

TRANSFER CONTRACTS IN PROFESSIONAL SPORTS: PROBLEMATIC ISSUES OF LEGAL REGULATION

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Over the past few years there is a discussion about the place of sports law in the legal system as a branch of law and scientific discipline. Without going into deep analysis of this controversy, it should be noted that the sports law right now is a large array of regulations that govern special on the structure, content and essence of public relations. Such relations are formed in connection with the preparation, organization and conduct of the competition, and their subjects are athletes, coaches, sports judges, organizers of sports and training activities, etc. Among the entire array of these relations especially singles out the relationship between athletes and sports organizations, and the most “painful” practical problem is the transition of athletes from one sports club to another, which is mediated by the existence of transfer system.

The legislation of Ukraine does not contain the terms “athlete transition” and “Transfer Agreement” (transfer contract). In the Law of Ukraine “On Physical Culture and Sport” (hereinafter – the Law), a single core piece of legislation in the field of sports, article 23.3 was dedicated to the transitions of athletes from one club to another (sports transfers), but in the new edition of the Law by the 17th of November 2009 this provision was removed and now none of the 54 articles of the Law is dedicated to the question of transfers. Specific provisions on movement of athletes are in local regulations, adopted by the professional leagues and national federations of sports, particularly in the special regulations of the Football Federation of Ukraine On the Status and Transfer of players taken by the Executive Committee FFU in July 19, 2010 [2]. Act enshrined the status of sports federations as public organizations of sports orientation (Article 20), and today, in the situation of absence of proper legal regulation, legal acts of such organizations are the main sources of law for the regulation of relations in the field of sports activities. Practically, this leads to a situation where normal rules of sports federations, often remaining at the level of customary law, regulate a number of important issues, including those related to contractual relations between players and sports

clubs, and thus significantly limiting the rights and interests of more weakness in sporting relations which are most often just athletes.

Thereupon, the purpose of the research is to study the legal nature of transfer relations, the essence of transfer agreement and to offer the solution of problems of legal regulation of relations on transitions of athletes from one sport club to another.

Questions of history, organization of transfer system were the subject of research of scholars such as S.V. Alekseev [1], V.P. Vaskevich, T. Korshunova [7], M. Tkalych [9] and others. Research on the transition of athletes was paid attention to by scientists not only in the field of law, but also practical lawyers, including D.V. Gorlova [6], V. Zaitsev, J.W. Supryaha [8] and others.

Transfer system originated in the late XIX century, when England began to emerge laws on transitions of players. More than centenary history of its existence it has undergone many changes in the direction of liberalization, that does not prevent it, and then based on the principles of substantial restrictions on the right of an athlete to choose and change the club, representing a complex system of hiring professional athletes, which limits their choice of teams they would like to perform, and determine the order of the transition from one team to another. This is because the existence of the transfer system is to organize such a distribution of athletes that would provide strong competition, achieving significant results, maintenance spectacular sporting events and as a result, getting high profits [1, 396]. Listed objectives are quite acceptable for consumers of professional sport, because, by definition of article 38 of Law, “professional sports is a commercial activity in the sport associated with the preparation and conduct of spectacular sporting events at a high organizational level in order to make a profit”.

Features of functioning transfer system are reflected primarily in that: 1) there is a fact of payment from one club to another certain amount of money (usually quite large), and 2) the basis of this payment is a contract between the club, which the

athlete leaves, and the club, part of which he passes, and 3) these relationships are called “contract of sale”, “contracts of exchange (barter)”, “lease (leasing)” and others. It should be noted that the first and third of the above conditions is not a subject of the research. Actually, it is not possible to check the fact of payment, so it presumes. As for the use of names of agreements which defines the transition of athletes, so they are not conscious attempt of legal qualification the acts that take place. Therefore, the greatest scientific interest is the study of the legal basis for the implementation of transfer payments – the contract between sports clubs (transfer contract). We propose to consider the question on the example of regulation of the transition of professional athletes in football, because, firstly, it is the football transfer system is the most common and the most advanced and demonstrates all its essential features, and secondly, organizations of this kind of sports accepted the largest number of regulations dealing on governing of transfer relationships on both international and national levels.

Regulation of the FFU On the Status and Transfer of players [2] defines the transfer contract as a form of agreement between the clubs about transfers, ie transition of player from one club to another. Thus, as mentioned, the rules do not offer extended definition of the transfer agreement, but regulates in detail the procedure requirements for the transition process of professional athletes from one club to another, which are as follows.

1. Preconditions of the right to transfer football player. First of all, footballer must be registered with the association. Registration gives him the right to perform at the club as a professional or an amateur, and, accordingly, the right to move to another club. For a professional footballer registration shall consist of the signing to associations the term of the contract with a club player for a specified period and issuing “the passport of football player.” That is the first condition for player to have a right for transfer is to conclude a contract with the relevant club (sports contract, contract for athletic activity), the second one is the presence of registration with the association, and in cases of international transfers is also the International Transfer Certificate, which is issued free of charge without any conditions or time limits.

2. Requirements for the right to transfer. Footballer has the right to transfer to another club in the following cases: (1) the expiration of the contract; (2) formalize an agreement between the club and the player on the early termination of the contract; (3) early termination of the contract in violation by the club labor legislation of Ukraine, as well as

failure of contractual obligations by the club or the player. If the term of the contract with the player is not over, transfer is possible in case of the consent of all interested parties (footballer, former club and new club). Regulation does not require the conclusion of transfer contract in all these cases, but only when the validity of player’s contract with the club is not over and he wants to move to another club, and when the transition of player is “on loan”.

3. Compensation payments for the transfer of player. Transfer contract must contain a clause of compensation and assistance for the training of athletes. Such compensation should be paid to the club (clubs) who train or prepare a player to take part in competitions each footballer’s professional transfer between clubs (during or after the expiration of his contract) to the end of the season, in which he reaches 23 years. In the follow transfers of athletes the right to compensation belongs only to his former club, and it is charged and paid for the actual period of training a professional footballer at this club.

4. Liability for violation of conditions of transfer. Transfer, conducted in compliance with regulatory standards and contract with a new club entitles footballer participate in competitions for the new club. If any conversion to athletes as well as sports clubs who have signed contracts with them, relevant professional league or federation may apply sanctions, such as disqualification of the athlete and the prohibition for the club to allow the athlete to participate in competitions.

Analyzing these rules and regulations, it is clear that the current regulatory model of transfer system significantly limits the right of an athlete to transfer to another sports club. Taking into account the need for restrictions on transitions of athletes from one club to another in order to achieve the goals and objectives of professional sports, the commercial nature of professional sport activities aimed at obtaining high income and the high level of competition, we must recognize the existing system of transfer of athletes imperfect and contradictory . And in this regard recognition the relationships that develop between an athlete and sports organizations as labor relations, and the contract between the athlete and the club as an employment contract creates the greatest difficulties [7, 59-60]. Article 38 of the Law stipulates that the athlete gets the status of professional athlete after signing the contract with the relevant actors of physical culture and sports about his participation in the competitions among professional athletes, but at the same time the Law doesn’t consist any definition of this contract or conditions or requirements to its conclusion. Regulation of the FFU defines a contract as a form of labor agreement between professional

Turning to the analysis of transfer contracts concluded in practice, should note that they are quite exceptional in their content. For example, the contents of transfer agreement according to the Standard Form of transfer contract of the transition of player on “lease” [5] are the following conditions:

1. The duty of the football club, which has initially concluded a valid employment contract with the player (former club), in agreement with the player suspend specified employment contract and move footballer for temporary employment for a specified period to the football club that accepts player (new

Regulation of the Russian Football Union On Status and Transitions (transfer) of football players determines transfer contract as a bilateral agreement concluded between professional football clubs and defines the procedure, terms and conditions of transition (transfer) of a professional footballer [3].

We believe this definition does not disclose the nature of relations that actually occur between sports clubs on transfer player, and for this reason, taking into account listed above, we suggest the following definition: transfer contract is a bilateral agreement under which one party (the former football club) provides the transition of an athlete to the new football club, and the other party (the new football club) pays for that amount of money (compensation payments) specified in the contract. The conclusion of such agreements is possible on the basis of the principle of freedom of contract, enshrined in Article 6 of the Civil Code of Ukraine, according to which the parties may conclude a contract which is not provided by the acts of civil law to regulate their relationship, which are not regulated in the legal acts, in such contract, and retreat from provisions of the Act and regulate their relations in their sole discretion. In accordance with Article 627 of the Civil Code the parties are free to contract, contractor selection and determining the content of the contract, and Article 628 of the Civil Code also provides the possibility of concluding

mixed contracts consisting of elements of various contracts. In this case it should be applied to the parties the provisions of civil law on contracts which elements are in mixed agreement. In connection with this transfer contract should be attributed to unnamed contracts because it regulates the relations that are not regulated by any known to civil law types of contracts. It is necessary to apply rules of the similar type of contract, and in its absence to apply the general rules that govern civil contracts, namely the articles posted in Chapter II of the fifth book of the Civil Code of Ukraine. Article 8 of the Civil Code of Ukraine stipulates: "If civil relations are not regulated by this Code and other acts of civil law or contract, they are governed by the legal provisions of the Code and other acts of civil law that governs related civil relations (analogy of law)."

In addition, it should be noted that the main feature of transfer agreements is that they regulate civil relations between clubs over transfer of athletes, and at the same time it has an impact on relationship that develop between the player and the respective clubs, and according to the rules of football organizations these relationships are governed by

the conclusion of fixed-term contracts. This situation is dangerous for sporting clubs as well as for athletes because, as we noted above, the existing system of concluding employment contracts and transfer contracts is contrary to the current legislation. Thus deprive the parties a defense in case of violation of their rights and legal interests, since according to Article 203 of the Civil Code such contracts may be invalidated [8, p. 163].

Thereby, we consider it necessary to recognize the relationship between professional athletes and sports clubs as civil relations about participating in competitions and organizing sports activities, and about the transition of athletes from one sports club to another. It should also be noted that the proposed recommendations made by the example of transfer contract in football, can also be applied to the transfer of contracts in other sports. For this reason, in order to have single understanding of transfer relationships and the prevention of offences in this area it is necessary to limit the scope of transfer contracts and settle their essential terms in the legislation, particularly in the special Law "On professional sports."

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АНОТАЦІЯ

Суша Ю.С. Трансферні контракти в професійному спорті: проблемні питання правового регулювання. – Стаття.

Стаття присвячена розгляду питань організації трансферної системи в професійному спорті. Автором досліджено джерела регулювання трансферних відносин в Україні, зокрема, положення законодавчих та локальних нормативних актів, виявлено їх прогалини і недоліки в правовому регулюванні відносин з переходу спортсменів та запропоновано шляхи їх подолання. Основну увагу приділено розгляду сутності та умов договору про перехід спортсмена з одного спортивного клубу до іншого, виявлена недосконалість існуючої практики укладення таких договорів та запропоновані власні бачення вирішення зазначеної проблеми.

Ключові слова: трансферний контракт, трансферна система, спортивне право, професійний спорт, цивільно-правовий договір.

АННОТАЦИЯ

Сухая Ю. С. Трансферные контракты в профессиональном спорте: проблемные вопросы правового регулирования. – Статья.

Статья посвящена рассмотрению вопросов организации трансферной системы в профессиональном спорте. Автором исследованы источники регулирования трансферных отношений в Украине, в частности, положения законодательных и локальных нормативных актов, выявлены их пробелы в правовом регулировании отношений по переходам спортсменов и предложены пути их разрешения.

Основное внимание уделено исследованию сущности и условий договора о переходе спортсмена с одного спортивного клуба в другой (трансферного контракта), выявлено несовершенство существующей практики заключения таких договоров и предложено авторское видение разрешения указанной проблемы.

Ключевые слова: трансферный контракт, трансферная система, спортивное право, профессиональный спорт, гражданско-правовой договор.

SUMMARY

Sukha Yu. S. Transfer contracts in professional sports: problematic issues of legal regulation. – Article.

The article deals with the issues of organization of the transfer system in professional sports. The author has investigated the sources of regulation of transfer relations in Ukraine, in particular, the provisions of laws and local regulations, and identified gaps in legal regulation of relations in the transitions of athletes and suggested ways to solve them.

The main attention was paid to the nature and conditions of the contract for the movements of athletes from one sports club to another (transfer contract), revealed the imperfection of the existing practice of concluding such agreements and asked permission of the author's vision of the problem.

Keywords: a transfer contract, transfer system, sports law, professional sports, a civil contract.