termination of employment within a certain time limit of the end of a training or academic studies. Its main goal is to encourage the employee to remain in the company for a specific time.

In this context most of the National Reporters confirm that such a clause is only valid if the employee's training was useful for the employee (e.g. some kind of monetary value or some kind of surplus for the employee's curriculum vitae).

In some countries the validity of such a clause is linked to a specific commitment period, e.g. after which period an employee can terminate the employment without the risk of having to pay the refund. If the period binding the employee is unreasonable the clause may be invalid. In order to give a quick overview of the most prominent limits, it is worth recalling:

- in **Spain** the commitment period of an employee may be up to 2 years;
- in **Germany** the Federal Labour court determines strict commitment periods from 6 months (lowest) in case the training period is up to 1 month to a commitment period of 5 years (absolute maximum) in case the training period is more than 2 years;
- in the **Czech Republic** and **Hungary** a commitment period may be agreed for a maximum of 5 years (not including in the Czech Republic maternity leave, service of a sentence, etc.).

Moreover, in **India** the employer can seek a reasonable amount of compensation, limited to the expenses incurred for the employee's training. However, according to Indian case law a reasonable amount of compensation has to consider the training costs involved, the actual loss incurred by the employer, the period of the employment and other relevant facts of the case. In the so called *Scipa India Limited v. Shri Manas Pratim Deb* case the employer invested an amount of INR 67,595 (ca. EUR

1,012, exchange rate dated 16 April 2015) for the employees' training. According to an agreement ("training bond") between employer and employee the employee was obliged to remain employed for a period of 3 years or to make a payment of INR 200,000 (ca. EUR 2,994, exchange rate dated 16 April 2015). However, the employee terminated the employment within a period of 2 years. To enforce the training bond the employer went to the court, which awarded an amount of INR 22,532 (ca. EUR 337.258, exchange rate dated 16 April 2015) as reasonable compensation for the breach of the training bond by the employee. According to the court decision, this is due to the fact that the employee had already completed 2 years of employment out of the agreed 3 years period. Thus, the judge divided the employers' total expenses into 3 equal parts for the three years period.

In **Latvia,** until the 1 January 2015, it was a mandatory rule that employers shall cover all and any expenses related to employee's training if the employee has been assigned to attend the training during employment with the respective employer. In contrast, since 1 January 2015 a new regulation has been introduced (article 96 of the Labour Law, as amended) whereby an employer under certain circumstances has gained the right to claim from employee indemnification of expenses related to his or her training.

Finally, in the **Netherlands** as of 1 July 2015 new employment legislation will come into force. As a consequence under some circumstances the employer will be obliged to pay a transitional compensation (which could also include costs of an employee's training) to the employee.

1.1.11 What are the possibilities of a 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)?

Generally, according to most of the National Reporters, the possibilities of a lawsuit for the employee against the former employer in case of the employer's disadvantageous actions during the period covered by a restrictive covenant do not depend on post termination restrictive covenants. Thus, this question should be considered in the light of the general provisions, e.g. claim for damages, injunctive relief, etc.

In this respect it may be that employer and employee agreed upon a covenant in the employment agreement or in the termination agreement according to which the parties agree that they both cannot at any time make any untrue, misleading or disadvantageous statements in relation to each other. Thus, if the employer breaches such a covenant, the employee may be entitled to file a claim for injunction, compensation or damages against the employer.

However, in the absence of such a covenant, the employer is still obliged to refrain from disadvantageous actions against the (former) employee. This may arise out of the employment relationship (e.g. duty of care or loyalty of the employer, etc.) and,

under certain circumstances, may remain in effect after the termination of the employment. In addition, untrue and damaging statements (e.g. spreading out rumours) may infringe the general right to protection of personality/privacy and/or may be defamation and therefore, constitute an unlawful act. Thus, a termination of an employment does not give license to the employer to act unlawfully towards the employee. In this respect, under certain circumstances, the employee may have a claim for injunction (injunctive relief) spreading of rumours, correction of wrongful information, damages, compensation, etc.

Moreover, in the **Netherlands** according to article 7:656 of the Dutch Civil Code there is an obligation for the employer to provide "references" on request of the employee at the termination of employment. In case the employer refuses to provide such requested reference or provides a reference with untrue statements, the employer may be liable towards the employee and third parties of the damages caused.

Similar provisions as in the Netherlands apply in the **Czech Republic.** The employer is, at the employee's request, obliged to provide the employee with references within 15 days. Such references may only contain information about the employee that relate to the employment relationship (e.g. information about the employee's qualifications, abilities, experiences and work assessment). Other information than that can only be disclosed by the employer with the employee's prior consent.

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?

Most of the National Reporters confirm that the concept of "garden leave" exists in their jurisdiction either as a contractual agreement (e.g. "garden leave clause") or given by law.

Generally, such a clause could be an effective opportunity for employers to increase the impact of a post termination restrictive covenant. Based on such clause an employer can require an employee to spend all or part of the notice period at home whilst in general the employee continues receiving the regular remuneration.

However, it also enables the employee's successor to establish himself or herself and develop relationships with the employee's (former) customers and contacts. A further advantage for employers 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 most information such employees do have become out of date until the garden leave ends.

In contrast, from the employee's perspective, such a clause is mostly considered as a sanction. Thus, a garden leave clause generally prevents the employee from taking up other employment with a competitor whilst still being employed with the employer

or prevents the employee from further practicing (and training) his or her specific occupation. This may be considered a disadvantage when it comes to profession, where actively pursuing your occupation is key (e.g. for professional athletes, surgeons, etc.).

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.

In this respect, according to most of the National Reporters, it is recommended to lay down the respective right to put an employee on garden leave in the employment agreement. Without such explicit clause in the employment agreement, for instance, according to **German law**, the employer's possibilities to release the employer are restricted. In such a case the employer is only allowed to release the employee from his or her working obligation if the employer has a factual reason.

In general, according to the National Reports it can be asserted that in almost every jurisdiction the principle of garden leave has to fulfil the following prerequisites:

- The employer is obliged to maintain the remuneration payments to the employee and all other employment benefits as applicable under the relevant employment terms throughout the garden leave period.
- The duration of the garden leave may not be longer than reasonable.

Besides this, in **Sweden** the employer is able to unilaterally decide to put the employee on garden leave at any time during the employment relationship, including the notice period or part thereof. Thereby the employee is entitled to receive salary payments and all other employment benefits as applicable under the relevant employment terms.

Similarly, in **Poland** the employer can unilaterally put the employee on garden leave. Thus, the garden leave does not have to be agreed between employer and employee. Moreover the employee has no legal means to oppose or to unilaterally change the decision of the employer. However, the duration of the garden leave is limited to the amount of the outstanding leave within the period of notice. In other words, if the employee in question fully uses his or her holiday leave days, the employer is not entitled to "impose" on the employee garden leave.

In **Latvia** the concept of garden leave is applicable if it is well justified, if it does not exceed a duration of three months and if the salary payments remain active. Thus, the employer can put the employee on garden leave in cases, in which

- it has been requested by state authorities or laws,
- an employee works under the influence of alcohol, narcotic or toxic substances or
- the omission to put the employee on garden leave may be detrimental to his or her safety or health or to the substantiated interests of the employer or third parties.

Moreover, it is to be noted that in **Germany** there are two different types of garden leave: the irrevocable release and the revocable release. In case an employer irrevocably releases the employee from his or her duties, the employer has no possibility to withdraw his or her decision and the respective declaration. Thus, the employee must not expect to be called to work again. As a (positive) result for the employer, vacation and other free time entitlements can be set off against the garden leave period. In contrast, if the employer releases the employee revocably from his or her duties, the employee has to expect to be called to work each moment. Thus, vacation and other free time entitlements cannot be set off against the garden leave period and would have to be paid out by the employer.

In the **US** garden leave is an uncommon concept. This results from the fact that "at-will" employment is the default employment relationship in the US where either party may terminate the relationship at any time without notice or payment. In some (unusual) cases where the parties would want or need to keep someone on the payroll after active employment has ended that would usually be referred to as administrative leave and not need to be paid and would depend on the parties' agreement.

In addition, in **India**, according to Indian case law (e.g. according to the so called *VFS Global Services Private Limited v. Mr. Suprit Roy* case) a garden leave clause is generally being viewed as restraint of trade (see section 27 of the Indian Contract Act of 1872) and therefore not enforceable.

Finally, in **Brazil** and **Belgium** there is generally no such concept. In these countries the employee has a right to be actively employed. Thus, the employer is not allowed to unilaterally keep an employee in the payroll under a garden leave agreement. In **Belgium**, it is only possible to send an employee on "garden leave" when the employee expressly agrees with it. However, this (written) agreement can moreover be given at the earliest **after** the notice is given.

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?

The right to be "actively employed" is known in some of the jurisdictions of the National Reporters. However, as described above (under Point 1.2.1) this right could lead to the consequence that a garden leave provision would not – or not fully – be enforceable for an employer. Thus, the employee would have a "right" to continue working until the end of the employment.

In this context it is worth giving notice of some interesting differences between the jurisdictions:

- According to the Supreme Court of the **Netherlands** the employee has a right to work if he or she has personal or business reasons to work and cannot reasonably be required not to work, e.g. to maintain the level of professional competence (Supreme Court, 23 January 1980, NJ 1980/264).
- Contrary to the Netherlands, in **Switzerland** in some professions (e.g. professional athletes, artists or surgeons) employees may argue that the garden leave imposes on them is a breach of their personal rights. However, the consequence of such breach is not a claim to be "actively employed" by the current employer, but the right to terminate their employment agreement with immediate effect for cause and to start a new employment with another employer before the end of the garden leave.
- Finally, as already mentioned above (see 1.2.1) in the **US** most employees are employed under an "at-will" structure, meaning that employees have no statutory rights for any particular time and may be terminated at will of either party without notice or severance. In case an employer and employee contractually agree to a notice period, the employee would not have any separate rights to work actively during that period. This means any garden leave provisions would be enforceable in accordance with general contract law.

1.2.3 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.

Restrictive covenants, e.g. in the initial employment agreement or in a termination agreement, are the primary way to protect an employer's interest at the end of an employment relationship.

Moreover, National Reporters recommend that an employer should, as soon as he or she learns about an employee's intent to resign or give notice to termination, take all practical and necessary steps that may be required to protect the employer's interests (depending on the specific circumstances), including, for instance, to

- gain control and access (keys, cards, codes, etc.) of the IT equipment (e.g. computers, tablets, mobiles, etc.) containing critical information and sensitive data;
- gain control and access of important and sensitive documents (including their copies); and
- secure contact with clients and customers representatives that may have been managed by the departing employee to prevent solicitation or loss of important relationships.

Besides this, in the **US** in some cases employers try to protect their interests at the end of an employment relationship by entering into an independent relationship with a former employee. Thus, the employee is paid to remain on the employer's payroll as a consultant in case issues come up, and is subject to a conflict-of-interests

provision during the term of the contract. This approach is usually reserved for senior executives (e.g. managing directors) and other key employees, and most often in the context of retirement.

2. The World of Sports and Employment Law

2.1 General questions

2.1.1 Does employment law apply to the relation between athletes and sports clubs/associations in your jurisdiction? Are there relevant differences between the kinds of sports and between professionals and amateurs?

The national employment laws have become a significant issue in the world of professional sports. In general, employment law applies to most of the contracts between athletes and sports clubs in many jurisdictions of our national reporters. However, the following exceptions are important:

- Athletes who 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 athlete, an employment relationship usually does not exist.
- Employment law usually does not apply to amateur athletes, but only to professionals.

While these principles are the same in most of the countries, the details are quite different:

- In some countries, the distinctions between amateurs and professionals and between self-employed athletes and employees are defined by specific sports laws, as for example in **Spain, Hungary, Belgium** and **Greece**. In **Latvia** Article 19 of the Sports Law provides that a professional athlete shall be deemed an individual who on the basis of an employment contract and for the agreed remuneration prepares himself/herself for sports competitions and participates therein. In **Italy**, according to Art. 3 of the Law 91/1981, the professional sport employment relationship is the one rendered on a continuous basis, after payment and not on unprofessional basis; as a consequence, every time the activity is rendered within a single performance (or in more than one performance, but in one single event which is held in a limited period of time),

or the performance does not exceed a set threshold (8 hours per week, or 5 days per month or 30 days per year), or the athlete is subject to a set number of trainings, the relationship will be considered autonomous.

- In other countries, for example in the **United Kingdom, Finland** and **Sweden**, professionals and athletes are distinguished according to general guidelines or laws. This can lead to a category of "semi-amateurs", as in **Germany**: Those athletes, as for example football players in lower leagues, earn a small monthly salary and/or performance related bonuses, but the salary is more than a mere reimbursement for their expenses. In order to be considered to be an employee an athlete must perform the sports at least partially as a profession to support his or her own living expenses.
- There are only a few kinds of sports with professional athletes in most of the countries, usually in the most commercialized team sports, as for example football and ice hockey in **Sweden**, while it is only cricket in **Sri Lanka**. In **France,** mainly football, rugby, basketball and handball are covered by employment law.

On the other hand, the system is completely different in the **Czech Republic**: The majority of relationships between athletes and sports clubs are based on business contracts instead of employment contracts. The business contract is usually called a "contract on sports activity" and treats the athletes as independent contractors, even though 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.

The situation is similar in **Poland** as regards football: The contract between a professional player and a football club may be based – at the discretion of the parties – on the employment law or on the civil law.

2.1.2 Are there specific employment law provisions (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?

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 it is not surprising that a lot of national and international federations have their own rules and systems for the employment of athlete. On the other hand, there are indeed some jurisdictions that have enacted laws for the employment of athletes.

Therefore, the legal situations in the jurisdictions of our national reporters are quite diverse. In general, employment relations between athletes und clubs are usually governed by the following sources of law:

- In those countries who do not have special laws for athletes, for example in **Sweden**, **Greece** and **Latvia**, the usual employment laws apply – which can lead to difficult situations whenever the question arises if the special kind of such relationships have to be considered. This is currently a major discussion in **Germany**, where a labour court held that the fixed-term contract of a Bundesliga goalkeeper (*Heinz Müller*) should run for an indefinite period of time according to general employment law, while the club (*FSV Mainz 05*) has appealed this decision based on the argument that these general rules should not apply.
- On the other hand, some countries have specific laws dealing with the special situation of sports: In **Hungary** the Labor Code provides the general protection of employees and the Act on Sport provides the special and unique statutory provisions for the sports career of athletes. In **Spain** Royal Decree 1006/1985 governs the special labor relation of professional sportsmen or women, while the Workers' Statute Act (WSA) applies to those (general) matters not covered by the RD 1006/1985. In **Italy** L. 91/1981 on professional sports is applicable to the limited number of relationships entered into athletes enrolled with the Football National Federation, Cycle National Federation, Basketball National Federation, Boxing National Federation and Golf National Federation, while the relationships with the athletes enrolled with other National Federations as well as the relationships with unprofessional athletes, even if rendered on a regular basis and after payment, are not ruled by the L. 91/1981, but by the general discipline on employment relationships. In **France** there are particular rules of the Labor Code dealing with the nature of sports activities, preventing permanent contracts. In **Finland** there is only one issue dealt with by a particular law on sports: The "Athlete Pension Protection Act" obligates the sports team/club/association as the employer to provide all player/athlete employees under the age of 43, who annually earns a minimum of 10.980,00 Euros (in 2015), with an insurance for accident and retirement protection.
- Collective Bargaining Agreements (CBAs) between sport's governing bodies and players' trade unions are also important in some countries. This is in particular the case in the **United States**, where CBAs apply to all major sports. The result is that most players are subject to the same restrictions, albeit by contract as opposed to statute – and the courts would review these under state-contract-law precedent (usually caselaw as opposed to statute). Major examples in the **United Kingdom** include footballers' and cricketers' contracts negotiated by the Professional Footballers' Association and the Professional Cricketers' Association respectively. In **Sweden** only football and ice hockey trade unions and employers' associations have entered into CBA's.
- Finally, the contracts between clubs and athletes are of course important for the employment relationship. However, in many kinds of sports (in particular football) the respective national and/or international associations set the frame conditions or even predefine the forms for standard contracts, and the parties may only deviate from these forms in certain issues. However, the terms of these contracts have to be compliant with the higher legal sources described above.

Post termination restrictive covenants and garden leaves are unusual in the world of sports, and there are no special rules for athletes in the jurisdictions of our national reporters.

- However, there have been cases of garden leaves for football managers in the **United Kingdom**.
- In **Germany** the players' right to continue to work has been subject of numerous decisions of German labour courts, although these have not been usual garden leave cases regarding the notice period: Sometimes clubs have 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. Some of these 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 if a club drops the player for an indefinite period of time and does so without having agreed upon this possibility explicitly in the employment contract. Even if such a clause is included in the contract it is only valid if the working and practice 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. Also in the **Netherlands**, the right to continue to work for an athlete is affiliated with the admission to his training. If there hasn't been a provision included in the player's contract that states that a player is allowed to train with the second team, the player always should be allowed to train with the first team. The right to play in matches of the highest team is not honored in the Dutch jurisprudence.

Restrictive covenant wise, **Belgian** law provides for transfers in breach of contract a ban on playing for another team in the same league during the current season.

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?

Many associations and some countries provide for arbitration bodies for sports matters in general and/or employment matters between athletes and clubs, some of which are mandatory or at least usual. In detail the situation is as follows:

- In some countries there are no arbitration boards for sports employment matters at all. In **Sri Lanka** an independent Tribunal and an Arbitration Board for disputes arising in the sports field and disciplinary matters has been proposed but not yet been implemented. In **Brazil** employment matters concerning labor rights are dealt with by Labour Justice (without the possibility of arbitration). In **Belgium** disputes in relation to employment contracts cannot, in advance, be made subject to arbitration.
- On the other hand, **Greek** law provides that any financial disputes arising between athletes, coaches and Limited Sports Companies or sports unions are

settled by Financial Dispute Resolution Commissions, a permanent arbitration body established jointly by the relevant federation and the body representing its athletes. The submission of the disputes to it is mandatory unless the athlete's contract specifically provides another way of resolving the dispute. In **Hungary** there is also a permanent arbitration body provided by law, the Sports Standing Arbitration Court, but it is not mandatory.

- In some jurisdictions, for example in the **United Kingdom**, there is no arbitration body provided by law, but some sports associations offer non-mandatory arbitration systems. However, athletes and clubs also have access to the courts in the normal way; there is no requirement to go through arbitration proceedings first. The situation is similar in **Spain**, where employment disputes between athletes and clubs are resolved by the ordinary social courts after a compulsory attempt to conciliation between parties, while specific conflict resolution systems put in place by the corresponding federations are voluntary. In **Poland** arbitration is usually non-mandatory, but contracts can determine a mandatory arbitration. The **Finnish** Sports Arbitration Board only issues recommendations which cannot be enforced in the way court orders and arbitral awards can. Nevertheless, the Sports Arbitration Board is well established in the Finnish sports scene as the parties involved have adhered to almost all of its recommendations. It is voluntary to bring a dispute to the Sports Arbitration Board.
- In the **Czech Republic** the rules of the Czech Football Association stipulate a mandatory arbitration between clubs and athletes by the association. Such a clause is currently discussed in **Germany** in a non-employment case ("*Pechstein*"), where the Court of Appeals Munich has recently held that the speed skating association was not allowed to deny athletes access to courts by demanding them to invoke the Court of Arbitration for Sport (CAS), because the association has a market dominating position.
- In **Sweden** some sports associations, clubs and athletes are bound to resolve their disputes by arbitration and disputes may not be arisen in an ordinary court, while in ice hockey dispute resolution regarding employment matters is allowed in an ordinary court. In **Italy** arbitration is mandatory if a respective clause has been included in the contract. The situation is similar in the **United States**: Some collective-bargaining agreements contain dispute-resolution procedures requiring arbitration of certain types of claims (for example Major League Baseball).

2.2 Transfer Fee System and termination of contracts

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.

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?

In all **EU Member States** the transfer fee systems have changed:

Before the Bosman decision 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 words: 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.

After the Bosman judgment a transfer a fee can only be demanded if an athlete wants to change the club during the duration of his contract. Therefore the clubs are interested in signing long-term contract with their most important players, while the players have received a greater bargaining power near the end of their contract.

- In some countries new laws have been implemented in order to establish the principles of the Bosman judgment, for example in **Greece** and **Italy**.
- Most of the associations have accepted the new rules, as for example in **Sweden** and in the **Netherlands**, but some associations try to circumvent the outcome of the Bosman case by developing new systems. **Belgian** clubs try to use option clauses in order to extend the duration of contracts, but these may be illegal. On the other hand, even the law provides for stricter rules for sportsmen (compared to regular employees) regarding the breach of contract by leaving a club while the contract is still valid. According to the **English** transfer rules, a football club may require a transfer fee for an out of contract player if the player is under the age of 24 and has been offered a new contract on no less favourable terms. Such rules may be legal, as the ECJ decided in the case of *Olympique Lyonnais* vs *Bernard* and

Newcastle, provided that the scheme is suitable to ensure the attainment of the objective of encouraging the recruitment and training of young players and if the fee does not go beyond what is necessary to attain it. In the **Czech republic** there is a transfer fee systems for national transfers only: A 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"). In **Spain** "training or formation compensations" are even allowed by law, if the collective bargaining agreement contains a respective clause, as it is the case in the Professional Football Players Collective Agreement, as well as in different regulations of the Basketball and Handball's Spanish Federation. In **Finland,** the sports associations have tried to ignore the Bosman case at first, but the Turku Court of Appeals deemed it illegal in 1997 that TPS Turku, one of the most famous ice hockey clubs in the country, had required a transfer fee for the transfer of its former junior player Joni Lehto several years after he had last represented TPS and in circumstances where Lehto was not under contract with TPS. Since then, the new rules seem to be accepted.

- The new EU member states **Hungary**, **Latvia** and **Poland** had to implement the results of the Bosman case when joining the EU. In **Hungary** the ECJ decision was quite famous even before, because *Balog Tibor*, member of their national football team, filed an action in 2000 against his former Belgian club *Charleroi* who wanted to get a transfer fee at the end of his contract (probably claiming that *Balog*, being Hungarian, was not allowed to invoke EU rights). Eventually, the case was settled and Balog received significant damages as compensation.

The situation in some **NON-EU Member** states is as follows:

- In **Brazil**, the former transfer fee system was abolished in 1998 by the "Pelé law", but the former clubs can still receive payments under certain circumstances.
- In the **United States**, there has never been a tradition of transfer fees at the end of player contracts as in Europe. The hiring of professional athletes is regulated by CBAs and is quite unique. The teams utilize a "draft" system, where those who want to play professional athletics enter the "draft" and the teams have an agreement amongst themselves where they pick or "draft" players—teams pick in a certain order and have a certain number of picks. Those players who sign up for the draft are bound by it—players cannot choose which team they will start their career with, they can only choose to sign with the team that drafts them or not. If they go undrafted, they can sign as a free agent, but obviously will not command very much at that point. After a certain amount of time, athletes can become "free agents" and seek to join another club, even if the contract is still running. If athletes seek to work for another club before that time, this is considered a breach and the athlete may be suspended. Because the collective agreements apply leaguewide, any deviation from this practice would be unusual.

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 with professional athletes are usually fixed-term contracts in all of the jurisdictions of our national reporters. Most of the sports associations have bylaws in which the most important conditions of the contracts are indicated. As for football, FIFA rules provide a maximum duration of five years for players' contracts, while FIBA sets a maximum of four years for Basketball.

- In **Greece** these rules match the general employment laws, which allow fixed-term contracts with durations from 6 months to five years, corresponding to the usual duration of two or three years.
- In other countries specific sports laws allow these rules by way of introducing an exception to the provisions applicable to general employment contracts, as for example in **Brazil** and **Hungary.** The same is true for **Spain**, and moreover there exists an extraordinary law: Upon the termination of the fixed-term contract, the athlete will be entitled to compensation equal to twelve days' pay per year worked. In **Italy**, Art. 5 of the L. 91/81 sets the maximum duration of 5 years to the sport contract, and, upon expiry of the term, the contract can be prolonged.
- There are also countries, in which the exceptions from the general rules are allowed by CBAs: In **Sweden** temporary employments up to a fixed term of two years are accepted by employment law, but exceptions are possible by agreeing on permission for longer temporary employment in a collective bargaining agreement. This exception has been utilised in both football and ice hockey. In the **United Kingdom** employees, who have been continuously employed for four years or more on a series of successive fixed-term contracts, are automatically deemed to be permanent employees (that is, employed on an indefinite contract) unless the continued use of a fixed-term contract can be objectively justified. This includes cases where the original contract has been renewed or extended, or where a different contract has been entered into after the expiry of the original contract. But this rule may be varied on under a collective or workforce agreement, in particular regarding the justification of the renewal or successive use of a fixed-term contract by objective reasons. In the case of professional footballers, a standard contract of employment has been negotiated between the Premier League and the Professional Footballers Association. In the **United States**, the contract system is governed by CBAs anyway as described above.
- However, there are countries where the athletes' contracts are in conflict with general employment laws for fixed-term contracts: In **Germany** the maximum duration for fixed-term contracts is usually two years unless there is a specific reason for a longer duration or the successive use of fixed-term contracts. Such

reasons are laid out in the fixed term law and can also be developed by jurisdiction. As mentioned above in no. 2.1, a current lawsuit deals with the question if the possibility of fixed term contracts is necessary in the world of sports, as an athlete is not capable to deliver a maximum performance for an indefinite period of time due to physical reasons. In **Latvia** fixed term employment contracts are permitted only in areas listed by applicable regulation and as soon as validity term of the fixed term employment contract concluded between same employer and employee have reached 5 years in total (including extensions thereof) such employment contract shall become open-ended; the association bylaws cannot be considered as prevailing the statutory requirements. In **Finland** the employer is prohibited from using consecutive fixed-term contracts when the amount or total duration of fixed term contracts or the totality of such contracts indicates a permanent need of labor. In such circumstances fixed-term employment contracts are deemed to constitute indefinite employment contracts to which different provisions apply with regard to termination and cancellation.

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?

The usual fixed-term contracts bind both parties, so the player cannot simply switch the club during while the contract is still running unless the former club consents to the transfer (which is usually achieved by offering a transfer fee). Many associations safeguard this principle by a license system, so the player will only get a new license to play for the new team after the association has verified the termination of the contract or the consent of the former club. In football, players are not even allowed to sign a new contract or negotiate it more than six months before the termination of the former contract.

Apart from mutually agreed exemptions, the following exceptions to these rules apply:

- In the **United States** the CBAs provide a different system: During the first part of the term (a designated number of years), a player is not permitted to sign or negotiate with other teams. For example in Major League Baseball, after three years (or 2.83 rounded up) of major league service time, a player is eligible for the arbitration process to negotiate with his team. If the team does not offer the player a contract, he is said to be "non-tendered" and is granted free agency at that point. After that initial period and for the remainder of the contract term, a player remains under contract with their team for the remainder of the contract term, but is granted "free agency" and may negotiate with other teams. If the player signs with another team during this second phase, the new and former team will typically negotiate a deal to close out the player's contract with the former team (either money or draft picks). At the conclusion of the contract

term the player can re-sign with the current team or sign with another team. A player wishing to attain "free agent" status before his contract allows must obtain permission from the applicable league, which is rarely granted.

- In some countries, for example in **Brazil**, the parties have to agree on a clause which allows the player to leave the former club if the new club pays a certain transfer fee. In **Spain**, such penalty clauses are not compulsory but usual (at least for the better players). One reason for this may be the fact that the athlete is entitled to receive at least 15% of the transfer fee.
- In **Belgium** a player may breach his contract and join another club (to the extent permitted, e.g. during transfer window). No transfer fee will have to be paid. Yet, the employee will have to pay a severance indemnity (which may be paid for by his new club). In practice, few players dare doing so.
- In **Sweden** football players have the right to cancel the contract if justified by a "sporting cause" according to the respective CBA: If the athlete has played less than 1/10 of the games during one season, the contract may be cancelled and the player may switch club without the consent from the former club and without agreeing on a transfer fee.
- In **Hungary** a player may terminate the contract even before its end if the club becomes incapable of taking part in or disqualified subsequently from the competition system (championship) for any public debt or any other reason. After the cancellation, the athlete is forthwith transferable, irrespective of any prevailing transfer period.
- In the **Czech Republic** employment law would allow an athlete to terminate the contract during its term without the prior consent of the club; hence the duty to pay a transfer fee would be in breach of employment law. But, as mentioned above in 2.1, athletes' contracts are based on business law instead of employment 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?

As described above, a transfer before the end of the employment contract is not possible if the respective association denies the player a license to play for his new club. If the player has been transferred nevertheless, the player and the new club may have to face disciplinary penalties by the association (which can lead to the exclusion from both national and international competitions). Furthermore, this will be deemed as a breach of contract in most of the jurisdictions of our national reporters, and the former club can demand compensation from the player (and subject to association rules also from the new club). The amount of compensation can already be fixed by a penalty clause in the employment contract; otherwise it

will have to be determined by the court. The following special features are interesting:

- In **Finland**, as in most of the other countries, the amount of such compensation is evaluated on a case by case basis by taking into consideration, among other things, the extent of possible damages, the nature of the breaching act and the circumstances of the parties involved.
- In **Greece** the former club is entitled to the salary the player would receive from the point of the termination until the end of the following transfer period plus any bonuses the player would be entitled according to employment law provisions such as Christmas bonus, annual leave bonus etc. and an amount equal to the sum of the remaining installments until the expiration of the contract divided by the number of the remaining transfer periods up to the expiration.
- In **Spain** the economic compensation agreed in the contract can 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 does not contain an economic compensation, the damage compensation's amount will be set by the labour court according to the following criteria: sports circumstances, damage caused to the former club or breach of contract's reasons, among others. Before the judiciary procedure, the parties are obliged to attempt a mandatory conciliation stage and meeting.
- In the **United States**, subject to the applicable CBA, the employer may place the employee on suspension, generally without pay, if the athlete violates his contract by signing with another team in violation of the contract.

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.

Further to the above mentioned legal situations, there are a lot of remarkable conflicts regarding employment law between athletes and managers on the one hand side and sports associations on the other hand side. The most interesting ones are worth to be mentioned subsequently:

- **United Kingdom:** In the case of *Kevin Keegan v Newcastle United W.S.L.R. 2009*, the manager of Newcastle United FC had been promised that he would have the final say in the recruitment of players to the club. The Uruguayan International, Ignacio *Gonzalez*, was recruited against his express wishes and he resigned in response. *Keegan* was awarded damages by the Managers' Association Tribunal on the basis that the club's behaviour destroyed trust and confidence. Similar cases have arisen were a club sold players against the manager's wishes.
- **Germany:** The law regulating working times for minors has also affected the world of sports, as players of minor age (under 18) have played in the UEFA

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.

- *Luis Suarez*, the football player well-known from the WorldCup 2014 in Brazil, has played in the **Netherlands** some years ago. He has been subject to the arbitration proceedings many times, but not only for biting incidents. In 2007 Suarez was playing for FC Groningen. He played for one year and wanted to go to AFC AJAX. He started a procedure against FC Groningen because they weren't willing to let him go. He claimed that there was a substantial improvement when he would play for Ajax, not only in his salary, but also on sporting level. Groningen could not offer him the same salary. The arbitrary court decided that the improvement wasn't substantial enough and Suarez had to be kept to his contract at FC Groningen. Even though the Court of Arbitration for Sport didn't allow Suarez to leave for Ajax, the same day of the ruling Ajax and Groningen agreed on a transfer.
- **United States:** Federal law prohibits illegal monopolies or attempts to monopolize, as well as illegal contracts in restraint of trade (e.g. two companies in the same industry agreeing not to hire each other's employees). Professional sports leagues are comprised of teams that, practically speaking, are competitors with each other. Nevertheless, all league teams form a system of detailed rules governing the initial hire (draft) and trading of players. The procedures on their face would seem to violate federal antitrust law. But by statute as further developed in case law, the collective bargaining process is exempt from antitrust scrutiny in order to promote cooperation among employers and employees. Agreements between a group of unionized workers – including a union of professional athletes – and management will not be considered illegal. Because of the inherently monopolistic nature of sports leagues, however, a number of antitrust challenges have been raised. For example, in 2010, the NFL initiated a lockout after unsuccessful negotiations for a new CBA. In response, the players dissolved their union and initiated an antitrust lawsuit claiming that the NFL's actions constituted an illegal boycott. A similar lawsuit involving the NBA was brought around the same timeframe. The players in these cases argued that the exemption did not apply when the union was no longer established and negotiations were not in session. Though a federal district judge in the NFL case issued an injunction against the lockout (overturned in part), both disputes settled before any merits ruling was issued on the antitrust issues.
- **Brazil:** The question has arisen if the football player *Wether Thiers* was breaching his contract with his football team Sao Paolo when he played futsal (indoor soccer) for another team during the term of his employment contract.
- **Spain:** 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 included 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.

- **Sweden:** A heavily discussed case in the labour court dealt with an employment agreement between the ice hockey club *Djurgården Hockey AB* and the player *Marcus Nilsson*: The club and the player entered into a temporary employment agreement for four years. When the club, two years after the parties signed the contract, was relegated to the second division the club terminated the contract with the player. Due to the heading of the contract, the player's high salary and the absence of the club's capacity to pay the player's salary, the club claimed that the player must have understood that the contract should only be in force as long as the club played in the first division. The court stated that when the parties entered into the contract they had presumed that the club hereafter was going to play in the first division. Despite this statement, the court came to the judgement that it did not mean that the contract contained a termination clause in case the club was relegated to a lower division. The court determined that the club's termination of the player's contract was a dismissal without any ground. Therefore, the club was obliged to pay pecuniary and general damages amounting to SEK 470 019 and 75 000 respectively. The labour court did not differentiate employment agreements within sports to the general employment market, i.e. a temporary employment agreements cannot be terminated before its fixed date.
- **Czech Republic:** 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.
- **Italy:** A significant difference between the common rules applicable to employment contracts and those set forth for sport contracts relates to those with women: The Federations are responsible for deciding whether a discipline, both for men and women, shall be considered professional or unprofessional

and, as a matter of fact, none of the female disciplines is considered professional. This implies that in Italy there can be men contracted as professional football, basket, rugby players or cyclists, but there are no women treated the same. As a consequence, this leads to the paradox that the same discipline is played as a professional or unprofessional player, simply because of the gender of the athletes. The most relevant effect of this dichotomy is that women athletes cannot benefit of the same regulation provided for by the L. 91/81, ruling the relationship with men athletes, thus leaving to the contractual regulation the whole discipline of their relationship and – in fact – penalizing their negotiations.

- **Hungary**: There are ongoing cases regarding the payments when the players suffered occupational accident and they are required to rehabilitate for a long period. Some of the – mostly having financial difficulties – clubs during the term of this period fails to pay the full salary. Under the Subsection 5 of the Section 8 of the Act on Sport accidents of professional athletes occurring in the course of sports activities pursued within the framework of their employment shall be regarded as occupational accidents. Employers are obliged to take out life and sports accident insurance policies for their professional athletes if prescribed by the relevant sports federation's regulations. The problem occurs when the club is entering into a very minimum level of the insurance which do not cover the salary of the players. Also the problem goes back to the fact that in the area of sport a special taxation system is available, which is very positive for the parties on the one hand, however not as positive on the other hand. At this point a provision of the Labour Code helps to settle the disputes, namely the employer shall compensate the employee for all his losses in full, especially when the loss, i.e. the accidents is suffered by the employee on the football field, during the court and perform the tasks and obligations of the players. Otherwise the players could not be expected to step on the football field with all of their knowledge and 100% performance even jeopardize their health or risk a broken leg when upon a suffered accident they might not receive their full payment. Not to mention the fact that medical treatments are everything but inexpensive and the player might not be able to be part of the team for quite a long period.
- Finally, in **France** (and some other countries) there are conflicts regarding the notion of working time and work overtime. This question can also lead to possible conflicts in the amateur sports area in **Germany** because of the new 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.