Autonomy of will and contractual freedom in professional sports

G á b r i š, T.*

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Autonomy of will and contractual freedom in professional sports. The paper explains routes through which legal limitations of contractual freedom were introduced into sports law, taking their premise from the employment law regulations applicable in Slovakia. The main aim was to legally compensate the actual (mostly economic) inequality of contracting parties, similarly as it is accepted in labour law and in the consumer protection law. However, an amendment to the Act on Sports, introduced in 2020, changed this trajectory by allowing the sports entities a broader contractual freedom as to their choice between an employment contract and contract for services. On the other hand, however, the amendment thereby introduced a limitation of contractual freedom in the case of opting for the contract for services (concluded between entrepreneurs) – newly, these contracts generally concluded under the Commercial Code have to observe minimum standards reserved previously only for the sporting employment contracts.

Keywords*: autonomy of will, contractual freedom, professional sports, sports law, labour law, commercial law*

Introduction

Albeit in general, a shift from status to contract is being proclaimed with regard to evolution of labour law in Europe, there is still an important factor of "status" being present in modern labour law. This is namely the status of a weaker party, which makes it legitimate and acceptable to limit the general principles of contract law, being the principles of autonomy of will and freedom of contract as its manifestation. The status of a weaker party is namely used as an argument to limit these principles in order to protect the weaker party in their weaker negotiating position against the other party – being their employer mostly. This concept is nevertheless quickly expanding to other branches of law as well – from labour law (the employee as a weaker party) in civil law (consumer as a weaker party), up to business (commercial) law. With regard to the latter, we shall offer here an example concerning business relations between entrepreneurs in sports – namely between the players and clubs. Albeit the Slovak Act on Sports from 2015 (effective as of 2016) provided for the employment status of players performing dependent work in sports, and thus introduced largely limited contractual freedom in the field of sports law, the situation has drastically changed in 2020. An amendment to the Act on Sports namely allowed the clubs and the players to conclude instead of employment

* Prof. JUDr. PhDr. Tomáš Gábriš, PhD., LLM, MA, Faculty of Law, Trnava University in Trnava.

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contracts, contracts on the provision of services, based on the Commercial Code. Hence, the amendment allowed for circumventing the labour law standards introduced through the Act on Sports. In this paper, it is being suggested that what might seem to be a return to the ideals of autonomy of will and contracting freedom via the amendment to the Act on Sports, should, in contrast, be seen as a twofold limitation of autonomy of will and contractual freedom in sports. First of all, the so-called freedom to decide between the labour protection and the commercial relationship will certainly allow for the exploitation of the weaker position of the players in the negotiating process. Secondly, the amendment has introduced an obligation for the parties to the commercial players' contract to observe certain mandatory rules laid down in the Act on Sports. The amendment is thus expanding the limitations of contractual freedom onto all the sporting contracts concluded under the Commercial Code – introducing thereby unintentionally the concept of a "the sporting weaker party" into commercial law.

1. Concept of autonomy in law

In private law, in general, a relatively high degree of autonomy (freedom) is considered to be one of its philosophical backbones – at least since the times of the victory of liberal political and legal thought.[1] From a broader historical perspective, however, the recognition of "private autonomy" in law is all but a modern element. In fact, it can be rather perceived as a relic of a much older historical concept of autonomous rule-making, which was very much characteristic of the pre-modern and pre-liberal era, when the state and state-made law played only a minor role in regulating various aspects of everyday life. It was only with the emergence of the legislative monopoly of the state that autonomous rule-making has shrunk to what we know nowadays mostly as contractual autonomy in the law of obligations.

The current situation is thereby a heritage of the 19th century legal scholarship, in Central Europe being mostly influenced and inspired by German pandectist legal thought, refusing autonomous law-making and limiting autonomy to an element of law of obligations – to the extent that it is recognized and allowed for by the state. It was specifically Carl Friedrich von Gerber (1823–1891) and Paul Laband (1838–1918) who embraced this concept. Gerber explicitly rejected autonomy as the source of law, claiming there is a difference between law-making and law enforcement – and autonomy thereby only means the power to act legally, but not to create law.[2] Autonomy should thus not be considered a separate source of "non-state law", but rather only a source of contractual relations and legal activities, and therefore, a part of the law of contracts, Gerber claimed.[3]

[1] DULAK, A.: K princípu zmluvnej slobody v súkromnoprávnych vzťahoch. [On the principle of freedom of contract in private legal relations] In *Právny obzor*, 86, 2003, p. 408 ff. Cf also ATIYAH, P. S.: The Rise and Fall of Freedom of Contract. New York: Oxford University Press, 1979.

[2] In GERBER, C. F. von: Über den Begriff der Autonomie. In *Archiv für die civilistische Praxis*, 1854, 37, p. 36 and 46. Quoted from MEDER, S.: Ius non scriptum – Traditionen privater Rechtssetzung. Tübingen: Mohr Siebeck, 2009, pp. 60–61.

[3] Ibid., p. 53.

Otherwise, according to Laband, normative autonomy would necessarily conflict with the sovereignty of the state. Laband also quoted Savigny, who claimed that legal acts of private entities are only sources of subjective rights, but not of objective law.[4] In this spirit, Wilhelm Eduard Wilda (1800–1856) in 1842 finally transferred the notion of "*Privatautonomie*" from the legislative and law-creating process into the law of contracts[5] where it is mostly found today, being denoted as autonomy of will and its immanent part –freedom of contract.

2. Autonomy of will and contractual freedom in private law

Autonomy of will (individual autonomy) of entities of private law is perceived as a principle guaranteeing that no one can find themselves in any legal position against their will, and also as a natural desire to be free, to express this freedom and to implement it freely. In other words, it is an indicative of the possibility of "auto-determination" and "self-regulation" of own interests.[6] Autonomy of will in a broader respect jointly includes:

(a) freedom to own, to acquire and enjoy property (ownership freedom)
(b) freedom of use of property values and rights (freedom of contract) and
(c) freedom of development of human personality and of its creative intellectual activity (freedom of creation).[7]

Moreover, some other authors also distinguish

(d) the possibility to decide freely on property upon one's death.[8]

At this point we shall only concentrate on the freedom of contract in labour law and in sports law, which basically implies:

(a) liberty and freedom in the choice of legal instrument, type of contract and of contracting partners, and
(b) discretion in determining the content of the act, the content of the contract.[9]

Freedom of contract (contractual freedom) thus means that parties are free to choose a contracting partner, the form of the contract, the contents of the contract and the fact whether they conclude any contract at all. To what extent this is applicable and in fact applied in professional sports is the basic question to be answered in this paper. Namely, while both parties dispose of the freedom of contract, in practice one may sometimes

[4] Cf. MEDER, S.: Ius non scriptum – Traditionen privater Rechtssetzung. Tübingen: Mohr Siebeck, 2009, p. 63.

[5] Ibid., p. 164.

[6] KRÁLIČKOVÁ, Z.: Autonomie vůle rodinném právu v česko-italském porovnání. [Autonomy of will in family law in Czech and Italian comparison] Brno: Masarykova univerzita, 2003, p. 33.

[7] LAZAR, J. et al.: Základy občianskeho hmotného práva 1. [Fundaments of substantive civil law] Bratislava: Iura Edition, 2004, p. 15.

[8] WINTR, J.: Říše principů : Obecné a odvětvové principy současného českého práva. [The empire of principles : General and sectoral principles of current Czech law] Prague: Karolinum, 2006, p. 144.

[9] CIRÁK, J., FICOVÁ, S. et al.: Občianske právo : Všeobecná časť. [Civil Law : General Part] Šamorín: Heuréka, 2008, p. 32–33.

question whether the bargaining position of both sides is really equal and their freedom of contract is actually present in full.[10]

This is the situation well known in consumer relations and employment relations. In these situations one of the parties is a "weaker party" who mostly cannot influence the content of the contract. The weaker party only has a choice to sign or not to sign, which may later prove to be detrimental to their interests. To compensate for this factual inequality, the legal fiction of being a weaker party was introduced, together with some compensating mechanisms such as public law instruments expressed in mandatory rules serving to protect the interests of the weaker party.

In fact, this is being done by limiting the freedom of contract again. However, this time it is with the intention to protect the weaker party against misuse and abuse of the dominance of the other contracting party (entrepreneur, or employer).

With regard to labour law and sports law, this is also manifested in the so-called *numerus clausus* (limited number) of contract types allowed to be used in sports and in the employment relations, with strictly regulated content of the contract and high standards of protection of the weaker party – the (sports)employee. Albeit this is clearly in conflict with the contractual freedom and autonomy of will to a great extent, still, it is being accepted as the legitimate aim to protect the employee.

Finally, in both the legislation and in case law, the interpretative principle of *in dubio contra proferentem* is being invoked in this respect additionally, which means that the conflicting interpretation of the contract is to favour the weaker party. This principlehas been already confirmed by the Constitutional Court of the Slovak Republic in its decision of 19 June 2008 (I. ÚS 243/07). According to the Court, the vague term is to be interpreted against the party who used it, and this is to be applied as a general method of interpretation of all legal acts. This rule is also expressly provided for in § 266 (4) of the Slovak Commercial Code and § 54 (2) of the Slovak Civil Code – in the latter case in favour of consumers.

3. Contractual freedom in labour law

The discipline of law where the limitation of contractual freedom and autonomy of will can be witnessed to its greatest extent, is probably the branch of law known as labour law or employment law. Originally, legal scholarship of the 19th Century considered the employment relationship to be an immanent part of law of obligations without any major deviations being applicable and necessary. It was traditionally perceived as being based on the Roman law model – contract of lease. A term *locatio conductio operis faciendi* was used.[11] Thus, classical bourgeois theory considered employment relationship to be

[10] MAGEE, J.: When is a contract more than a contract? Professional football contracts and the pendulum of power. In *The Entertainment and Sports Law Journal*, 4, 2006, no. 2. Available at: http://go.warwick.ac.uk/eslj/issues/volume4/number2/magee (accessed on 31 October 2021).

[11] VENEZIANI, B.: The Evolution of the Contract of Employment. In *The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945*. Ed. Bob Hepple. London: Mansell Publishing Limited, 1986, p. 31.

governed by the general law of obligations, without any attention being paid to the "weaker" status of the employee. The contract was more important than the status.

On the other hand, since the 18th Century, labour relations were treated by scholars separately for various kinds of jobs and works performed, recognizing the differences in their nature and regulatory tools – e.g., regulations were different for domestic servants and agricultural workers.[12] Such atomization of labour law regulations for various sectors of the economy and types of work performed survived in Central Europe, including the territory of Slovakia, until the mid 20th Century, and in many countries it survives up to these days. In Czechoslovakia, however, a unified Labour Code was enacted in 1965, introducing common rules for all the types of employment relations. Albeit this move was criticized at that point of time as failing to take into account the important differences between various sectors of the economy, the situation has not changed since then and even nowadays this general regulation (currently in the form of Labour Code from 2001) is applicable to almost all types of employment relations in a unified manner. Thus, apparently, more than anywhere else one can agree that a shift from status to contract has taken place in this branch of law, as the contractualists in labour law suggest.[13]

However, already by the end of the 19th Century, the contractualist views were being challenged. First of all, it was by the birth of the idea of protection of employees as weaker parties against unlimited freedom of contract as defended by early contractualists. Subsequently, new theories emerged – of a sort of a community and shared interests between employers and employees – called corporativist theories.[14] These were mostly proposed and defended by the fascist countries and regimes. In the eyes of the later socialist (communist) theory, however, the corporativism served only as a tool for the exploitation of the working population by their employers.[15] Still, a similar approach was also taken by the communist regimes. In fact, all the totalitarian regimes actually exploited the workers in very similar terms, just replacing the private employers with the state interests and state-run companies. What was claimed to be a way out of exploitation, was in fact a total exploitation.

Against this attitude, contractualist approach still persisted in democratic regimes worldwide, considering employment relationship to be solely contractual, accepting the notion of autonomy of will and contractual freedom as its manifestation. Still, even the contractualist concept of contractual freedom has witnessed an important shift between the end of the 19th Century and these days, not leaving much from the proclaimed freedom of contract – under the pretext to protect the interests of the workers.

Thus, even the current theory of labour law in Slovakia in its treatment of contractual freedom[16] recognizes openly the existence of limits (borders) of contractual freedom (1), while invoking legitimate reasons for its limitation (2) with regard to certain important aspects of employment relations (3).

[12] Ibid., p. 33.

[13] Ibid., p. 54.

[14] FILO, J. et al.: Československé pracovné právo. [Czechoslovak labour law] Bratislava: Obzor, 1981, p. 220.

[15] Ibid.

[16] DOLOBÁČ, M.: Hranice zmluvnej slobody v pracovnom práve. [Border of contractual freedom in labour law] Košice: Univerzita P. J. Šafárika v Košiciach, 2017, p. 66–67.

As far as the limits (borders) are concerned (*ad* 1), these are given primarily by the legislative technique applied in labour law, which uses *numerus clausus* of contract types and mandatory norms mostly. Another threshold for the exercise of contractual freedom is set by the legal capacity of the parties to the contract.

Should we focus on the reasons for the restriction of contractual freedom in labour law (*ad* 2), one can emphasize in particular the public interest, from which the idea of protection of the employee as a weaker party arises, attempting to balance the interests of both contracting parties in order to achieve the fairest possible arrangement of mutual relations.

The contractual freedom in labour law manifests in the following main aspects, while in each of them it is largely limited (*ad* 3):

a) freedom to act legally (to perform a legal act) – a significant restriction of the contractual freedom of the employer is introduced with regard to termination of employment – in order to protect the employee;
b) freedom of choice of the contracting partner – a quota system is applied in Slovakia as an expression of positive discrimination of employees with disabilities, requiring priority for such employees. Other limitations have to do with the employing of foreigners and relatives in public (state) service;
c) freedom to choose the content of a legal act – numerous mandatory norms are setting the content of the employment relationship, mainly in the form of a legal maximum or minimum – minimum wage entitlements, maximum scope of overtime work, etc.;
d) freedom of choice of contract type and form – in this regard, *numerus clausus* of contract types was introduced in Slovakia, limiting the choice for both the employer and employee.[17]

Another characteristic feature of labour law is, moreover, the restriction of contractual freedom by the collective will, meaning

(i) the restriction of contractual freedom by the interference of employees' representatives in individual employment relationships (e.g., in termination of employment); and
(ii) restriction of contractual freedom by collective bargaining, resulting in a collective bargaining agreement.[18]

Most of the above limitations of contractual freedom apply also in the field of sports law – in sporting employment, since as of 2016, the special regulation of sporting employment was introduced in Slovakia. The Act on Sports, effective as of 2016 is namely limiting contractual freedom in sports similarly as in general labour law,[19] with regard to:

a) freedom of choice of the contracting partner,
b) freedom to conclude a contract,
c) freedom to determine the content of the contract,
d) freedom to terminate the contract,
e) freedom to choose the form and type of contract.

[17] Ibid.
[18] Ibid., p. 86–87.
[19] BARANCOVÁ, H. et al.: Zákonník práce : komentár. [Labour Code : Commentary] 2nd ed. Prague: C. H. Beck, 2019, p. 60–74.

In the following chapter 4 and its individual subchapters, we shall take a closer look into these five aspects of contractual freedom in sports law in Slovakia, together with its important material and formal limitations as given by the Act on Sports effective as of 2016. In the final chapter 5 of this paper, we shall then present the changes introduced into this system via the 2020 amendment to the Act on Sports.

4. Freedom of contract in sports law

4.1 Freedom of choice of the contracting partner

The choice of a contracting partner in sporting employment is limited on both sides of the contract – on the side of the player as well as on the side of the sports organisation. This is first of all naturally done through rules on the legal capacity of the sporting entities to enter into a contractual relationship.

In § 46 (8) of the Slovak Act on Sports, the sports organization's capacity to conclude a contract for professional performance of sports is specifically regulated. The rules of the national sports association can provide that a contract for the professional performance of sport may only be concluded by a sports organization that has deposited a financial guarantee to a bank account of the sporting body, which governs the sporting event. This serves to cover any future outstanding dues of the club (sports organisation) taking part in the competition.

On the other hand, the regulation of the player's capacity to conclude a contract for the professional performance of sport also contains some specific features and limitations. According to § 31 (2) and (3) of the Act on Sports, modelled after the Labour Code, the age limit of 15 years was introduced as a condition for the capacity to enter into contractual relationships under the Act on Sports: "*Capacity of a sportsperson to have any rights and obligations in a contractual relation established under this Act and the legal capacity to acquire these rights and to assume these obligations by their own legal acts, unless stipulated otherwise in subsection 3, arises on the day when the sportsperson reaches 15 years of age*." Under the following subsection 3, "*In order to conclude a written agreement with sportspersons between the ages of 15 and 18, their legal representative shall be required to additionally sign a contract or a separate document as a part of the contract*."

This allows the players to conclude sporting contracts from the age of 15, but at the same time their legal representatives (parents) are required to affix their signature (even if they disagree with the contract). Without the signature, the player will not be able to validly enter into a contract. Thus, failure to sign a contract by a legal representative will make it impossible for the player to pursue sports. On the other hand, even if the representatives disagree, their signature allows the minor player to perform the sport.[20]

[20] The Labour Code in a similar situation does not require this statement to be in writing, nor in particular to have the form of a signature on the contract, since refusal to sign would have the effect of frustrating the possibility of a minor employee to validly conclude an employment contract.

According to § 34 (6) of the Act on Sports, a sportsperson under the age of 15 may also conclude a contract for the professional performance of sports, but in this case the contract with the sports organization is concluded on behalf of the players by the legal representatives instead of the player: "*The contract for the professional performance of sport is concluded with the sports organization on behalf of the sportsperson under the age of 15 by their legal representative. The conclusion of a contract for the professional performance of sport by a sportsperson under 15 years of age or older than 15 years but prior to ending their compulsory education shall be subject to authorization, issued by the competent labour inspectorate in agreement with the relevant state administration body in the field of public health. Authorization may only be granted if the performance of sport does not endanger the sportsperson's health, safety, further development or compulsory education. The permit shall specify the conditions for the exercise of sport. The competent labour inspectorate shall withdraw the permit if the permit conditions are not complied with*."

4.2 Freedom to conclude a contract

In sport, in a majority of cases the sportsperson (especially if he/she is not a superstar) is found in the position of a "weaker party" as to both the freedom to conclude a contract as well as the freedom to set the contents of the contract. He/she only has a choice to sign or not to sign, which may later prove to be detrimental to his/her future sporting career. Freedom of contract is therefore largely limited by a stronger position of sports organizations selecting between the available players, as well as by the specific transfer rules in many sports disciplines, limiting the possibility to change the affiliation of the sportspersons only during specific "transfer windows" – time periods for transferring from one club to the other.

Additionally, the internal rules of national sports associations and international federations also give implicitly rise to another contract that the players are very often absolutely ignorant about. This is the clause or the agreement on submitting any future disputes to the jurisdiction of internal bodies of the sports associations (federations), such as the national dispute resolution chamber, or FIFA Dispute Resolution Chamber, or finally to the Court of Arbitration for Sport in Lausanne, as the supreme instance.

This sort of arbitration clause or arbitration agreement contained solely in the internal norms of the sports movement was openly considered by the European Court of Human Rights (ECtHR) to be a situation of compulsory arbitration in the Ali Riza case (Applications nos. 30226/10 and 4 others, and the award of 13 July 2021, no. 74989/11, Ali Riza v. Suisse) and similarly in the previous Mutu and Pechstein Judgment (Applications no. 40575/10 and no. 67474/10, and the award of 2 October 2018), where the ECtHR drew a distinction between voluntary and compulsory (forced) arbitration.

In general, arbitration is forced in the circumstances where athletes are required to either accept arbitration and earn their living by practising their sports at a professional level or to refuse the arbitration and be obliged to give up their professional activities

completely.[21] In fact, however, it is not only the arbitration that is being forced – the application of all of the rules of international federations (being contractual in their nature) is similarly compulsory and non-consensual, accepted by the players only due to their wish to perform professional sports.

The ECtHR appears to have thereby accepted the utilitarian, functional grounds, claiming the internal rules including the jurisdiction of CAS provide for a swift, independent, and impartial means of resolving international sports disputes by a specialized tribunal, with the benefit of uniformity and consistency in dispute settlement.[22] Nevertheless, the actual nature of sporting rules as compulsory rules, remains open.

4.3 Freedom to determine the content of the contract

Until the Act on Sports no. 440/2015 Coll. entered into effect in Slovakia, previous practice was that of having the player's rights and obligations enshrined in players' contracts based on § 51 Civil Code or § 269 (2) of the Commercial Code, both allowing for concluding atypical, innominate, unregulated types of contracts.

Since the effectiveness of the Act on Sports, minimum requirements of sporting contracts for both professional sportspersons and amateur sportspersons are being set so as to include at least:

(1) identification of the contracting parties;
(2) term of the contract;
(3) type of sport concerned;
(4) remuneration and related issues;
(5) personal rights commercialization;
(6) paid leave and conditions for taking the leave;
(7) the date of beginning of sports performance;
(8) date of contract's entry into effectivity; and
(9) date and signature.

Additionally, the contract may contain:

(1) the place of usual performance of sports;
(2) notice of termination period;
(3) covering of sportsperson's costs;
(4) shortening the paid leave in extraordinary circumstances;
(5) securing the fulfilment of rights and obligations;
(6) sanctions applicable;
(7) applicable law;
(8) applicable language; and
(9) confidentiality clause.

[21] FREEBURN, L.: Forced Arbitration and Regulatory Power in International Sport - Implications of the Judgment of the European Court of Human Rights in Pechstein and Mutu v. Switzerland. In *Marq. Sports L. Rev*., 21, 2021, p. 299. Available at: https://scholarship.law.marquette.edu/sportslaw/vol31/iss2/6 (accessed on 31 October 2021).

[22] Ibid., p. 312.

The Act on Sports thus combines some of the mandatory elements of labour coiṅtracts taken from the Labour Code (e.g., minimum wage), with some specific rules necessary and applicable to sports solely. Thereby, it deviates from the Labour Code in particular with regard to the following institutes of labour law:

a) working time and rest (§ 37) – the player‘s daily working time is considered to be a period of 24 consecutive hours during which the player is obliged to observe the rules of lifestyle. The actual performance of sport thereby takes place only during the time agreed in the contract for the performance of sport. Continuous rest shall thereby not be less than six hours in any 24-hour period. The sports organization shall also ensure that the player has one day of continuous rest once a week. If this is not possible, the sports organization shall ensure continuous rest so that the player has at least two days of continuous rest every week,

b) leave and obstacles to sporting work (§ 44) – under § 44 (2), the player shall be entitled to an annual leave of at least 20 calendar days (i.e. less than a regular employee under the Labour Code). Under § 44 (3) the sportsperson is entitled to 1/12 of the annual leave for each month of the contractual relationship. According to § 44 (13), leave shall be granted for a period of at least a week of seven consecutive calendar days.

c) concerning obstacles to performing sports, according to § 44 (14), only some of the provisions of the Labour Code on the obstacles to work on the part of an employee are adequately applicable to the obstacles on the part of a sportsperson,

d) specific regulation of pregnancy and maternity in the context of obstacles to the performance of sport was introduced (§ 44) – according to the provisions of § 44 (16), a pregnant sportswoman has the right to refuse to practice sport if, according to a medical confirmation, the practice of sport endangers the life or health of the conceived child. For a period when a pregnant sportswoman does not perform sport because of pregnancy, she is not entitled to wage or wage compensation unless the sports organization and sportswoman agree otherwise. According to § 44 (17), the provisions of the Labour Code shall adequately apply to maternity and parental leave.

These rules are thereby mostly mandatory in their nature, meaning they are not to be circumvented or replaced by the agreement of the parties, unless the Act explicitly allows them to do so (as it does e.g. with regard to the pregnant sportswoman).

In practice, however, in additon to these clauses, many other clauses are included in the contracts, which regulate issues potentially disadvantageous for the players. These are mostly rules on regulation of lifestyle which often have to do with the limitation of fundamental rights of the players – specifically as regards privacy and freedom of expression of players.

Limiting the privacy of athletes and their freedom of expression usually takes the form of a contractual clause governing the conduct of an athlete. Thereby, it is generally asserted that a contractual agreement leading to a restriction of some fundamental rights is acceptable, as long as this restriction is voluntary and does not go beyond what is necessary for the needs of the other contracting party. Nevertheless, the boundary between permissible interference with the fundamental right to privacy and freedom of

expression on one side, and disproportionate restriction of these rights on the other, remains very unclear.[23] It becomes of importance when a sports organization imposes sanctions on the athletes for their comments made in public or for the media, e.g. about the financial situation of the club. In such a case, it is very problematic to strike a proportionate balance between fundamental freedom of expression and the interests of the employer (the club). Moreover, even the type of sanction and its severity (amount of fine) may be questionned as to its proportionality. At the end of the day, it is to be assessed by the respective dispute resolution body – instead of a general court of the Slovak Republic, mostly due to the jurisdiction being provided to the internal sporting bodies.

4.4 Freedom to terminate the contract

A complete opposite and contrast to a situation of freedom is quite naturally the situation of slavery of forced rule. Regarding the sport, it might seem that sports cannot be regarded as slavery or forced labour at all. Nevertheless, it is sometimes possible to encounter views considering a sporting activity as forced labour, given the limited possibilities of the termination of a contract. In the 1980s, Arnold Mühren approached the European Commission to assess the transfer rules in football as forced labour. However, in 1984, such a characteristic of sport was rejected by the Commission, arguing that the athlete (player) became a sports employee based on his/her own will, he/she does not do anything against his/her will and is limited only to some extent.[24]

In Slovakia, a sporting employment contract (contract for professional performance of sports) may be contracted for a maximum of five years, unless the sports organization provides otherwise. A special rule serving to protect a player is introduced in § 31 (5) of the Act on Sports: "*The period between the day of signature of the contract and the day of its effectiveness can not be longer than one year, under the penalty of invalidity*." This aims to avoid the possibility of "chain contracts" that could be signed in advance with their effectiveness deferred for several years, as a result of which the sportsperson would be contractually committed longer than the allowed maximum duration of contracts under the Act on Sports (five years).

As regards the termination of the contractual relationship, the Act on Sport discerns the same basic ways of termination as the Labour Code – termination by expiration, death of a sportsperson or the dissolution of a sports organization without a legal successor, agreement, dismissal or by immediate termination (§ 38). A special way of termination, similarly laid down also in the Labour Code, is automatic termination on the day on which a foreign player's residence permit to stay in the territory of the Slovak Republic expires.

[23] GÁBRIŠ, T.: Behaviour clauses in sport : Basic rights of sportsmen (LLM Thesis). Tilburg: Tilburg University, School of Law, 2011. Available at: http://arno.uvt.nl/show.cgi?fid=106138 (accessed on 31 October 2021).

[24] Cf. GÁBRIŠ, T.: International and European Sports Law. Nové Zámky: Expensis propriis, 2015, p. 72.

However, there are indeed specific limitations as to the termination of a sporting contract. Namely, a problem would undoubtedly arise in the event of the termination of a sporting employment during the sporting season, which is therefore prohibited in general. This is justified by the fact that if, during the season, a rich club could attract top players from rival clubs, this would change the balance of power during the season, which would be detrimental to the whole competition, and particularly, to its attractiveness to spectators.

This rule is enshrined in the so-called principle of contractual stability, which does not allow the player to arbitrarily terminate the contractual relationship with the club in the middle of the season. The same applies also vice versa – clubs cannot terminate the relationship with a player. For this reason, even the institute of the probationary period at the beginning of a sporting employment relationship is not known in the Act on Sports.

At the international level, this principle is expressed in the International Federation of Football Associations (FIFA) Regulations on the Status and Transfer of Players. These rules in Article 16 explicitly *prohibit the unilateral termination of contracts during the season. After the season,* Article 14 allows a player to terminate the contractual relationship if there is *a legitimate reason (just cause),* for example, if a player played in less than 10% of the club's matches in the season. Even in this case of so-called sporting just cause, however, a player may only terminate the contract within fifteen days after the last match played by his/her club during the season. When a player terminates the contract at the end of the season for an unauthorized reason *(without just cause),* he/she will be obliged to pay a compensation calculated, with regard to national law, according to the specificity of the sport and other objective criteria that include, for example, the remuneration for sporting activities and other benefits that the player receives, costs his/her club has faced with respect to the player, the originally negotiated duration of the contract, and whether the termination occurred in the protected period (which is determined by the age of the players – the players signed up before the age of 28 years must stay in a contractual relationship for at least three years, players older than 28 years, only for two years).

The amount of any compensation may be determined by the agreement of the parties concerned. The player and his/her new club, into which the player transfers, are both responsible for the payment. It is explicitly presumed that if there was a dismissal without just cause, a new club urged the player to terminate his/her contract with the previous club. In such a situation, the new club is to be punished with a ban on registering new players for two registration periods.

In the event of termination within the so-called *protected period* (three or two years), sporting sanctions may be imposed on the player in addition, generally being a four-month ban on playing official matches. In the case of aggravating circumstances, the penalty can be extended up to six months. Unilateral termination of the contract *after the protected period* does not bring any sporting sanctions. Only a disciplinary sanction may be imposed if the contract is not terminated within fifteen days from the last official match of the club in which the player is registered in a given season.

Hence, it is quite clear from the outset that the freedom of the player to terminate the contract is not exactly the same as that of any other employee.[25]

4.5 Freedom to choose the form and type of contract

Legal status of athletes was not clearly defined in Slovakia until 2016. It was not clear, whether they should be considered employees or self-employed persons. The classification of athletes as employees or self-employed was thereby problematic at the European Union level as well. In the case *Walrave and Koch* (C-36/74), the Court of Justice of the EU (CJEU, resp. at that point of time known as the European Court of Justice, ECJ) stated that Article 39 or 49 of the EC Treaty should be used.[26] From the aforementioned two Articles, the former dealt with the free movement of workers, and the latter with the free provision of services. The Court has thus not delivered a clear opinion on whether the athletes were employees or self-employed. Similarly, the Court also left the question open in the *Donà v. Mantero* case (C-13/76). A change in the arguments of the Court occurred with the *Bosman* case, when the Court spoke only of Article 39 (on the free movement of workers) and said that this Article applies to rules of the organizations such as Belgian Football Association, FIFA or UEFA. This means that a permanent relationship between athletes and the club (it was a case of a football player) is to be considered an employment relationship. In another case, *Deliège* (C-51/96), which concerned an individual sport, judo, the Court declared that Article 49 should be used. In the case of basketball – *Lehtonen* (C-176/96) – the Court used Article 39 again. Analysing these cases, Stefaan van den Bogaert[27] notes that professional footballers and players of team sports in general, show the essential features of employment as laid down in decisions such as *Lawrie Blum* and many others. In contrast, individual athletes such as skiers do not satisfy the condition of subordination, therefore the Court invokes self-employment in their case.

Similarly, in Slovakia, there were basically two possibilities – that the athletes were either employees or self-employed. Thereby, the Slovak Labour Code contains, since 2007, in its first paragraph, an enumeration of the features of dependent work, which is an essential component of the employment relationship. According to § 1 (2) of the Labour Code (Act no. 311/2001 Coll.): "*Dependent work is work performed in a relationship of the employer superiority and subordination of employees, personally by an employee for the employer, under guidance of the employer, in their name, in the working time designated by the employer*."

[25] GARDINER, S., WELCH, R.: The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules 'The Beautiful Game'? In *The Ent. & Sports L.J.*, 5, 2007, 1.

[26] Since the Treaty of Lisbon the EC Treaty was renumbered and renamed into TFEU; the relevant Articles are now 45 and 56 TFEU.

[27] BOGAERT, S. van den: Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman. The Hague: Kluwer Law International, 2005, p. 52–67.

Dependent work can generally be carried out only within the employment and rarely in other legal relationship, governed by special legislation (e.g., civil service).[28] However, until 2016, athletes in Slovakia usually signed a player's contract under the Civil or Commercial Code, which seemed unsustainable at least since the 2007 amendment to the Labour Code, introducing the concept of dependent work. However, even before being regulated in the Labour Code, the definition of dependent work was known in the Slovak theory of labour law.

The practice of using Civil and Commercial Code contracts in sport was thus to be firmly rejected, also with reference to § 3 (2) of the Labour Code as effective up to 2016: "*Labour relations of … professional athletes are governed by this Act, unless stipulated otherwise*." The Labour Code was to be clearly applied onto sportspersons performing dependent work in sports. Unfortunately, Slovak courts did not exert any authority to remedy the status of athletes in this respect. Even while deciding on the claims of players arising from players contracts, courts did not dispute the nature of the contracts concluded as atypical contracts under § 51 of the Civil Code or § 269 (2) of the Commercial Code. The fictitious status of these athletes as self-employed apparently did not bother any of the parties in the relationship and neither the courts.

Clubs and the players thus intentionally circumvented the provisions of the Labour Code, which was understandable with reference to the rigid, predominantly mandatory nature of labour law in Slovakia. For example, repeated concluding of fixed-term contracts is restricted by both national and European labour law, whereby such employment is usually accepted only for two years, while in the sport, five-year contracts are usual. Therefore, a simple application of the Labour Code was objectively not possible. Similarly, in the case of the termination of employment, this could not be applied in a sports relationship, in order to prevent potential termination during the season. Slovak labour law, moreover, does not accept fines or arbitration in labour disputes, which would make the application of labour law to professional sports even more difficult. Finally, there were also arguments proclaiming that even in the case of team sports, players exert a somewhat independent activity, rather than dependent work.[29] All these arguments made a straightforward applicability of labour law to sports doubtful.

Due to all these facts, a new solution was found in the introduction of a specific regulation of sporting contracts, both for professionals performing dependent work, being considered employees under the special rules of the Act on Sports (with only some of the Labour Code provisions being applicable), as well as for the amateur sportspersons performing sports to a minor extent only (of a maximum eight hours per week, five days in a month or thirty days in a year). The Act on Sports has also introduced some amendments to the Labour Code, such as explicitly stating in § 2 (3)

[28] BARANCOVÁ, H.: K vymedzeniu pojmu pracovného pomeru: Pracovný pomer alebo obchodnoprávny vzt'ah? [On the definition of the notion employment relation: Emplyoment relation or commercal relation?] In *Právny obzor,* 87, 2004, no. 1, p. 28–44.

[29] SLUKA, T.: Profesionální sportovec (právní a ekonomické aspekty). [Professional sportsperson (legal and economic aspects)] Prague: Havlíček Brain Team, 2007, p. 140–142.

of the Labour Code that a professional sportsperson's employment is regulated by a separate Act, and the Labour Code applies only if provided by that special Act (Act on Sports).

In principle, however, the Act on Sport was fully accepted and applied in practice only with respect to professional football. Other sports, especially ice hockey, have ignored and circumvented this Act, following their previous practice of innominate (atypical) contracts under the Civil Code or the Commercial Code. Instead of intervening and ensuring compliance with the Act on Sports, the state authorities were again inactive. In contrast, surprisingly, the parliament of Slovakia itself, at the very end of its parliamentary term ending in the Spring 2020, adopted in December 2019 an amendment to the Act on Sports attempting to approve and validate the actual illegal practice of many sports organisations. The amendment to the Act on Sports, effective as of February 1, 2020, namely aimed at allowing the sports organizations to replace the contracts for professional performance of sport with "other contracts", i.e. innominate contracts under the Commercial Code, freely choosing between the statuses of sportspersons as employees or self-employed persons.

Pressure from the side of the national associations and clubs not willing to comply, nor to accept the obligation to pay social insurance premiums for their employees, therefore finally resulted in the 2020 amendment to the Act on Sports, aiming to allow the players and clubs to agree and choose between the employment or self-employed status of the players.

On the one hand this means that some of the barriers introduced to the contractual freedom of sports organisations and players were wiped out, re-introducing the previous possibility to conclude players contracts under the provisions of § 269 (2) of the Commercial Code on atypical contracts,[30] instead of subordinating the relationship between the athlete and the club under the provisions on dependent work. Quite naturally, this leads to the practice where clubs and players are inclined to opt for the self-employed status, which allows both parties a greater flexibility and larger scope of contractual freedom. However, the unlimited freedom of contract in this regard means in fact a deprivation of protective standards applicable to all other dependent workers.

On the other hand, still, some of the protective rules and mandatory regulations previously applicable to dependent workers in sports, were expanded by the 2020 amendment to the Act on Sports also onto the newly recognised self-employed contracts for provision of services, concluded under § 269 (2) of the Commercial Code. The scope of the contractual freedom generally guaranteed under § 269 (2) of the Commercial Code is thus limited as regards to contracts between parties with the specific status – of a sportsperson and a sports organisation. Hence, again, the status trumps the contract, and introduces some important limitations to the freedom of contract.

[30] KRIŽAN, L.: Mal by mať profesionálny futbalista na Slovensku postavenie zamestnanca? [Should a professional footballer be considered an employee in Slovakia?] In *Bulletin slovenskej advokácie*, XV, 2009, no. 3, p. 28–34.

5. Amendment effective from February 1, 2020 and the contractual freedom in sports

Amendment no. 6/2020 Coll. to the Act on Sports, effective from February 1, 2020, introduced substantial changes especially to the provisions of § 4 and § 46 of the Act on Sports. Newly, according to § 4 (3) (a) "*professional sportspersons pursue sport ... under a contract for the professional performance of sport or under other contract if they pursue sport for a sports organization as self-employed persons …*".

§ 46 (10) of the Act on Sports with effect from February 1, 2020, stipulates that "*A contractual relationship between a sportsperson and a sports organization established by an other contract, if the sportsperson carries out sport for the sports organization as a self-employed person, even in a manner that meets the features of dependent work, shall be deemed to be a commercial relationship*."

This is closely related to the transitional provision effective from February 1, 2020, expressed in § 106d of the Act on Sports: "*A contractual relationship between a sportsperson and a sports organization established before February 1, 2020 if the sportsperson performs sport for the sports organization as a self-employed person, even in a manner that meets the features of dependent work, is to be considered a relationship established by an other contract than a contract for professional performance of sport under this Act...*"

According to the members of parliament who proposed this amendment to the Act on Sport, these changes were to introduce the possibility for sportspersons (but in fact rather for the clubs) to "freely" choose between the status of a dependent worker or a self-employed person. It migth really be perceived as a sort of return to the idea of autonomy of will and contractual freedom generally accepted in civil law (with the exception of consumer relations) and in business law, pretending the clubs and the players are generally on an equal footing, none of them being a stronger or a weaker party.

However, the idea of freedom of contract (contract type) is not completely true, since the amendment to the Act on Sports provides for mandatory rules even as to the "other contract". Under § 46 (9) of the Act on Sports, the legal relations of a sportsperson and a sports organization established by an "other contract", if the sportsperson performs sport for the sports organization as a self-employed person, shall namely adequately be subject to the provisions of § 32 to 34, 38, 39, 40 (1) to (3), § 42 and 43 of the Act on Sports. This means that the 2020 amendment extends to the self-employed persons the regulation of the Act on Sports, which was intended only for players engaged in dependent work, namely:

(1) Basic obligations of the sportsperson (§ 32)
(2) Basic obligations of a sports organization (§ 33)
(3) Pre-contractual relations (§ 34)
(4) Ways of termination of a contractual relationship (§ 38)
(5) Agreement on termination of a contractual relationship (§ 39)
(6) Termination by notice (§ 40 (1) and § 41 (1) to (3))

(7) Immediate termination of the contractual relationship (§ 42)
(8) Temporary hosting of a sportsperson (§ 43).

In contrast, in comparison to the contract on professional performance of sport (sporting employment under the Act on Sports), "other contract" concluded between a club and a self-employed person shall not need to take into account and regulate:
(1) Basic obligations of the sportsperson (§ 32)
(2) the contents of the contract (§ 35),
(3) minimum wage claims (§ 36),
(4) working time and rest arrangements (§ 37).

It might thereby be open for discussion whether this mandatory regulation should be applicable only to voluntarily self-employed sportspersons performing dependent work under "other contract", or rather to all the self-employed sportspersons using other contracts outside the scope of the Act on Sports. These contracts were previously not regulated by the Act on Sports at all and were purely regulated by rules of general civil law and commercial law, if concluded under § 51 of the Civil Code or § 269 (2) of the Commercial Code. Should the amendment consider also their contracts to fall under the category of "other contracts", that would – somewhat ironically – mean the important penetration of mandatory rules into all those sporting contracts which were previously unregulated in the Act on Sports.

In any case, due to the 2020 amendment, the "other contract" became in fact a specific type of contract that the parties can agree to conclude as an atypical non-standard contract under § 269 (2) of the Commercial Code, but only within certain specific mandatory mantinels regulated by the § 46 (9) of the Act on Sports, as effective from February 1, 2020. This means that the contractual freedom was not broadened absolutely. The amendment wiped out those rules that served for social protection of players and instead preserved those mandatory norms that provide for contractual stability of the contractual relationships, serving the needs of the clubs mostly.

The "compromise" is thus at the end of the day neither the return to the contractual freedom applicable in civil law and commercial law (business law), nor the preservation of the limited contractual freedom applicable in labour law serving to protect the interests of the weaker party. It is a middle way – an experiment going in the direction of depriving sportspersons of some protection (and the clubs of the financial burdens connected thereto) while providing a certain level of mandatory regulation in sports relations for the sake of uniform regulation.

Conclusions

The dependent work in sports was traditionally a neglected topic and a field for legal experiments. At first, it was tacitly accepted that in spite of the wording of the Labour Code, sportspersons performing dependent work were illegally concluding contracts under the Civil Code or Commercial Code to perform their work. Only in 2015, the Act

on Sports introduced specific rules on sporting employment, which was to do away with those inflexibilites of the Labour Code that made the straightforward application of labour law onto sports impossible. Still, the sports sectors ignored the Act and with the exception of some disciplines such as football, continued with their practice of using contracts concluded under the Civil Code and Commercial Code, providing them with a larger scope of contractual freedom. This practice was approved by the 2020 amendment to the Act on Sports, broadening on the one hand the scope for contractual freedom, but on the other hand preserving certain limits for contracts used by fictitious self-employed persons (in fact performing dependent work in sport) – these contracts are newly to be concluded under the Commercial Code solely, while respecting mantinels laid down in § 46 (9) of the Act on Sports. Moreover, it might be argued that these mantinels were even further expanded onto the contracts which were previously not regulated by the Act on Sports at all – namely those of truly self-employed sportspersons in some individual sports (if any such contracts between the sportspersons and the sports organisations were concluded in some individual sports). This "compromise" can thus again be seen as another legal experiment tested in sports – this time an experiment with a sort of a middle category between employed and self-employed persons, with a somewhat broader contractual freedom as it is within the employment relations, but with less protection provided for the players.

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