

СУЧАСНИЙ СПОРТ, ЯК СФЕРА ПРИВАТНОПРАВОВОГО РЕГУЛЮВАННЯ

Анотація. *Робота присвячена дослідженню приватних суспільних відносин, що складаються в сучасному спорті, та особливостей їхнього правового регулювання. Автором доведено, що головним рушієм розвитку спорту, як унікального соціального явища, на сучасному етапі є комерціалізація. Встановлено, що сучасний спорт набуває ознак окремої індустрії, сектору світової ринкової економіки, відповідно, її серед засобів правової регламентації зазначених відносин мають переважати приватноправові. У свою чергу, спортивне право являє собою інтегровану частину цивільного (приватного) права. Встановлено, що глобалізація, професіоналізація і тотальна комерціалізація сфери спорту призводять до зміни якості як самих суспільних відносин, так і засобів їхньої правової регламентації. Спортивне право доцільно розглядати як систему приватноправових норм, спрямованих на регулювання, насамперед, майнових відносини, що складаються у зв'язку із здійсненням спортивної діяльності.*

Ключові слова: спорт, спортивне право, Lex Sportiva, приватне право, приватноправові засоби правової регламентації, локальні норми права, акти саморегулювання.

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MODERN SPORT AS A SPHERE OF PRIVATE LAW REGULATION

Abstract. *The article is devoted to the study of private social relations, which are formed in modern sports, and the peculiarities of their legal regulation. The author of the article argues that the main driver of the development of sport, as a unique social phenomenon, at the present stage is commercialization. Modern sport becomes a sign of a separate industry, the sector of the world market economy, respectively, and among the means of legal regulation of these relations should prevail in private law. In turn, sport law is an integrated part of civil (private) law. It was established that globalization, professionalization and total commercialization of the sphere of sport lead to a change in the quality of both the social relations themselves and the means of their legal regulation. Sport law should be considered as a system of private law, aimed at regulation, first of all, property relations, which are formed in connection with the implementation of sports activities.*

Keywords: Sport, sports law, Lex Sportiva, private law, private law remedies, local law, self-regulation acts.

INTRODUCTION

Physical culture and sports have always played and continue to play an essential role in human civilization genesis and development process. The first sets of physical exercises and simple games have occurred a good while ago in the primitive society. The primitive tribes on various continents practice in running, jumping, lifting heavy items, hurling spears and boomerangs, archery, games with primitive balls, etc. Thus, the skills of labor activity have been transferred, preparation for military conflicts was carried out, administering has been done, etc.

Over the time, apart from the ritual, sports began to perform upbringing, educational and other functions, along with entertainment function. Contemporary sports is no longer just a unique socio-cultural phenomenon, it has acquired the marks of a powerful sector of the global economy. According to various estimates, total capitalization of sports at the moment is from 500 billion to 1.3 trillion. USD [1]. For reference, global agriculture capitalization, including forestry and fisheries, in 2017, according to World Bank estimates, amounted to 3.342 trillion. USD [2].

Apparently, sports today on equal footing compete with traditional sectors of the global economy. Capitalization of sport will only increase in the future, as the main trend in sports development throughout the world is its further professionalization and commercialization.

In particular, nowadays in the world of sport happen events which could be hardly imagined even few years ago. Thus, La Liga Spanish professional football league in 2018 signed 15-years contract with Relevant Sports international media company, according to which certain number of matches of the regular Spanish football championship will be held in North America each year. Participants in these matches should be, in particular, Real and Barcelona football clubs, as, according to representations of the parties to the contract, form a positive reputation of the Spanish championship [3]. Surely, Spanish championship matches holding in the countries featured with significant interest in Spanish football, in other words, a direct access vast foreign “sports market” will substantially increase the revenue of the Spanish Football League and sports clubs. At the same time, prior to starting Spanish clubs’ games overseas, the gross income of Barcelona’s football club for the previous fiscal year (2017/18 season) amounted to an unprecedented \$ 1.05 billion USD [4]. An essential portion of this amount is revenue from TV broadcasts. It should be noted TV broadcasts also produces profit during the other leading European football championships. In particular, the revenue of the English Premier League football clubs from TV broadcasts for the 2016-2017 season amounted to a record-breaking sum of 4.5 billion pounds. Here-with, the total cost of the sports media rights globally by the end of 2016 amounted to \$ 43 billion USD. In 2019, the total cost of these rights may reach 50 billion USD [5]. The next example of sports’ commercialization and its transformation into a powerful segment of the global market is the continuous improvement of sports rules in order to increase visual appeal of sports events and to attract bigger audience. One of the

first of such examples has been 24-second rule introduction in basketball. In 1954 NBA team, Syracuse Nets owner Danny Biason proposed to limit the time of ball possession by single team with 24 seconds. As sophisticated calculations have shown, it is the time a team needs to organize a full-fledged attack. Introduction of the named restriction to the rules of basketball has been reasoned by the fact that by that time the team that has been ahead had the opportunity to expend time and “dry” the game, which adversely affected audience appeal of basketball.

Tennis rules modification has also contributed to the increase of audience appeal of this game and tennis transformation into one of the most profitable kinds of sports. In particular, until the 1970s, it was necessary to get ahead of competitor with at least 2 games to win the set. Due to that, competitions turned into multi-hours back-breaking trials. In order to avoid such unjustified delays of the game tie-breaks have been introduced. In case of an equal score by games in such a case, the player won who first scored 7 points in the next game.

In 1990s, volleyball also focused on visual appeal enhancing. In particular, the following modifications have been introduced to the rules of the game: the ball became multicolored, so that fans in the stands and viewers felt more comfortable watching the game; it was allowed to touch the ball with any part of the body and conduct an active game with legs; the team included a libero player who performed defensive functions only; “rally-point” scoring system has been introduced, that is, the scoring after each snap, and not only on own deliveries, as it has been before [6].

Nowadays, modifications introduction to the rules of the game are often associated with modern technology application. In particular, since 2018, FIFA introduced to football play rules the rule concerning possibility to use the VAR system (“video assistant referee” – technology in football, which allows the lead referee to make decisions in controversial moments of the match using video refs) [7]. In turn, the English football Premier League allowed using gadgets during the game to monitor the physical qualities of the players. And in cricket automatic simulators has been officially introduced to simulate ball serve, which until recently could only be done by player (bowler) [8].

1. MATERIALS AND METHODS

Theoretical basis for the study are the papers of such well-known theorists of private law as S. S. Aleksieieva, S. M. Bratus', A. S. Dovgert, O. S. Ioffe, N. S. Kuznetsova, V. V. Luts', R. A. Maidanyk. Ie. O. Sukhanov, S. O. Kharytonov, O. I. Kharytonova, R. B. Shyshka, etc. In addition, author's concept formation concerning private law regulation of relationships in sports has been influenced by the works of such well-known foreign researchers of sports law, as Ian Blackshow, Boris Koliev, Gaiden Opi, Lorenzo Casini, Michel Bieloff, Marie Demetriou, Robert Zikman, Steven Vezeril, Tim Kerr, Gabriel Feldman, Garry Roberts, Paul Veiler, Simon Gardiner, Michael Coccilio, Charles Woodhouse, etc.

Special attention deserve the latest researches in the sports law field, published in the leading European edition of the International Sports Law Journal by Leonardo de Oliveira [9], Carolina Tetlac [10], Bronislaw Hawka, Suren Gomtsiana [11], Tom Serbi [12], Daniel Heerdt [13], and others.

Methods of research used in the process of research paper preparing are as follows: historical-legal – to study sports law genesis as a part of the private law; comparative law – to perform comparative analysis of domestic and foreign legal acts provisions – in order to determine specific features of legal regulation of relations arising in professional sports; method of analysis – to identify law enforcement issues in sports field; formal-logical – to identify the shortcomings of the current law in the field subject to study and to develop proposals for its improvement; formally-legal – to establish the legal status of participants in sports field and its content; simulation – while formulating the prospects of legal regulation of relations in sports field.

2. RESULTS AND DISCUSSION

Thus, undeniable is the fact that modern sports is developing in accordance with a market economy principles. One of such principles is “demand and supply” principle, according to which the aggregate supply of a product at competitive market at any period of time tends to be equal to aggregate demand. Perfect example of this principle in football is the creation in 2018 of a new football tournament for the national teams of Europe – the League of Nations. Establishment of such competition has been made exclusively due to profound interest of huge audience towards football competitions and UEFA’s desire to earn extra money on this. Despite the large number of different football events, the demand for football competitions is continuously rising both in Europe and globally. In case with the League of Nations, non-profitable friendly games of the national teams have been substituted with official matches, transforming these competitions into a full-fledged sports product.

Another example of market economy principles operation in sports is the official recognition of new potentially profitable kinds of sports and further organization of full-fledged commercial tournaments in these sports. In particular, in August 2018, by the order of the Ministry of Youth and Sports, sports poker was recognized as a sport [14]. Together official status provision, said sport has received additional opportunities for development, in particular, the opportunity to access on TV and TV audience capture.

The next in line to get the official status of sport in Ukraine is cyber sport (computer sport). What has been previously came off exclusively as home PC entertainment for children today is the official sport in many countries all over the world. Moreover, cyber sport seriously aspires to be included into Olympic Games program. According to Forbes, cyber sport market volume in 2017 amounted to \$ 1 billion USD [15]. Already in 2019, cyber sport tournaments audience will be about 400 million persons. [16] The main sources of revenue in eSports, in traditional sports, are prize money in competitions, sports merchandise sale, sponsorship, advertising, betting on competition outcome, etc.

Thus, sports market is growing at a fast pace thanking in particular to new sports. Regarding traditional sport, its various types are unevenly represented on the general sports market.

Depending on the capitalization of the sport and due to its popularity, the positions are as follows: football – 43% of all gains in sports; American football – 13%; baseball – 12%; Formula 1 – 7%; basketball – 6%; hockey – 4%; tennis – 4% and golf – 3% [17]. Capitalization of the leading sports clubs amounts to billions USD. For example, the value of National Football League's Dallas Cowboys team exceeds 4.8 billion USD [18].

Thus, sports has already turned into a powerful industry. Surely, globalization, professionalization and total commercialization of sports sphere lead to change in the quality of both social relations and their legal regulation means. In particular, the share of private relations in sports is increasing rapidly. Accordingly, sports relations, previously governed by the public law rules, nowadays require private legal regulation.

Private relations in the field of sports are mainly property relationships, based on legal equality, free willingness, property independence of their participants, occurring in connection with sports activities implementation, and regulated by the private law rules.

Since relations in sports sphere acquired features of property relationships, then logical consequence of said process has become actual recognition of sport as a kind of business activity. In particular, European Court of Justice in *meca medina* case has acknowledged the following conclusion: “sports organizations must comply with the rules laid down in the Treaty Establishing the European Community dated 25.03.1957 (the Treaty of Rome). Among other things, the EU Court stressed that sports activities fall under Articles 101 and 102 of the Treaty of Rome, which prohibit trade discrimination and the use of monopoly position at the market of commodities and services, and guarantee the adherence to free competition principles by all participants of the marketplace [19]. Consequently, in the EU, sports is officially recognized as a kind of economic activity.

The US experience is rather challenging. Since the century before last, sports in this country has been formed as a kind of business. Key powers in sports relations regulation are concentrated in the hands of individuals. In the United States, the basic principles governing regulation of relationships between the relevant parties of sports activities are established by the sports leagues, which solve the issues using private law mechanisms. Thus, the United States and the EU countries consider sports as part of a market economy and the sphere subject to private law regulation.

National legislator is currently do not acknowledge sports a kind of business activity, although it calls professional sports a commercial activity in sports sphere (Article 38 of the Law). However, sports commercialization process refers not only to professional sports, but also various other areas of sports activities. In particular,

under conditions of insufficient funding of sports industry by the state, sports organizations of state and municipal ownership quite often raise money in the form of sponsorship. In addition, even calling professional sports a commercial activity, legislator does not think it necessary to introduce more detailed legal regulation of professional sports, confining with noting professional sports in the aforementioned Article of the Law of Ukraine “On Physical Culture and Sports”.

At the same time, rapid development of the commercial segment of sports is observed all over the world. It is entirely justified to contend that modern sport is predominantly commercial sport. Thus, the developed western countries are featured with prevailing approach that sports is private law regulation sphere. At the same time, in the post-Soviet countries different point of view prevails, according to which sports pasteurizes integrated statutory regulation sphere. It seems that such a concept is false because integrated approach violates the systemic nature of regulatory impact on the relevant relationships, generates competition between the norms of various branches of law, creates the risk of using inappropriate methods and techniques of legal regulation, and ultimately reduces the quality of legal regulation or even denies the opportunity for certain relations’ legal settlement.

It is necessary fall into line with the opinion of E. O. Sukhanov, who claims that the system of law should be characterized with the internal consistency of all subsystems that make the part of it, and rely on socio-economic and organizational and legal factors ... The inconsistency of individual legal systems has been overcoming earlier through new “integrated” or “secondary” legal branches creation along with the former generally accepted ones and so has made the system even more complicated. However, “modification of this system has become one of the imminent consequences of the fundamental reform of economic and social systems. Private law fundamentals restoration and transition to conceptual division of the entire legal sphere into private law and public law ones led to substitution of subordinate branches “pyramid” with their new system, based on the equality of private law and public law approaches. In this system, two interacting however not subordinate spheres of private and public law absorb fair good number of separate legal branches and their groups ... It is also clear that the new system of law is more in line with the task of the state governed by the rule of law and civil society formation, which should no longer be under continuous and comprehensive state influence. The unity and consistency of this system are provided not by hierarchical subordination of its components, but by the unity of the general legal principles underlying it, as well as by criteria for legal branches allocation (separation), which determines the functional features of each of these subsystems. The socio-economic basis of such a status is formed by acknowledgment of the key role of the inalienable rights and liberties of individual ..., as well as the market principle of the economy “[20, p. 27].

Thus, it is clear that in the system of law there is no place for “integrated” branches of law and other “integrated” components of the system of law. Recognition of the separate branch of law status by each or most of the branches of legisla-

tion, leads to loss of the internal unity of certain components of the sphere of law and the systematic effect on social relations. Concerning the aggregates of legal norms, grouped by the subject of legal regulation, using the so-called private-public method of legal regulation, they can exist at legislation system level, however at the system of law level relevant norms shall be distributed by their “fundamental” branches of law.

Thus, the acknowledgment of the system of law division into private and public, taking off the table obsolete hierarchical construction of the system of law based on the principle of legal regulation’ subject primacy and recognition of the key role of legal regulation method in separation of the branches of law, provides systemic nature and unity of individual elements of the system of law impact on the relevant social relations. The result of such systemic impact on social relations is surely legal regulation quality improvement, which is really the main criterion of expediency in choosing one or another model of system of law construction. At the same time, the very system of law breaks free from unnecessary complications and over burden, becomes clear and logical, and the concept of the “integral” branches and other components of the system of law naturally loses its significance.

Consequently, sports law should be considered as a special sphere of private law regulation, which includes in its subject, first of all, the property relations which are formed in connection with sports activities carrying out.

By reference to the the modern approaches of domestic civil law science to civil law and private law systematization in general, for the time being sports law definition as sub-branch of the civil law is fully acquitted. The classical law of pandects since the time of G. Vindscheid names only 4 subs branches of the civil law, which includes property, contractual, family and inheritance rights. However, the current state of civil relations development proves the need to detach new sub-branches of the civil law. This process is related to the fact that the general civil law rules are not able to provide fully high quality arrangement for the new types of public relations, which are civil law in their nature, however require more detailed legal regulation or regulation different from customary one. One of sub-branches of civil laws, namely corporative law has passed the very same way in its development. At certain stage of relationships development under participation of corporations the necessity has arisen to introduce special legal regulation of the relevant relations. In fact, corporate and sports law, as sub-branches of the civil law, are similar, in particular and in connection with the important role of corporate practices in sports law relationships regulation. We are talking about the fact that corporate practices regulate wide range of social relations, which are created between legal entities of the private law in the process of their activity. Same way corporate practices of sports organizations regulate wide range of legal relationship. In addition, both corporate practices in general and corporate practices of sports organizations are not rules of law, however they are taken for execution and used to clarify legal norms, which are provisioned in the

other regulatory legal enactments. Corporate practices are focused on local level of relationship regulation and are contained in special acts, adopted by the authorized institutions. Referring sports sphere, as a rule such organizations are federations in various sports. It should be mentioned that apart from corporate practices of local regulations creation an important source of the legal regulation in sports sphere are the judgments of the International Sports Arbitration (CAC), the findings of which are mandatory for all parties to the sports sphere.

In such a way, it is fully justified to name sports law the sub-branch of the civil law. Sports law rules shall be acknowledged as special with regards to the general rules of the civil law. Accordingly, with a view to regulate private relationships in the sphere of sport, general rules of the civil law shall be applied subsidiary.

Surely, it should be taken into account that civil law rules are mostly dispositive, that is, it provides they provide the participants of relevant relationships with a wide range of opportunities to regulate their relationships within the limits set by the relevant rule. However, even such a flexibility of the behavior of the participants in the relationship does not always allow to account for specificity of certain legal relationships. Of course, the current Civil Code of Ukraine, built on law of pandects allows for settlement of any private relations, in particular, in the sports sphere.

However, there is a necessity for legislative settlement of the most important social relations in the relevant sphere, which makes it possible to establish general bases and principles to regulate these relations. At the same time, it should be borne in mind that one of the specific features of the sports law, as a sphere of private law, is the availability of various sources of legal regulation, not least of which are self-regulation acts (contracts and local acts of sports organizations), which in fact attain legislative effect. In particular, the rules for athletes transfer from one sports club to another are fully defined in the corporate acts of the international sports organizations. Accordingly, de facto national legislator is significantly restricted in its opportunities for legal regulation of these and other similar relations in the sphere of sports. Nevertheless, the general principles of the state policy in the sports sphere shall be established at the level of laws. as well as concepts and principles of legal regulation of professional (commercial) and non-commercial (amateur) sports shall be determined at the same level In addition, rules should be established for sport recognition, state supervision and control measures over the state of the rights and freedoms of individuals and legal entities observance in the sphere of sports, etc. at the level of national legislation,

Thus, the availability of our own specifics of private relations in the field of sports and the formation of specific legal constructions that are not suitable for other private relations regulation provides the grounds for sports law recognition as private law sphere. At the same time, in our opinion, there are no grounds to distinguish the so-called public sports law. To our mind, public relations in the field of law may well be regulated by the rules of public law branches, that is, it is not about “public sports law”, but about “public law in sports”.

In view of the above, one of the main directions of the national legislation improvement in the field of sports is meant to be legal regulation of social relations improvement in the sphere of commercial (professional) sports, actual recognition of the private legal essence of the entire blocks of relations in the field of sports and legal basis creation to use the discretionary method for their settlement. In particular, it is advisable to introduce modifications to the Part 2 of Art. 38 of the Law of Ukraine “On Physical Culture and Sports” [21], which stipulates that the activities in the sphere of professional sports must be regulated to the utmost by the civil law rules. Meanwhile, said article mentions only the Labor Code: “Activities of athletes, coaches and other professionals in professional sports covering professional athletes preparation and participation in sports competitions which is the main source of their income, is carried out in accordance with this Law, Labor Code of Ukraine and other legal regulatory enactments, as well as statutory and regulatory documents of the relevant subjects of the sphere of physical culture and sports and international sports organizations. “At the same time, only one small article is dedicated to professional sports in the Law, and the Labor Code of Ukraine does not at all take into account the specificity of public relations in the field of sports.

As concerns professional sports in general, the necessity to adopt separate regulatory act is long overdue, which will clearly define at the national level the basic principles of legal regulation of the relevant relations taking into account the specific features of “sports law” as a unique system of justice going far beyond the national legal system. By the way, as far as in 2007, the Inter-Parliamentary Assembly of the CIS member states has approved a model law on professional sports. Although the laws on professional sports have not been adopted in all post-Soviet states yet, some of them pay much more attention to professional sports than our country.

In particular, in Turkmenistan separate law on professional sports came into force in 2015 [22]. The said law is dedicated regulatory legal enactment, which at the fundamental level regulates legal, economic and social relations in the field of professional sports. In particular, the said law defines the subjects of professional sports, their powers, major rights and obligations in the field of professional sports; determines the signs and types of legal relations in the sphere of professional sports, in particular provides the basis for legal regulation of labor relations in the field of professional sports, professional sports’ subjects rights guarantee, the principles of legal regulation of legal relations with respect to intellectual property in professional sports, rules for professional athletes engagement to the national teams, legal liability principles for harm inflictions in professional sport; establishes sources of professional sports’ funding and logistical support; establishes the principles of international cooperation in professional sports sphere.

In other CIS countries the attention is also paid to the legal regulation of professional sports. Indeed, dedicated law on physical culture and sports in the Russian Federation defines such concepts as “professional sports league”, “professional sports

competitions”, “professional sports club”, “sports agent”, “sports sanction”, “organizer of sports competition”. The said law will contain separate article concerning professional sports leagues, namely covering specific features of their creation, their rights and responsibilities, mechanisms of interaction with professional sports clubs and sports federations. This article of the law states that sports leagues may integrate both Russian and foreign professional sports clubs; they can also act as organizer of international professional sports events, etc. The law also regulates the activities of sports agents. In particular, agents are not allowed to in gambling using betting offices or betting terminals by making pari for official sports competitions in sport of their agency.

Named law also contains a section on disputes settlement in professional sports and high performance sports. It refers to a permanent arbitration institution, which administers arbitration (mediation) of these disputes [23].

As for Ukraine, in fact professional sport is not regulated here in terms of legislation. Currently there is not any promising draft law on professional sports. Moreover, national legislators do not plan to regulate professional sports even at the level of the general law on the physical culture and sports.

At the same time, draft law on amendments introduction to the Law on Physical Culture and Sports is placed at the website of the Ministry of Youth and Sports of Ukraine, which proposes to clarify the concept of sport, the type of competition, institution of physical culture and sports; to introduce notion of sports discipline; to bring the terminology of the law into compliance with the law of Ukraine on civil groups; to provide for the adoption of provisions on sports clubs subject to approval of the Cabinet of Ministers of Ukraine; refine upon the status of physical culture and sports associations and sports federations, etc. Draft law does not contain the rules with respect to professional sports.

CONCLUSIONS

Thus, performed study allows making the following conclusions. Modern sport is an industry developing based on market economy principles. The share of private relations in the field of sports is increasing rapidly. Accordingly, sports relations which previously have been governed by public law rules, today require private legal regulation. Private relations in the sphere of sports are mainly property relations, based on legal equality, free act and deed, bargaining power of their participants, which arise in connection with sports activities, and are regulated by the rules of the private law.

Specificity of private relations in the field of sports and specific legal structures formation which are not suitable for other private relations regulation, give grounds for sports law acknowledgement in the sphere of the private law. Herewith, there are no grounds to distinguish so-called public sports law are absent. Public relations in law area may well be regulated by the rules of the public law branches, that is, it is not about “public sports law”, but about “public law in sports”.

Sports law can be recognized as sub-branch of the civil law. Sports law rules in this case will be considered special with respect to the general rules of the civil law. Accordingly, in order to regulate private relations in the area of sport, the general rules of civil law should be applied in a subsidiary manner.

National legislation in the area of sports is outdated and does not fully meet the needs of modern sport and society as a whole. Accordingly, the improvement of the national legislation, primarily in terms of bringing it in line with up-to-date models of professional sports and sports in general, should become one of the priorities for both the executive authorities and all subjects involved in the sphere of sports. As we see it, there is an urgent need to adopt the law “On Sports” (“On Professional Sports”), which would contain special legal rules, firstly and primarily focused on private relations regulation in the field of sports. Adoption of such a law would boost national commercial (professional) sports development along with the development of Ukrainian economy as a whole.

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