

RETENTION AND TRANSFER CLAUSES IN A SPORTS CONTRACT- WITH REFERENCE TO THE EASTHAM AND BOSMAN CASE

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Introduction

The aspect of sport has seen its growth from a recreational activity to a commercial activity. Historically, sport has been regarded as a social movement, but today elite sport is a commercial industry.⁴⁴⁹ This worldwide business, with its lucrative contracts and sponsorships, generates an estimated US\$384 billion per year.⁴⁵⁰ Contracts are necessary in sport to ensure the sport's continuing success. Sport contracts are commonly entered into to reduce the margin for dispute between the privy parties and are binding on each party. However, contracts are unenforceable if they contain provisions that are contrary to public policy. For instance, if a contract is entered into by a person and if it unreasonably restrains that person in the implementation and exercise of their profession or trade, it is unenforceable. This is known as a restraint of trade.⁴⁵¹ The restraint of trade issues have, without a doubt, formulated the legal constitution and structure of modern day sport.⁴⁵²

The doctrine of restraint of trade allows an individual, entity or a person to go ahead with his trade or business in a legal way and in '*such a matter as he chooses*'.⁴⁵³ Hence, any restraint that is imposed on a person and his right to work is prima facie considered as void. There is a probability of this provision being rebutted, only if the restraint imposed on the person is considered as a 'reasonable' one.⁴⁵⁴

The landmark case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co*⁴⁵⁵ has put forward a test known as the *Nordenfelt Test* which is used in establishing whether the restraint imposed is reasonable and if it is in the interest of the parties and the public or not.⁴⁵⁶ It is seen that if the restraint imposed on the interest of the parties is held to be reasonable, then even the restraint on the interests of the public is reasonable.

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⁴⁴⁹ D Healey, *Sport and the Law* (3rd ed 2005) 15.

⁴⁵⁰ D Andrews, *Sport and Corporate Nationalisms* (2004) 22.

⁴⁵¹ James Johnson(2009), *Restraint of Trade Law in Sport*, <http://epublications.bond.edu.au/slej/10>

⁴⁵² L Halgreen, *European Sport Law – A Comparative Analysis of the European and American Models of Sport* (2004) 85.

⁴⁵³ *Petrofina (Great Britain) Ltd v Martin* [1996] 1 Ch 146, 180 per Diplock LJ.

⁴⁵⁴ *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.

⁴⁵⁵ *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*[1894] AC 535

⁴⁵⁶ In *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535, 565 Lord Macnaghten stated, 'reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public.'

There are two requirements under the *Nordenfelt Test* need to be satisfied, for the restraint to be a reasonable one. They are:

1. The party who seeks to restrain the other party must have a *legitimate interest*.
2. The restraint imposed must not be anything beyond *what is necessary* to protect that interest.⁴⁵⁷

Coming to the context of sport, the league/club and the athlete are considered to be the privy parties. If the league restrains an athlete by implementing a cap on him, the league can argue that the legitimate interest of it lies in its financial sustainability and stability and the implementation of the cap and reduction in the athletes' salaries, is a necessary step to protect the financial sustainability, which is the legitimate interest.⁴⁵⁸

Retention and Transfer System

A standard player contract is an employment contract that specifies the player's rights. A standard player contract or uniform player contract contains many unique provisions that separate it from other employment contracts, due to the unique nature of sport. The retain and transfer clause are rooted in the standard player contract. A situation is provided to gain a better understanding of the system of retention and transfer. . When children play team sports they frequently pick and choose sides by first identifying team captains, who then alternate in choosing players. The rationale behind this is to balance the skills of the teams so that the match is sufficiently balanced and even to interest the participants.⁴⁵⁹ Professional sports leagues use a similar scheme to allocate and distribute players among teams. Under such a scheme the team which finishes last during the prior season has the foremost choice or a higher probability of receiving the first choice, from newly available players; the team with the second poorest record selects second, and it continues in the same pattern until the championship team of the prior season chooses last. Then the process is repeated, with the weakest team getting first choice on the second round, and so on.⁴⁶⁰

They are effective only if attached with a restraint which prevents a drafted player from skipping to a team which did not draft him. This paired scheme usually consists of an agreement among the teams to refrain from employing

⁴⁵⁷ *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] AC 535

⁴⁵⁸ James Johnson(2009), *Restraint of Trade Law in Sport*, <http://epublications.bond.edu.au/slej/10>

⁴⁵⁹ John J. Siegfried, *Sports player Draft and Reserve System*, 14 Cato J. 443 1994-1995

⁴⁶⁰ John J. Siegfried, *Sports player Draft and Reserve System*, 14 Cato J. 443 1994-1995

a player drafted by another team in the league. It is called a "reserve system"⁴⁶¹. The reserve clause, introduced in 1876, permits clubs exclusive rights to re-contract their athletes at the expiry of their existing agreement.⁴⁶²

The transfer system associated with European football is completely unique from any other form of American sports.⁴⁶³ Unlike American sports where players are drafted, traded, and signed via free agency, European football players are bought and sold for substantial amounts of money.⁴⁶⁴ This system has undergone remarkable amounts of change in recent time, and while these changes have provided medicine for many issues, they have also produced others.⁴⁶⁵ The new transfer system has greatly increased players' rights in contractual negotiations and allowed for practically unlimited player movement throughout the European Union (EU).⁴⁶⁶ The changes have been exceedingly advantageous for the players but these changes have resulted in an increase in team expenditures.⁴⁶⁷ The transfer fees associated with the world's top players have also risen to such a level that only a handful of teams are able to remain competitive.⁴⁶⁸

The most controversial and well-documented transfer in history of sports was that of Cristiano Ronaldo. In June 2010, the Portuguese forward was sold from Manchester United to Real Madrid for a record £80 million, or \$141 million.⁴⁶⁹ By 2010, these "transfer fees" had become so high that despite record revenues across the continent, the total debt of European clubs had risen to €1.6 billion.⁴⁷⁰ According to the governing body of European football, the Union of European Football Associations (UEFA), the percentage of clubs reporting operating losses in 2011 had increased to an astounding sixty-three percent.⁴⁷¹

⁴⁶¹ John J. Siegfried, *Sports player Draft and Reserve System*, 14 *Cato J.* 443 1994-1995

⁴⁶² C Kolonko, *Restraint of Trade in Sport: An International and South African Perspective* (2006)

69.

⁴⁶³ See The Center for the Law and the Economics of Sport, *THE ECONOMIC AND LEGAL ASPECTS OF TRANSFERS PLAYERS I* (2013), available at <http://ec.europa.eu/sport/library/documents/fstudies/study-transfers-final-rpt.pdf> (last visited Sept. 16, 2013).

⁴⁶⁴ Paris Saint-Germain Dream into Action, THE SWISS RAMBLER (July 18, 2012), <http://swissramble.blogspot.com/2012/07/paris-saint-germain-dream-into-action.html> (last visited Sept. 16, 2013).

⁴⁶⁵ See The Center for the Law and the Economics of Sport at 4

⁴⁶⁶ Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. 295 (2005).

⁴⁶⁷ Ryan M Knight, *A Football Monopoly: The Lack Of Parity And Financial Responsibility In Today's Game*, 20 ILSA J. Int'l & Comp. L. 107 2013-2014

⁴⁶⁸ See The Center for the Law and the Economics of Sport at 226

⁴⁶⁹ Mark Ogden, Cristiano Ronaldo Transfer: Real Madrid Agree £80 Million Fee with Manchester United, THE TELEGRAPH (June 11, 2009, 9:30 PM), <http://www.telegraph.co.uk/sport/football/teams/manchester-united/5505073/Cristiano-Ronaldotransfer-Real-Madrid-agree-80-million-fee-with-Manchester-United.html>

⁴⁷⁰ The term "transfer fee" refers to the price one team pays another team to gain the rights to a player. This fee does not include the player's wages. See The Center For the Law and the Economics of Sport at 24.

⁴⁷¹ Sefton Perry & Stephanie Leach, *The European Club Licensing Benchmarking Report* 101 (2012), available at <http://www.financialfairplay.co.uk/resources/UEFA%20Club%20Licensing%20Benchmarking%20January%202011.pdf>

The beginnings of the transfer system correspond directly with the origins of football itself.⁴⁷² This system was originally established to prevent wealthy clubs from monopolizing all of the league's best talent. Clubs were required to register players with the Football Association each and every season. These players and their contracts then became tradable commodities between the different clubs.⁴⁷³ Under this system, when a player's contract expired, an option period began that was controlled entirely by the club. The option contract could last as long as the player's original contract. Under this system, other teams were allowed to sign players from their current club if they reimbursed the club for the remaining value of the player's contract.⁴⁷⁴ While this system drastically limited a player's ability to move freely within the market, it did allow smaller clubs to retain their talented players and prevented larger and wealthier clubs from sniping off the best talent and destroying the league's competitive nature.⁴⁷⁵

There have been a few cases in the history of football which have changed the meaning of the retention and transfer clause in the player contract and got in new perspectives to the same. The two most important ones are analyzed and summarized.

1. Eastham v. Newcastle Football Club⁴⁷⁶

The case of *Eastham v. Newcastle Football Club* is of significance for a number of reasons, which combine to mean that it remains of modern-day as well as historical interest. The case played a key role in rebalancing the employment relationship between the club and the player. George Eastham was a professional football player who played for Newcastle United from 1956 to 1960.⁴⁷⁷ In 1959, with his contract approaching expiration, Eastham refused to sign a new one and requested a transfer; however, Newcastle refused to let him go. Eastham was quoted referring to the Retain and Transfer system⁴⁷⁸:

⁴⁷² Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. AT 297

⁴⁷³ Stephen Dobson & John A. Goddard, *The Economics Of Football* 90 (Cambridge University Press 2001).

⁴⁷⁴ Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. AT 297

⁴⁷⁵ Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. AT 298

⁴⁷⁶ [1964] 1 Ch 413

⁴⁷⁷ Arsenal's Greatest Midfielders: Early Era's Vote Time, ARSENAL (June 29, 2013), <http://arsenalarsenal.wordpress.com/tag/george-eastham/> (last visited Sept. 16, 2013) [hereinafter Arsenal's Greatest Midfielders].

⁴⁷⁸ Jon Spurling, *Rebels For The Cause* 81 (Mainstream Publishing 2004).

*“Our contract could bind us to a club for life. Most people called it the slavery contract. We had virtually no rights at all. It was often the case that the guy on the terrace not only earned more than us-though there's nothing wrong with that-he had more freedom of movement than us. People in business or teaching were able to hand in their notice and move on. We weren't. That was wrong.”*⁴⁷⁹

The case concerned a challenge to the rules of the English Football Association (“the FA”) and Football League (“the League”) relating to the system of “retain and transfer”, which governed the movement of players between clubs. Eastham’s playing contract with Newcastle United had expired. However, the combination of the rules of the FA, the sport’s regulator, and the League, the organizer of the premier English league competition, meant that Newcastle United could still retain his registration, even though his contractual relationship had ended. The result of this was that, despite the absence of a contract between him and Newcastle United, the claimant was prevented from moving to another club unless Newcastle agreed to release his registration. He claimed declarations against Newcastle United, the FA and the League that his contract with the club, the rules of the FA and the regulations to him as being in unreasonable restraint of trade and, or in the alternative, *ultra vires* and hence unlawful as being in breach of contract⁴⁸⁰. On the whole, Eastham argued that the retention system had the effect of impeding his ability to pursue further employment and make use of his abilities as a professional footballer after the termination of his contract.⁴⁸¹

Under this, the FA had the capacity to refuse a club the right to retain a player if it considered the wage offered to be insufficient. Retained players were barred from representing any other League club, and there were no limits with regard to the length of time for which a player could be retained although not being contractually bound to the club. A transfer to another club was possible upon a payment of a fee to the retaining club from the player’s new club. A transfer to a club outside of the League was, in any case, available to a retained player on condition that FA rules were complied with.⁴⁸²

Wilberforce J opined that the court’s analysis was not just limited to the contractual question of *ultra vires* in ensuring compliance with the relevant rules and regulations, but also extended to testing these against the requirements of public policy. Thus, for the first time, a situation arose in which a court was willing

⁴⁷⁹ Jon Spurling, *Rebels For The Cause* 81 (Mainstream Publishing 2004).

⁴⁸⁰ [1964] 1 Ch 413

⁴⁸¹ [1964] 1 Ch 413

⁴⁸² *Eastham v. Newcastle United Football Club Ltd.*, [1964] 1 ch. at 414 (Eng.).

to give genuine consideration to the validity of the rules of a sport's governing body, making it a significant development. In considering whether there was an unreasonable restraint and, if there was, whether the restraint was justified, Wilberforce J chose to consider the retention and transfer elements of the rules separately. The system of transfer and retention were examined separately and in isolation from each other. He concluded in the end that the combination of retain and transfer operated in inexcusable restraint of trade, but refused to decide whether the transfer system in itself would also be regarded in this manner.

Despite Newcastle United eventually granting his request to transfer, Eastham took his case to the High Court (of England) in 1963, so that the system could be disputed as a whole. Eastham sought a declaration that the retention and transfer system should not be allowed because the system was an unlawful restraint on trade.⁴⁸³ The Chancery Division held that the retention provisions of the system interfered with a player's right to seek employment and therefore could not be upheld. This case did not overturn the limits on foreign players, but it greatly increased a player's negotiating power.

2. Union Royale des Sociétés de Football Association ASBL v. Bosman

The transfer system was drastically altered after the landmark decision by the European Court of Justice (ECJ) in *Union Royale des Sociétés de Football Association ASBL v. Bosman*⁴⁸⁴ in 1995. Jean-Marc Bosman was a Belgian football player who played for RC Liege from 1988 to 1990. When his contract expired in 1990, Bosman had fallen out of favor with the team and the team placed a fee of £500,000 on him.⁴⁸⁵ This fee was more than five times what RC Liege paid for him just two years prior. When the French team, US Dunkirk, approached RC Liege about purchasing Bosman, RC Liege insisted the team pay the entire fee upfront. When the team refused, RC Liege pulled out of the deal and cut Bosman's salary by seventy-five percent to just £500 per month.⁴⁸⁶ Bosman refused to sign this inadequate contract and brought a suit against UEFA and RC Liege. Bosman went to court seeking a declaration that

⁴⁸³ *Eastham v. Newcastle United Football Club Ltd.*, [1964] 1 Ch. at 414 (Eng.).

⁴⁸⁴ Case C-415/93, *Union Royale Beige des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-4921, [1996] 1 C.M.L.R. 645 (1995).

⁴⁸⁵ Mark Burton, *Who is Jean-Marc Bosman?*, THE INDEPENDENT (Sept. 21, 1995), <http://www.independent.co.uk/sport/who-is-jeanmarc-bosman-1602219.html>

⁴⁸⁶ Mark Burton, *Who is Jean-Marc Bosman?*, THE INDEPENDENT (Sept. 21, 1995), <http://www.independent.co.uk/sport/who-is-jeanmarc-bosman-1602219.html>

the nationality clauses of each league violated the Treaty Establishing the European Economic Community (EEC)⁴⁸⁷

In Bosman, the ECJ held that the transfer fee system and its rule limiting the number of foreign players a club could field at a time, violated Article 48 of the EEC.⁴⁸⁸ The Court recognized that while there was no absolute ban on foreign players, the league's rules preventing teams from fielding more than three such players for a match significantly, limited a player's opportunities; therefore, they constituted unlawful discrimination of EC members.⁴⁸⁹

UEFA argued against this ruling claiming that these provisions had legitimate purposes, such as:

- To field a team representative of the local population;
- To develop a local pool of talent from which the national team could select players from; and
- To maintain parity within the league.⁴⁹⁰

The Court disregarded these arguments stating that “ *the protection of nationalism as a means of "enabling the public to identify with its favorite team" was illogical given the absence of similar regulations ensuring proportional representation of residents hailing from a team's "locality, town, region or territory."* ”⁴⁹¹

In actuality, this ruling meant that when a player's contract ended, he was no longer at the obligation of his current club and was free to sign with another team in any country he desired. In March 2011, an agreement was eventually reached between Mario Monti, the new head of the EU Competition Committee, and Sepp Blatter, the head of the Federation Internationale de Football Association (FIFA). The agreement maintained much of the current transfer system but completely did away with the reserve system and allowed for an unlimited number of EU players to be on a team's roster.⁴⁹² The expansion of the Bosman ruling sparked a widespread belief that the football leagues of the EU's wealthier nations would be flooded with players from poorer countries who would agree to work for much lower wages than their domestic counterparts.⁴⁹³

⁴⁸⁷ Treaty Establishing the European Economic Community art. 48, Mar. 25, 1957, 298 U.N.T.S 11, 36 [hereinafter EEC Treaty].

⁴⁸⁸ Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. AT 301

⁴⁸⁹ *Bosman*, 1995 E.C.R. 127-29.

⁴⁹⁰ *Bosman*, 1995 E.C.R. 123-125

⁴⁹¹ *Bosman*, 1995 E.C.R. 123, 131

⁴⁹² John J. Siegfried, *Sports player Draft and Reserve System*, 14 *Cato J.* 443 1994-1995

⁴⁹³ John J. Siegfried, *Sports player Draft and Reserve System*, 14 *Cato J.* 443 1994-1995

Conclusion

The retention and transfer clauses have been applied extensively in football contracts especially in Europe. The transfer clause's overview has been drastically changed since the *Bosman* and *Eastham* ruling. While the expansion of players' rights has led to increased salaries and transfer fees, it has also led to a decline in competitive equality. The *Bosman* decision, the increase in football revenues, the internationalization of the game, the onset of rich financiers have undoubtedly contributed to the increase in value and the number of transfers across all the European football leagues and has also helped in the continuous success of the sport.

