

ПРОБЛЕМИ ЗАСТОСУВАННЯ ЗАКОНОДАВСТВА ПРО СПОРТ

Анотація. Спортивне право, як елемент системи права України, за своїми нормативними і функціональними властивостями поступово починає набувати ознаки самостійної галузі, в межах якої об'єднуються конкретні правові інститути. Тому основна мета роботи полягає у дослідженні проблеми застосування законодавства про спорт. Проведено порівняння національного спортивного законодавства та спортивного законодавства Франції. Зазначено, що норми спортивного права враховані не тільки в численних галузевих нормативних актах, але й в законодавстві інших галузей, причому число відповідних норм неухильно зростає. Встановлено, що важливим фактором, що впливає на розвиток спорту в зарубіжних країнах, є комерціалізація сфери спорту, створення на його базі дохідних бізнес-моделей. Результати дослідження ускладнюють праворозуміння і правозастосування у сфері спортивного права, підтверджуючи необхідність його як найшвидшого реформування та вдосконалення спортивного законодавства.

Ключові слова: спортивне право, цивільне законодавство, спортивно-правові відносини, субсидіарне застосування норм, систематизація нормативно-правових актів.

Bohdan V. Fasii

Department of Civil Law
National University "Odessa Academy of Law"
Odessa, Ukraine

PROBLEMS WITH THE APPLICATION OF SPORTS LEGISLATION

Abstract. Sports law as an element of the system of the Ukrainian law, by its regulatory and functional properties is gradually beginning to acquire signs of an independent industry which unites specific legal institutions. Therefore, the main purpose of the work is to investigate the problems of application of the legislation on sports are investigated. A comparison has been made between national sports legislation and sports legislation in France. It is noted that the norms of sports law are taken into account not only in numerous sectoral regulations, but also in the legislation of other sectors, and the number of relevant norms is steadily increasing. The results of the study complicate legal understanding and enforcement in the field of sports law, confirming the need for it as the fastest reform and improvement of sports legislation. It is established that an important factor which has the impact on the development of sports in foreign countries is the commercialization of the sports sector and the creation of profitable business models on its basis.

Keywords: sports law, civil law, sports and legal relations, subsidiary application of norms, systematization of legal acts.

INTRODUCTION

Over the last 10 years international sporting events have demonstrated that today's professional sport is not merely the sphere of social life, but also an important part of global politics. Any state considers achievements and success of its professional athletes at international competition to be the way to claim its place at global political Olymp. Modern stage of social development is featured with paramount importance, it has transformed from the way of health support and strengthening into specific style and mode of life of modern human, substantial portion of the market.

Over the recent years, the status of physical culture and sports in Ukraine has increased significantly. Development issues in this area became the priority tasks of the national policy. Lately global scale sports events more and more often take place on Ukrainian sports arenas, including European Championship (in cooperation with Poland, 2012), Champions League Final (2018). Despite numerous problems in the various areas of sports life, Ukraine becomes full-fledged member of the international sports community. In parallel professional and amateur sports is developing rapidly, physical culture is also stimulated. Dozens of state and municipal programs are being implemented in physical culture and sport fields, and considerable funds are being invested.

Named circumstances indicate not only significant development of legal relations in sports field, but also the necessity to bring sports legislation in line with them. Continuous transformation of sports legislation is causing quantum leap in sports law development, as well as putting the issue of further systematization of sports laws on agenda.

Although systematization of the laws and regulations does not immanently cause the development of new legal norms, at the present stage it is one of the key areas of legislative activity. The foregoing is relevant in continental legal family countries, including Ukraine.

For the time being over 20 law codes are in effect in Ukraine, and regulatory acts codification process is going on in the direction covering both existing law codes transformation and new ones development. In particular, the researchers review pending matters of transport, labor, environmental codes of Ukraine development as well as other codified regulations. Codification issue is also relevant to sports law development.

Sports law is relatively young science, and scientific community perceives it with a pinch of salt.

Legal regulation is an important factor influencing sports and creating certain conditions for its development. The Concept of the State Target Social Program for Physical Culture and Sports Development until 2020, approved by the decree of the Cabinet of Ministers of Ukraine dated March 1, 2017 No. 115 (hereinafter referred to as "the Concept"), analyzes the main causes of issues related to the crisis situation in physical culture and sports field. The purpose of the Program is to establish the

leading role of physical culture and sports as an important factor in healthy lifestyle, disease prevention, humanistic values formation, conditions creation for comprehensive harmonious development of a personality, individual's physical and spiritual perfection promotion, reserve capacities of the body identification, patriotic feelings formation among citizens. and positive image of the state generation in the global community. The Concept proposes to solve pending matters arisen in particular by improving legal and regulatory framework of physical culture and sports [1].

1. MATERIALS AND METHODS

For the time being this issue is subject to lively discussion in scientific community as sports laws development and improvement and solving the issues of sports laws application is an important tool to regulate sports relationships in Ukraine.

The issues of sports laws and regulations application, subsidiary application of civil law statutory regulations to sports relations in Ukraine have been investigated in domestic and foreign lawyers' publications. .

General scientific and special methods of scientific knowledge have been used to analyze the issues being subject matter of the research. Dialectical approach to legal reality cognition has been used to research general theoretical aspects of sports laws and regulations. The concept of subsidiary application of the civil law norms and regulations to sports relations has been investigated using formal-logical method. Structural-functional method allowed to consider the conditions and principles of sports laws and regulations application. The results of dogmatic (logical) analysis have been used while formulating findings and proposals, taking into account the requirements regarding certainty, consistency, coherence and relevancy of judgments within the framework of general theoretical and civil legal structures. Case study method has been used to identify the law enforcement value of sports laws.

2. RESULTS AND DISCUSSION

2.1. Particularities of sports laws in Ukraine

The key regulatory legal act in sports laws and regulations system that could serve as the basis for the future sports code is the Law of Ukraine "On Physical Culture and Sports" dated December 24, 1993. Currently the activities to improve its provisions are going on; practically each year since 1999 modifications to it have been introduced. In 2009, this Law has been adopted by Verkhovna Rada of Ukraine restated, however it was amended and restated since than on repeated occasions [2].

The Law of Ukraine "On the Physical Culture and Sports" establishes, among other things, the basic principles of the relevant legal code, as well as defines the system of legislation of Ukraine on physical culture and sports. In accordance with the Art. 2: "The legal code of Ukraine on physical culture and sport is based on the Constitution of Ukraine and consists of this Law, the relevant international treaties of Ukraine and other normative legal instruments regulating legal relations in this area."

The preamble to the Law states that it defines general legal, organizational, social and economic foundations of the activity in the field of physical culture and sports and regulates social relations in creating conditions for physical culture and sports development. Consequently, the adoption of the restated Law creates new opportunities for our state to attain set objectives; however unfortunately, it does not solve all the issues arising in physical culture and sports area. Such issue as legal regulation of professional sport deserves special attention. On September 28, 2004, the Decree of the President of Ukraine No. 1148/2004 approved the National Doctrine for Physical Culture and Sports Development (hereinafter referred to as Doctrine). Paragraph 13 of Doctrine states that the state creates conditions for the further development of professional sports on commercial basis. Economic and labor relations in professional sports are regulated at legislative level, measures are being developed to protect the interests of professional athletes [3]. However, despite declared intention of the state to regulate relations in professional sports by adopting relevant legal code declared in Doctrine, wide range of issues in this area still remain either unresolved or requiring improvement.

Specific system of sports laws and regulations availability in Ukraine non-prejudicially acknowledges the necessity to systematize laws and regulations which will ensure proper legal understanding and law enforcement in this area. Considering distinguished types of systematization, it should be noted that they form a strict hierarchy, the upper level of which is occupied by codification. The main and most obvious argument in favor of codification is unbiased impossibility for further systematization of legal code area through consolidation. Taking into account that the result of sports laws and regulations consolidation has been the development and adoption of the Law of Ukraine “On Physical Culture and Sports”, and considerable number of sports legal regulations are contained in the laws, including codified statutory instruments of the other sectors, we can make the conclusion that codification only may become the next stage of sports laws and regulations systematization in Ukraine.

2.2. Sports legal code peculiarities in developed countries

In the mean time, the question relating to the necessity for sports laws and regulations codification still remains open-ended. Physical culture and sports laws and regulations codification is observed in a certain foreign countries (USA, Brazil, and France). Sports laws codification in these states has become a phenomenon of legal reality in recent decades. France stands apart, with completely developed full-fledged Sports code (Code du sport) which is already in effect. As French law refers to continental legal family, as well as our domestic law, the analysis of the French experience of codification of sports law is extremely important in the context of proposals development to improve sports legal code of Ukraine.

Sports code of France is among the special purpose codes that are the constituents of the civil law. Draft Sport code, developed in 2004 and adopted in 2006, as seen by the Ministry of Youth, Sports and Civil Life (Ministère de la Jeunesse, des Sports et de la Vie), was intended to establish the prioritized nature of the development of sports, to approve this trend as one from the key sections of the state policy [4]. In addition, the Code “was intended to improve the understanding and accessibility of sports laws and regulations”, that is, in fact, was adopted for the same purposes, in the direction of which we need to go to develop Ukrainian sports legal code.

Sports code of France includes four books, each of which refers to the separate aspect of sports law [5]:

Book I – Organization of physical culture and sports;

Book II – Participants in sport events (athletes, referees, coaches, teachers, sports officials);

Book III – Various types of sports practices, safety and hygiene of sport, sports events arrangement and management;

Book IV – Sports funding and legal code application in the legal relationships that arise in overseas sports communities.

Its worth to note that the Sports code of France has invigorated French sports adevelopemnt nd created actual conditions for efficient elimination of corruption and other forms of sports crime. French experience in sports law codification is a vivid example of the way to solve the issues of physical culture and sports status enhancement, law enforcement clarity in the course of sports laws systematization, along with the way to lay right vector for legislative branch and appropriate area of law.

An important factor making impact on sports development in foreign countries is commercialization of the field of sport, revenue-generating business models creation based on it, such as it is done in UK or the United States, where one of the important tasks of sports is to earn money. Each English football club that is part of the English Premier League is a successful business project. In the USA, a professional sport in general is a unique joint business product, which is not subject to monopoly activities restriction, and objective of which is to generate income by drawing audience.

Meantime, the state is removed from resolving financial issues of sports development. China’s experience in sports development area also seems to be noteworthy: here private business, including foreign investors, is allowed to participate in the state model of sports development. After sports invetsment program adoption by political leaders in 2014, Chinese business has entered global sports market. It should be noted that the main difference in the legal regulation of relations in Ukrainian sports sphere is the minimum degree of autonomy of physical culture and sports entities, their independence from state administration, even in comparison with China.

Ukrainian sports laws and regulations are characterized by pending issues which are in fact similar to those which have been resolved when codifying French sports laws. Conspicuous is the fact that effective branch regulatory document – the Law

on Physical Culture and Sports – has been chosen as the basis for codification. In this case, it is likely that foreign experience, analyzed and reviewed through the prism of domestic legal reality, gives us ready precedent for further development of Ukrainian sports legal code.

The above reasoning confirm sports law existence, as well as indicate incompleteness of regulatory process in this area. On the other hand, sports law area has key and fundamental legal regulatory instrument (the Law of Ukraine “On Physical Culture and Sports”).

2.3. Sports-legal relation principles analysis

Rapid development of professional sports has also led to active migration of the legal norms of neighboring areas of law into sports relations. Most sports relationships are usually built on civil relations and this is supported by the Art. 12 of the Civil Code of Ukraine, in accordance with which individuals exercise their civil rights at their own discretion. It's worth mentioning that the following provisions characterizing sports legal code may be distinguished: a) the ability of the individual to determine the type and nature of behavior, his/her place in society in the system of sports relations at his/her own discretion; b) recognition of the fact that sports law subject has the right to make contracts or refraining from contracting, determine the content of such contracts at his/her own discretion in accordance with the agreement reached with contracting party; c) the requirement of fairness, reasonableness and fairness, which is expressed in establishing equal conditions for the participation of all persons in sports relations, establishing the possibility of adequate protection in case violated civil law or interest.

Sports law creates legal framework for self-regulation in the private law area, defines the principles of internal regulation of the parties to civil relations through an agreement, that is, the participants in relations can independently determine the rules of conduct for themselves. One of the most important regulations in civil relations, including sports ones, is freedom of agreement principle. The parties at their discretion, within the limits of the law, decide the issue agreement making and its content being guided by fairness, bona fides and right mindedness principles.

Article 627 of the Civil Code of Ukraine defines the freedom of agreement (sports contract) as the right of the parties to freely enter into agreement, choose contractors and decide the terms of the contracts, taking into account the requirements of the Civil Code of Ukraine, other acts of civil law, customs of business practice, requirements of reasonableness and justice. Article 628 of the Civil Code of Ukraine defines the content of agreement as provisions (paragraphs), established at the discretion of the parties and agreed upon by them, provisions that are mandatory in accordance with acts of civil law. The analysis of these articles shows as follows: a) inadmissibility of compulsory entry into sports contract relations, that is, participants in sporting

relations have the right to decide on their own discretion whether to enter into contractual relations or not; b) possibility of free choice of future counterparty; c) opportunity for the parties to freely determine the nature (kind, type) of contract they are making, that is, the parties at their own choice have the right to make contracts as foreseen by civil law and contracts not provided for by civil law however do not contradicting general principles of such law (so-called “nameless” contracts); d) possibility for the parties to the contract to determine its content without limitations.

At the same time, sports-legal relations disposition principle has certain requirements (restrictions) – the requirements of good faith, reasonableness and justice embodied in the Civil Code of Ukraine. Good faith and reasonableness principles objectivation is of utmost importance for the entire system of sports law functioning. First, they accumulate the general principles of sports law. Second, application of all the principles of sports law should not lead to unfair and unjust results [6]. In particular, Art. 627 of the Civil Code of Ukraine indicates the restriction of the principle of freedom of wisdom with requirements of reasonableness and good faith. Third, these particular principles are the basic essence of the law and indicate its natural origin and essence.

By settling the principle of free exercising of rights by sports relations participants, sports legislation simultaneously defines certain requirements which should be observed by the person at their rights exercising. The content of these requirements varies and depends on the nature and purpose of specific subjective rights, such as Art. 319 of the Civil Code of Ukraine, which states that the owner (for example, the owner of a sports club) owns, uses, disposes his/ she/ its property at his/ her/ its own discretion. While exercising his/ her/ its rights the owner shall adhere to the moral basis of society.

When exercising a variety of civil rights, sport relationships participants must act reasonably and in good faith, obeying moral and other norms of behavior accepted in society, however it does not mean that civil and sports law confer moral norms same status with legal ones, since violations of moral norms does not cause negative legal consequence to sports’ legal relations participants, and any other interpretation of the requirements of the law would ignore the difference between the norms of law and moral. The content of this requirement comes down to the purpose of participants in sports relationships focusing on the necessity to observe general accepted moral norms in their activities.

Category of “reasonableness” is widely used in the new Civil Code, reasonable conduct of business (Art. 122), reasonable foreseeing change of circumstances (Art. 652) along with the other legal regulations, which in fact refers to reasonableness motives clarification (Art. 634).

Reasonable acts are deemed the acts that would have been done by sports relations participant provided that such participants have regular level of intelligence and life experience.

Makings any acts, sportsman primarily seeks to pursue his/ her own interests. However, legal regulations that require good faith actually encourage subjects to law to refrain from acts that could cause adverse consequences for other individuals. That is, subject to sports law must act in such a way as to take into account and satisfy his/ her own interests, however at the same time minimizing negative consequences for others. The boundary of reasonableness is an act that takes into account the interests of both parties. In particular, Art. 373 of the Civil Code of Ukraine provides that land plot owner has the right to use it at his/ her/ its own discretion, according to its intended purpose. That is, the owner of the stadium may use at his/ her/ its own discretion everything that is above and below the surface of this site, unless otherwise provided by law and unless this does not violate the rights of the other persons.

It is worth mentioning that sports law is considered from “conceptual approach” standpoint, which is defined as an aggregate of ideas, concepts, knowledge, associations and emotions arising in connection with the use of “sports law” term, accompanying and characterizing it. However, not paying attention to the issue of sports law place establishing in the system of the national law, it should be noted that such relations are firstly and primarily regular relations directly regulated by economic, labor, criminal, tax and civil law. Thus we’ll speak now about the subsidiary (additional) application of statutory civil regulations to sports relations, which are subject to other law norms.

Given the role of civil law as the “mother sector” and allied relationships to which it applies, subsidiary application of civil law to sport relationships is quite possible. The Art. 9 of the Civil Code of Ukraine determines admissibility of the Civil Law of Ukraine subsidiary provisions application to allied relations, provided that they are not regulated by other legislative instruments.

2.4. Civil law code subsidiary application features

Subsidiary application of civil law norms to sports relations means legal mechanism allowing to remove from legal code inappropriate duplication of identical and similar norms and concepts in allied relations, institutes. This way of gaps overcoming refers to additional procedures, as it does not provide complete overlapping of gaps.

Nowadays subsidiary application of civil law rules takes an important place in consciously preventing legislator from duplicating the existing norms in civil law, which are applicable to allied relations in the field of sports. In other words, given the existence of civil norms expressed in civil law, the necessity is eliminated for repeated regulation of these relations along with relevant rules fixing in sports legal code.

The law delimitates subsidiary application of the norms of civil law differs from analogy of the law (inter-sectoral analogy).

First, subsidiary application of the norms of civil law in some cases may not be of temporary, as a kind of analogy of the law (inter-branch analogy), but of stable nature, directly established by the legislator, in order to achieve unity in the legal regulation of social relations, as is occurs under sport relations regulation.

Second, subsidiary application of the rules of law is carried out directly as a result of the will of the legislator, who introduces into the relevant legal norm special references to other norms governing such relations.

Third, the basis for regulatory action of the analogy of law exercising in the civil law of Ukraine is the Art. 8 of the Civil Code of Ukraine, and the basis for subsidiary application of the norms of civil law is Art. 9 of the Civil Code of Ukraine.

Fourth, only the judicial authorities while disputes settling in the field of sports are the subjects of law analogy (inter-sectoral analogy), the subsidiary application of the rules of law can be done by all participants in sports relations.

Subsidiary application of the rules of law ought to be interpreted wider than merely as an inter-sectoral analogy, since it can be used both in the presence of gaps in the law, and in the absence of them (as means to save regulatory material).

However, regardless of whether subsidiary application of the civil law norms is considered to be a kind of analogy or certain legal mechanism that allows to unloading of regulatory material, it is provisioned by certain conditions. Therefore, in order to ensure the principles of the rule of law and legality in the regulation of any relations, the necessary arises to identify the legal conditions under the presence of which legal norms application through subsidiary application of the rules of law to sports relations will be recognized as necessary, feasible and appropriate.

According to good point made by Yu. Kh. Kalmykov, “power law enforcement bodies do not use “subsidiary application of law” concept, they either directly refer to the necessity to use one or another norm from the allied domain of law, or formulate the possibility to refer to the latter in expressions, like “in accordance with the Art. ... “[7].

In particular, the provisions for subsidiary application of the civil law norms to sport relationships are as follows:

1. Lack of proper regulation of the sports relations. Unavailability of norm in the allied legislation that regulates sports relations, which can not be eliminated by analogy to the act, analogy to law, judicial practice or business conduct traditions application;

2. Availability of norm that regulates exactly these sports relations in civil law. It means certain genetic connection of allied branches of legislation

Allied branches are the branches of law with similar subject and methods of regulation. Branches allied to civil law are: family, business, labor, international, private, procedural civil and economic, administrative, land, natural resources, financial law, etc. [8].

3. Uniformity of subject and method of legal regulation in allied branches of law regulating sports relations, is similar to those in respect of which subsidiary application of the civil law norms take place.

For example, civil and labor law has always been historically interconnected, because labor law has been detached from the civil system in the process of historical evolution and due to complication of legal relationships. New branches of law, institutions, and relations formation observed by us nowadays in sports law also has been taken and takes place based on the civil law. Labor law and social protection law also uses legal structures and theories developed by civil law.

4. There is not any direct prohibition for the subsidiary application of the law norms. It is necessary to take into account that subsidiary application of the civil law norms to sports relations is not prohibited by law.

5. Taking decision on the basis and within the legal norms of allied branches of law in sport activities, in accordance with their objectives and general sense principles. It is important to emphasize that when choosing subsidiary applied norm of law, the principles inherent to the branch of law to which these norms actually belong should be primarily taken into account. Thus, the subsidiary application of the norms of law takes place only between relations in sports field, that is, identical in their nature and genetically interrelated

In some cases, one of the conditions for the subsidiary application of the civil law norms is the availability subject empowered for such application. Subjects who may use subsidiary application of the civil law norms to these relations are all participants in sports relationships.

In particular, the rule of the Part 4 of Art. 209 of the Civil Code of Ukraine stipulates that at the request of individual or legal entity, any transaction under participation of such individual/ entity may be certified by a notary public. The question arises as to how notary should act in the event of the necessity to certify sports contract that is not provided for by legislative instruments or in the absence of substantive law norms required to regulate social relations being the subject of notarial acts. Since notary carrying out notarial acts may not refuse to perform notary acts without substantiation, he/ she can subsidiary apply civil law norms for sports contract certification. However, Art. 49 of the Law of Ukraine “On Notary” containing grounds for refusal to perform notarial acts, does not provide for notary’s obligation to refuse to perform notarial acts in the event of lack or incompleteness of the law, noting only that the acts performance can not be contrary to the laws of Ukraine.

CONCLUSIONS

The result of subsidiary application of civil law norms to sports relations by the named sports law subjects is the adoption of enabling legislation – order or judgment of court, decree and other legal and regulatory acts of state and private legal entities

and individuals, sports contract. In any case, compliance with the conditions of subsidiary application of the rules of the law by participants in sports relations is rather important, eliminating the risk of abuse of this legal mechanism. It is not allowed to adapt the same norm to the allied relations in sports field via slightly different interpretation, since the essence of subsidiary application of the civil law norms is not in norm content interpretation, but in its effects transfer to sports in their context and nature relations.

In order to provide meeting the requirements of specific truth while subsidiary applying civil law norms to sporting relations, such subsidiary application shall be based on the principles – such initial ideas of its being which express the most important consistent patterns and basis of the state and law of this type, which are one-way with the essence of law and make up its main attributes, are featured with versatility, higher mandatory nature and general meaningfulness, correspond to the objective necessity to build and strengthen certain social system

Taking into account general legal principles and general basis of the civil law (Article 3 of the Civil Code of Ukraine), and also bearing in mind that the subsidiary application of the norms of the law can be carried out by all participants in sports relations, the following principles can be apportioned:

- 1) arbitrary interference in private life sphere inadmissibility principle;
- 2) freedom of contract principle;
- 3) rights and interests judicial protection principle;
- 4) supremacy of law, legality, equality, substantiation principles;
- 5) justice, honesty, reasonableness and efficiency principle.

Currently, sports law norms are taken into account not only in numerous regulations of the branch, but also in other branches' law, and the number of relevant normss is steadily increasing. This complicates legal consciousness and law enforcement in sports law area, confirming the necessity for sports law fast reformation and improvement.

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Bohdan V. Fasi

Candidate of Juridical Sciences, Associate Professor
Department of Civil Law
National University “Odessa Academy of Law”
65009, 23 Fontanskaya Road, Odessa, Ukraine

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