

Peculiarities of the regulation of personal non-property rights when concluding sports contracts

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ABSTRACT

This article examines the regulation of the personal non-property rights of athletes in the context of modern contractual structures used in their professional activities. The author justifies that contracts used in professional sports have their own characteristics. The article analyzes European and Ukrainian legislation and individual contracts with the participation of athletes, which makes it possible to draw a conclusion about the presence and use of atypical contractual structures in this field. In general, the article emphasizes the need to use contractual structures to regulate not only the professional activities of athletes but also the regulation of personal non-property rights, which is more than topical in modern conditions.

KEYWORDS

Sports Law; Legal transaction; Civil law; Personal non-property rights.

1. INTRODUCTION

Recently, sport has covered the deep aspects of human life, which requires comprehensive consideration not only of its physical orientation, but also of legal regulation. The phenomenon of modern sport is ambiguous, there are many contradictions: high status of the athlete and, at the same time, life according to the rules, exhausting training and rehearsals, restrictions and rejection of many challenges of daily life and great sacrifices for fame, success, results and victories.

The development of professional sports and the directly related commodity and monetary relations necessitated the need to regulate relations between athletes, sports clubs, as well as other subjects engaged in activities in the field of sports with the help of legal transactions.

Professional athletes (football players, hockey players, basketball players, boxers and others) act on the basis of civil law contracts concluded with sports teams, agents, promoters, etc. Quite often, such contracts include conditions that establish certain rules and restrictions of a personal nature for athletes, such as the requirement to observe the regime of life activities, sleep, rest, the need to attend training sessions, the prohibition of smoking and drinking alcohol, the restriction of being in public places, the prohibition give interviews, etc. Undoubtedly, it can be stated that such clauses of contracts regulate personal non-property relations with the participation of athletes (Bobrik, 2010).

Thus, it can be noted that transactions with personal non-property goods in the field of culture and sports take place in modern professional sports. Taking into account the fact that professional sports are gaining popularity, it is necessary to recognize that the quality of legal regulation of civil-legal relationships in the field of professional sports must be constantly improved.

2. METHODS

The methodology of the chosen problem is a systematic approach, as well as dialectical, formal-logical and structural-functional methods and other general scientific research methods, as well as special legal methods: comparative law and formal law. The methodological basis of the study is theory cognition, its general method of materialist dialectics. The following were used as general scientific research methods: formal-logical and systematic methods.

3. RESULTS AND DISCUSSION

Regulation of legal relations existing in society in relation to transactions with personal non-property rights is a significant challenge for both governmental authorities responsible for lawmaking and all subjects of the legal system in general.

An analysis of the general legislative provisions relating to contracts concluded in sports reveals a wide range of opportunities available to parties involved in such personal non-property relations. The parties to such relations are free to enter into contracts and set the terms and conditions of contracts, which are not restricted by law.

Before entering into a contract, it is important for the parties to analyse the legal provisions relating to the specific type of contract they are considering. This analysis should take place before the specifics of the contract are determined. At the pre-contractual stage, it is particularly important to analyse the provisions of the Civil Code, especially those relating to the terms of the contract.

Legal transactions can be committed in various spheres of social life and allow to coordinate the interests of civil society participants: individuals and legal entities, the state, and other social and public entities. As an act of will, it has inherent properties that characterize the intentions and actions of the subjects of civil relations. This explains the fact that the validity of the transaction depends on the validity of the elements that make it up. The execution of a legal transaction that has a defect in one of the elements of its composition cannot create the legal consequences that the parties expected.

In the theory of civil law, there is a widespread point of view that personal non-property rights are so closely related to their bearer that the latter possesses them for life, and cannot renounce or be deprived of them. The personal nature of personal non-property rights is characterized by the impossibility of concluding any agreements regarding their intangible objects (Romovska, 1968). Thus, all management agreements with them are invalid. On the basis of the mentioned prerequisites, a conclusion is made about the impossibility of participation in the civil turnover of absolutely all personal non-property rights (Slipchenko, 2008).

In connection with the given characteristic, it is considered that the grounds for changing personal non-property legal relations are not provided for by civil law, as this may lead to the waiver of the rights of the subject of personal non-property legal relations in whole or in part or to their deprivation. If we take into account the fact that law-changing legal facts can lead to the transfer of rights from some participants in civil relations to others, a change in the object or content of personal non-property legal relations, thus questioning the close, lifelong, and inseparable connection of rights to the objects of personal non-property legal relations with their subjects, it is necessary to lean towards the opinion that there cannot be legal facts that change rights at all in the mechanism of legal regulation of personal non-property relations. Thus, it is concluded that the dynamics of personal non-property legal relations is associated with only three legal facts - the birth, law, and death of a person (Slipchenko, 2013). A similar approach is reflected in Art. 269 of the Civil Code of Ukraine.

Berveno, referring to the works of Dernburg and Chillarge, writes that many scientists justify the exclusive property nature of obligations as the latter formalize the process of commodity circulation and therefore should belong to the group of property relations (Berveno, 2006).

However, at the present time, in connection with the establishment in Ukraine of a civil-law institution of personal non-property rights and giving these rights an important social significance, in

practice many problematic issues arise regarding the exercise and protection of such rights, which are determined by the limits of regulation of personal non-property relations by current legislation. For instance, today the voice, image, and name of a well-known or even little-known individual are increasingly used in advertising, creating additional attractiveness of a particular product, and such use of them leads to the fact that the voice, image, and name themselves are increasingly beginning to be considered as objects of property relations, as goods. At the same time, as a rule, these changes remain outside of legal regulation and scientific interest. The relations arising from these benefits continue to be characterized and regulated as devoid of economic content, their objects will continue to be considered as inseparable from their carrier and as such, are not subject to monetary assessment. Therefore, scientists and practitioners nowadays question the categorical nature of the theory of contractual regulation exclusively of property rights.

Sports are big business and worth more than 3 percent of world trade. Not only are mega sums generated by the sale of sports broadcasting rights, especially to major sports events, such as the Olympic Games and the FIFA World Cup, but also through the commercialization of the sports image rights of well-known teams and sports persons.

Celebrities have a valuable asset - an object that does not fit into the traditional system of civil turnover. Athletes with outstanding sports results get the maximum benefit from their recognition by participating in advertising campaigns. Incomes from such activity significantly exceed incomes from sports activities.

The right to use a celebrity's name, image, manner, recognition, and reputation is currently classified as image rights. The legal nature of this concept is initially public and consists of the fundamental right of every person to use their own name and image at their own discretion. Gradually, this right acquires an economic component and becomes an object of civil turnover.

For instance, in the USA, the concept of image rights is covered by the construction of "the right of publicity", which protects against unauthorized commercial usage of a name and image. In the case of *Davis vs. Electronic Arts Inc*, in 2015, the court noted that the defendant's usage of images of professional American football players in the Madden NFL video game series is not accidental because this is the main commercial goal of Electronic Arts. This position has been upheld by the US Supreme Court, but the merits of the case are still pending.

In Great Britain, image rights also receive legal protection. Image rights are widely defined, using the expression "image" not in its narrow sense of "likeness" but in its wider sense of "persona" or "brand", to use a marketing term. In fact, a typical "grant of rights" clause defines image rights in rather broad terms, as follows:

Access to the services of the personality for the purpose of filming, television (both live and recorded), broadcasting (both live and recorded), audio recording; motion pictures, video and electronic pictures (including but not limited to the production of computer-generated images; still photographs; personal appearances; product endorsement and advertising in all media; as well as the right to use the personality's name, likeness, autograph, story and accomplishments (including copyright and other intellectual property rights), for promotional or commercial purposes including, but without limitation, the personality's actual or simulated likeness, voice, photograph, performances, personal characteristics and other personal identification.

See also the judicial definition of image rights in the English High Court Case of Proactive Sports Management Ltd v. 1) Wayne Rooney, 2) Coleen Rooney (formerly McLoughlin), 3) Stoneygate 48 Limited, 4) Speed 9849 Limited, involving the sports image rights of the former Manchester United striker and England captain, Wayne Rooney (Proactive Sports Management Limited vs. Rooney, 2011).

In the case of Proactive Sports Management Limited vs Wayne Rooney 2010, the Court evaluated the fairness of the agreement on the disposal of image rights, which the football player concluded at the dawn of his sports career. The court, having recognized as unacceptable the conditions for granting the manager company the right to use the name and image of the football player and profit from such activities, noted that in general such contracts have become a generally accepted and acceptable form of commercial relations.

In the case of Robyn Rihanna Fenty vs. Topshop 2015 the court found the retailer's sale of T-shirts with the image of a pop diva as a violation of her image rights, although such a concept does not exist in English law. The court focused the attention of owners of image rights on the need to resort to contractual regulation of their usage: «a celebrity seeking to control the use of his or her image must therefore rely upon some other cause of action such as breach of contract, breach of confidence, infringement of copyright or, as in this case, passing off » (Kravtsov, 2016).

In another case, NVA Management Limited vs. Obafemi Martins 2010, the court, considering the case, was guided by the definition of “image rights” specified in the contract: “All legal rights, rights to income and business reputation that exist regarding the usage, extraction of income, reproduction or association in any way with the personal attributes of the player, including without limitation the name, nickname, initials, autograph, caricatures, statements, biographies, characteristics, recognition, photographs, video, film or sound recordings, voices, reproduction of images and images and/or computer generated or animated images, or any other means of recognition or identification, in appearance”.

Another example of the recognition of image rights in British judicial practice is the case of Formula 1 pilot “Scuderia Ferrari” Eddie Irvine against the radio station TalkSport - Irvine & Ors. vs. TalkSport Ltd. 2003. The court ruled that the radio station's use of Eddie Irvine’s distorted image for advertising purposes was illegal, as the athlete did not consent to such usage. Interestingly, the court applied another definition of the athlete’s right to name and image - “hot property”.

Guernsey - an island located in the English Channel as part of the Channel Islands and which is under the jurisdiction of the British Crown - is little known and, at first glance, unremarkable. The peculiarity of Guernsey is the existence of a unique registration system of image rights, which operates based on the 137-page The Image Rights (Bailiwick of Guernsey) Ordinance, adopted in 2012.

The specified regulatory act is a fundamental document and covers a whole layer of issues related to the procedure of registration and usage of image rights. The concept of “image” in the aforementioned ordinance includes:

- the name of a person (it can be both legal entities and fictional characters) or any other name by which it is known;
- voice, signature, image, appearance, silhouette, features, face, expressions (verbal or facial expressions), gestures, mannerisms, and any other distinctive characteristics or properties;
- any photograph, illustration, image, moving picture or electronic image, or other representation of a specific person, and to no other person, except where that other person is not identified or singled out in connection with the usage of the image.

Image rights in Guernsey were registered, in particular, by Manuel Pellegrini (Chilean football coach) and Michael Owen (English football player).

Thus, with the development of the sports industry and show business, the right to a name and image can be monetized and has become a full-fledged object of civil turnover, which allows a celebrity to perform transactions with them and receive income from recognition.

Image rights are also known by different names and subject to different legal treatment in different jurisdictions. In the United Kingdom, they are known as image rights; in continental Europe, as personality rights; and in the United States as publicity rights.

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Data privacy is deeply enshrined in EU and UK law. The right to ‘protection of personal data’ is found at Article 8 of the EU Charter of Fundamental Rights, which was given the force of law by

the Treaty of Lisbon (albeit subject to a UK opt out). The principal legal instrument for data protection in the EU is the General Data Protection Regulation (GDPR). As an EU regulation pre-Brexit, the GDPR had direct effect in UK law (subject to certain limited derogations), although certain aspects of the GDPR required domestic implementation akin to an EU Directive (Lloyd, 2020) and the GDPR was thus further enshrined in domestic law in the form of the Data Protection Act 2018 (the DPA 2018). These instruments replaced the Data Protection Directive (Directive 95/46/EC) and the Data Protection Act 1998 (each now repealed) in the EU and UK, respectively.

The GDPR 'aimed to build a stronger and more coherent data protection framework in the EU, backed by strong enforcement', significantly modernising the data protection framework by introducing a number of changes to the existing data protection framework, including an increase to the severity of the available sanctions, a broadening of the scope of personal data caught, an augmentation of data subject rights, a widening of territorial scope, development of the requirements for processing and for transferring data, changes to the respective responsibilities of 'controllers' and 'processors' (terms of art in data protection law), and more.

The GDPR and the DPA 2018 primarily govern 'personal data'. This is an important preliminary point in the context of football data analytics, as data analysts are likely to manipulate both personal and non-personal data in the course of their work. Personal data is defined in Article 4 of the GDPR as being 'any information relating to an identified or identifiable natural person', otherwise referred to as 'data subjects'. The concept of an 'identifiable' person is an important one. Article 4 states that a person is identifiable if they: can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Moreover, in the context in which the sporting events, teams and athletes have become "goods" that are negotiated, bought, sold or traded (Blackshaw, 2017). The digitization of economic and social activities has created a favourable environment for obtaining advantages (economic, political or other) as a result of the valorisation of information on individuals. In order to unitary regulate the means in which the personal data can be processed and to establish minimum standards regarding their protection, at the level of the European Union, in 2016, the European Parliament and the Council had issued Regulation no. 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, also known as the General Data Protection Regulation (GDPR) (Iftimiei, 2018).

According to the provisions of art. 4 point 1 of the General Regulation on Data Protection, personal data means any information concerning an identified or identifiable natural person. “An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”. The regulation delimits a special category of data, namely sensitive data that lead to the guaranteed identification of a certain person due to their primary, original and unique character: data concerning health, biological data and genetic data (Tataru & Șerban, 2019).

For example, in Germany, Articles 1 and 2 of the Constitution protect image rights. Thus, Oliver Khan, the former German national goalkeeper, successfully sued Electronic Arts, the well-known games manufacturer, for using his name and image in an official FIFA Computer Football game without his express consent (Kahn vs Electronic Arts GmbH, unreported, 25 April 2003).

Another case of notoriety is that of the French footballer Eric Cantona, whose personal data were used without his consent. French law provides, within article 9 of the Civil Code, the general right to privacy, stating that "everyone has the right to respect for his private life". Considered infamous after the scandal in which he attacked a fan on the football field, Eric Cantona sued the "Foot Edition" publishing house and obtained substantial damages for the unauthorized commercial exploitation of his name and image, in a special issue of their magazine entitled "Special Cantona". The French court considered that the processing of the footballer's name and image was not for journalistic purposes, which would not have been illegal but, to the contrary, it was made for the commercial benefit and financial gain of the publisher and, therefore, against the law (Blackshaw, 2012).

Other European jurisdictions like Spain have also initiated high profile criminal prosecution against players on tax issue arising out of Image Rights. In 2016, Lionel Messi was awarded a 21-month prison sentence by Spanish Supreme Court for tax fraud related to his Image Rights. Messi, along with his father George, was found guilty of concealing earnings from his Image Rights by using tax havens in Uruguay and Belize, although he avoided his sentence by payment of fine.

Right strategies of handling Image Rights can also come in handy for players at times. For example, Gareth Bale, during his transfer to the Spanish team Real Madrid for record fee of £85.3 million (US\$ 105.3 million), assigned 50% of his Image Rights to the club – thus, making his dream transfer possible.

The study of transactions with intangible goods arose due to contradictions between the sphere of the proper and the real and knowledge about the proper and the real. In particular, in the sphere of things, there are contradictions regarding the transfer of such rights. Also, it is provided by law that some personal non-property rights may belong to other persons. Thus, the legislator assumes the possibility of transferring personal non-property rights to other persons. The legislation determines that personal non-property rights cannot be alienated (transferred), except for exceptions established by law. Analysis of the content of the specified norms allows us to conclude that in the case of direct prescriptions of the legislation, personal non-property rights can be alienated (transferred) (Iasechko et al, 2022).

In the field of knowledge about what is proper and what is, in the theory of civil law, it is a generally accepted opinion that only property rights and personal non-property rights cannot be transferred to other persons, they cease with the death of a person. In the sphere of “the real”, the following can be observed: legal relations regarding such intangible goods gain the ability to satisfy not only non-property interests but also property ones (Iasechko & Zaitsev, 2021). This indicates the existence of a certain inconsistency between legal norms and theoretical ideas regarding the alienation or transfer of personal non-property rights (Iasechko et al, 2020).

One of the forms of civil turnover is legal succession, inheritance, etc., that is, everything that mediates the movement of goods from one subject to another through the movement of rights to them. It has been established that legal succession is possible both during a person’s lifetime - based on a contract under which a person transfers certain rights to an individual, and as practice shows, more often to a legal entity, both within the term established by law or contract and in the order of inheritance. However, it should be noted that the derivative right of the heirs, in turn, can also be transferred to another person under the contract.

As a result of alienation, the right becomes alien to the original bearer and owned by the acquirer. Such a process may be accompanied by the transition (emergence) of the right itself. The key in this method of legal succession is that it becomes foreign to the alienator and owned by the derivative acquirer. Inseparability is such an inseparable connection of a good with its carrier that makes it impossible to physically separate it from a specific person. The connection is so inseparable that the disappearance of the subject entails the termination or disappearance of the right. Thus, if after death an intangible good continues to exist autonomously, i.e. is separated from it, the autonomy of these intangible goods creates the possibility of access to them by third parties, as well as the possibility of using them in isolation from the person. It is established that personal non-

property rights remain “inalienable” but “alienable” both during the lifetime and after the death of their owner.

The lack of research, despite the coverage by some scientists of some aspects of concluding transactions with personal non-property rights, leads to the uncertainty of the theoretical and methodological base, and contradictory law enforcement practice regarding such transactions. From the aforementioned facts, it can be stated that in the sphere of the present transactions with personal non-property rights, such personal non-property good is not alienated, and the owner only grants the right to use it both during life and after death.

4. CONCLUSIONS

When entering into transactions involving personal non-property rights, the owner (who can be any individual or legal entity anywhere in the world) may directly refer to specific rights when entering into any sponsorship contracts or sponsorship agreements or other transactions. This can be useful in the event of a dispute. In addition, these rights can also be transferred in part or in full by will, which ensures that valuable assets can be passed on to the next generation without hindrance. The rights can also be renewed indefinitely, ensuring the longevity of the asset class. If we compare this to the time-limited nature of copyright, for example, it becomes clear that image rights can be of enormous value to the individuals concerned and their heirs. As with trademarks, copyright and patents, ownership of such personal intangible rights can have tax implications, and the manner in which such assets are licensed or sold should be carefully considered to ensure tax efficiency. The ability to structure and manage these rights is just one of the reasons why they are becoming more popular every year. For example, as careers in sport are notoriously short, it is important for athletes to maximise their income during their career to provide for themselves when they are no longer at the top of their game.

As a result, with the commercialization of personal non-property rights in the field of sports, many legal problems arise, for the solution of which it is necessary to provide legal protection to all participants of sports activities and fair usage of these results. Legal regulation of such acts can help the development of sports, as well as ensure legal protection of such personal non-property rights, and reduce the risk of unfair usage of such rights. Thus, in light of the birth of sports law in Ukraine and the complication of legal relations in the field of sports, it is considered necessary to develop the legislation of the most common categories of this field, and in particular, of legal transactions with personal non-property rights, which today are not only popular both in Ukraine and abroad, but the

legal regulation of such transactions is not clearly defined. Unfortunately, at present, the issue of legal regulation of personal non-property rights in the field of sports has not yet received a clear solution both in theory and in practice. The mechanism of protection of such violated rights in the field of sports has not been fully studied.

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