

ЦИВІЛЬНЕ ПРАВО

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SOME ISSUES OF REALIZATION OF CONTRACTUAL STABILITY IN UKRAINIAN PROFESSIONAL FOOTBALL

The article is devoted to consideration of features of contractual stability and its realization in the sphere of professional football in Ukraine. The features of legal regulation and observance of the principle of contractual stability, consequence of its violation, in particular, which led to judicial proceedings, are studied. The conclusion about an important role of contractual stability in protection of rights and interests, both professional football clubs and professional football players was made. Particular attention is given to the relevant Ukrainian civil law and international norms of FIFA acts in order to determine how contractual stability is guaranteed in practice.

Key words: contractual stability, international transfers, compensation and solidarity mechanism, professional football.

Problem statement. The transfer system of modern Ukrainian football is based on strict observance and performance by its participants of the fundamental principles one of which is the principle of contractual stability. However, it is rather difficult to define the legal nature and features of such an international principle of football as contractual stability, especially its influence on the national law system, which regulates the sport sphere.

Analysis of recent research and publications. Among the scientists, which have worked with the questions of features of the principle of contractual stability, we can note the following people: Colantuoni L., Revello E, Michele Colucci, Ian Blackshaw, Boris Kolev, and others.

Paper purpose. The aim is to determine the legal nature and features of contractual stability in Ukrainian professional football.

Paper main body. The extensive autonomy granted to football sport organizations for the self-regulation of their activities is a fundamental characteristic of football as compared to other social activities.

In the absence of a special law in the professional football sphere, the self-regulation of public relations between subjects of this sphere steps forward. It should be noted that adoption of a special law would allow to combine

in a complex the autonomous regulation and self-regulation of civil relations in the sphere of professional football, thereby having recorded possibility of contractual self-regulation by participants of these relations [1, p. 44].

Contractual regulation in the sphere of professional football is important because the majority of relations in this sphere are regulated by the norms of civil law, the special role among which is played by civil contracts. The contract takes an important place in the international sports law in regulation of the relations that arising in command sports between participants of sports competitions [2, p. 69]. Civil contracts now are the most widespread basis of emergence of the majority of public relations and obligations in the sphere of professional football. For example, many contracts concluded within the framework of sports management or agency following normal civil law concepts [3, p. 23].

Along with contractual regulation, the procedural acts of sports organizations are important in the sphere of professional football. The local (corporate) acts of sports organizations play an important role in development of the international football competitions. It is connected with the principle of «unity of sport» which is realized in Europe. This principle means that management of different types of sport is always carried out «from above» by the international sports organizations (for example, the Fédération Internationale de Football Association (hereinafter — FIFA) and the Union of European Football Associations (hereinafter — UEFA) in professional football) which develop uniform rules (in the form of procedural, corporate documents) and oblige national sports federations to transfer such rules to the provisions, charters, other local documents [4, p. 30].

In Ukraine, the Football Federation of Ukraine (hereinafter — FFU) is an Association that has been admitted into membership of FIFA by the Congress. FFU as a member has the obligation to comply fully with the statutes, regulations, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (hereinafter — CAS) passed on appeal on the basis of Article 60 para. 1 of the FIFA statutes [5]. FFU according to this obligation frames and adopts local (corporate) acts on the basis of FIFA procedural documents.

It should be noted that contemporary football is caught between two very powerful concepts: the freedom of movement of players on one side and contractual stability on the other. The freedom of movement is the consequence of many social, cultural and political developments, which have caused an increase in international mobility of players in the recent past [6, p. 14]. Moreover, this specified principle completely corresponds to the right to free movement of workers, which is being guaranteed by the European Union as one of the fundamental freedoms of European law system. Nevertheless, in football sphere the right to move and reside freely within the territory of the member states of the European Union is limited to observance of the principle of contractual stability. Moreover, the FIFA rules to maintaining contractual stability in football are seem to be geared towards promoting a balanced competition as far as a football player is concerned.

The principle of contractual stability is one of the most important in the modern professional football. The aim of FIFA regulations in building an efficient transfer system is to protect the rights of professional football club and football players to safeguard the principle of maintenance of contractual stability between a professional football club and football players.

The principle of contract stability on the one hand is generation of norms of the FIFA and FFU procedural documents and isn't recorded by rule of law, on the other hand — it is directed to implementation of contractual self-regulation in the sphere of professional football.

The Head of Players' Status and Governance, FIFA Legal Affairs Division, O. Ongaro emphasized that the principle of maintenance of contractual stability between professional football players and clubs as well as the Dispute Resolution Chamber (hereinafter — DRC) were included in the FIFA Regulations on the Status and Transfer of Players and implemented within FIFA's regulatory framework in September 2001, following the agreement reached in March 2001 between the joint FIFA/UEFA delegation and the European Commission on the principles that should form the basis of international transfer rules in order to make them compatible with the European law [6].

FIFA attempts to provide a universal guideline on how to deal with contractual stability and international mobility. CAS had to decide upon several cases of unilateral breach of contract under Article 17 of the FIFA Regulations on the Status and Transfer of Players. In addition, Articles from 13 to 18 of the FIFA Regulations on the Status and Transfer of Players regard a fundamental principle of the international sports legal order: contractual stability between football clubs and footballers [7, p. 14].

Under the norms of the FIFA Regulations on the Status and Transfer of Players, a contract between a professional and a club may only be terminated upon expiry of the term of contract or by mutual agreement. However, a contract between a professional and a club may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause [8].

As it was already noted above CAS considers the cases arising of unilateral breach of contract under Article 17 of the FIFA Regulations on the Status and Transfer of Players.

Under the norms of the FIFA documents, a contract between a professional and a club may be terminated without just cause in following provisions.

In all cases, the party in breach shall pay compensation. Compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specific city of sport, and any other objective criteria; entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.

In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. The sporting sanctions shall remain suspended in the period

between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs.

In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach [8].

The FFU Regulations on the Status and Transfer of Players also fixes provisions of contract stability, in particular, Article 11 «Particular provision of terminating of the contract».

FIFA DRC and CAS firmly and unanimously always established that Article 17 of FIFA Regulations does not allow a club or a player to unilaterally terminate an employment agreement. The unilateral termination of an agreement between a player and a club without just cause or without «sporting just cause» is legally a breach of a contract. Any interpretation of Article 17 that are inconsistent with such a principle would result in a wrong application of the rule [7, p. 15]. According to this, the FFU Regulations on the Status and Transfer of Players have the obligations to sign the employment contract not only taking into account the labor legislation of Ukraine, but also taking into account requirements authorized and procedural documents of FIFA, UEFA, FFU and relevant associations. It was made with the aim of observing the principle of contract stability and conditions that the party in breach of terminating a contract without just cause shall pay compensation, because the labor legislation of Ukraine has not the similar norm.

Moreover, contractual stability is similar by the legal nature to norms of civil law about contractual regulation, in particular with the Article 525 of the Civil Code of Ukraine according to which unilateral refusal from obligation or unilateral change of its conditions shall not be allowed, unless otherwise established in contract or law and Article 651 of the Civil Code of Ukraine according to which amendment or cancellation of the agreement shall be allowed only by the parties' consent, unless otherwise is established by the agreement or the law [9].

Therefore, it should be noted that one of consequences of violation of the principle of contract stability is compensation payment. The FIFA Regulations on the Status and Transfer of Players does not contain the compensation calculation formula therefore compensation pays off for each case by the body which is considering dispute.

Juan de Dios Crespo Párez, the arbitrator of the European Handball Federation (ECA), noticed that «the contractual stability and the possibility to terminate a professional contract by a footballer ante tempus was not to be decided on a single angle but on a case-by-case basis and each proceedings will end with a different award, depending on several factors and multiple criteria» [10].

In a question of definition of compensation the important role is got by practice of the Sports Arbitration Court of Lausanne considering similar cases. For example, the provisions of Article 17 of the FIFA Regulations on the Status and Transfer of Players, was applied by the CAS in the well-known case of football player Matuzalem from Shakhtar Donetsk. Considering that this case played an important role in realization of contract stability in the Ukrainian football, we will focus the case of Matuzalem regarding the application of the parameters settled by Article 17 of the FIFA Regulations on the Status and Transfer of Players.

According to case (CAS 2008/A/1519), in July 2004 the Ukrainian club Shakhtar Donetsk signed a five year contract with the professional football player — Matuzalem Francelino da Silva. The Ukrainian club Shakhtar Donetsk paid a transfer fee of EUR 8,000,000 to the Italian club Brescia to secure the Matuzalem's services. Matuzalem had served three years of a five year playing contract with the Ukrainian club Shakhtar Donetsk in the 2 of the July 2007, when he decided to terminate his contract prematurely and unilaterally using the possibility given by Article 17 of the FIFA Regulations on the Status and Transfer of Players. After this, Matuzalem signed a playing contract with the Spanish club Real Zaragoza for three seasons with an annual remuneration of approximately EUR 1,000,000. The Ukrainian club Shakhtar Donetsk remained Matuzalem that he could only extinguish his playing contract and a join a the Spanish club «Real Zaragoza» (new club) if he paid the EUR 25, 000,000 to former club (Ukrainian club Shakhtar Donetsk) [11]. In particular, according to Clause 2.2 of playing contract of Matuzalem «transfer of Matuzalem to another club or a squad prior to expiration of the contract is supposed only with the consent of the Ukrainian club Shakhtar Donetsk and under condition of compensation the Ukrainian club's Shakhtar Donetsk expenses on the keeping and training of the Matuzalem, cost of his rights, search of substitute and other costs in full measure. The size of indemnity is defined under the agreement between the Ukrainian club Shakhtar Donetsk and Matuzalem» (Paragraphs 1 to 11 of The Court of Arbitration for Sport, the Matuzalem Decision, 19 May 2009.) [11]. According to Clause 3.3 of playing contract of Matuzalem, the Ukrainian club Shakhtar Donetsk may receive a transfer fee in amount of 25,000,000 EUR or exceeding the same above the Ukrainian club Shakhtar Donetsk undertakes to arrange the transfer in the agreed period [11].

After the studying of facts of the case and consideration of materials the CAS ordered that Matuzalem and the Spanish club Real Zaragoza (new club) were jointly and severally liable to pay to the Ukrainian club Shakhtar Donetsk (former club) EUR 11.86 million. Besides, in this case the conclusion was drawn that Article 17 of the Regulations does not provide a legal basis for the right to a unilateral termination of a contract between a professional player and a club. As clearly stated in the mentioned CAS award «Article 17 FIFA Regulations does not give to a party, neither a club nor a player, a free pass to unilaterally breach an existing agreement at no price or at a given fix price» and «the purpose of Article 17 is basically nothing else than to reinforce the

contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player » [11].

In assessing the amount of compensation payable by Matuzalem under Article 17(1) of the FIFA regulations, the CAS stated that a judging body must keep «in mind that the dispute is taking place in the somehow special world of sport. In other words, the judging body shall aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case» [11].

Besides, CAS accepted that despite that the exact extent of the damaged caused by the contractual breach it might include all the elements that is considered relevant. In particular, this conclusion was based on «the spirit of Article 17 para. 1 FIFA Regulations and having regard to the specificity of sport and to the applicability, subsidiarily, of Swiss law and in particular of Article 99 para. 3 and 42 para. 2 of the Swiss Code of Obligations, according to which if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and the measures taken by the damaged party to limit the damages...» [11].

In the *Juan de Dios Crespo Párez*, the arbitrator of the European Handball Federation, opinion that Matuzalem's case was quite different from that of Webster's case, because the transfer amount was not amortized when Matuzalem terminated his playing contract, with two remaining years still existing and no renewal of contract was involved. That is why a sum was granted to the Ukrainian club Shakhtar Donetsk (former club) for such pending amortization of the transfer fee. All the parties appealed to CAS and the novelty in the procedure at CAS has been the presence of FIFA, which has requested to be a party, even though Matuzalem and the Spanish club Real Zaragoza did initially not admit it. This is a clear sign that FIFA wanted, at last, not to be taken out of the legal decisions of CAS, contrary to its previous insistence not to be a party in the appeal [10].

Conclusions. Therefore, after studying the issue we can draw the following conclusions.

The contractual stability is one of the most important principles in contemporary professional football for which realization FIFA attempts to provide a universal guideline on how to deal with contractual stability. One of problems is diversity of national regulations in football that has internationalized rapidly and it is rather difficult to defend the contemporary transfer system in light of certain interferences with public and private law.

The principle of contract stability on the one hand is generation of norms of the procedural documents of FIFA and FFU and isn't recorded by rule of law, on the other hand — it is directed to implementation of contractual self-regulation in the sphere of professional football.

However, in Ukraine, the principle of contract stability by legal nature is civil and its applications to employment playing contracts contradicts the cur-

rent Ukrainian labor legislation. That is why the contractual self-regulation and regulations by local documents of FFU and procedure documents of FIFA comes to the forefront.

Summing up, it is justified that the FFU Regulations on the Status and Transfer of Players have the obligations to sign the employment contract not only taking into account the labor legislation of Ukraine, but also taking into account requirements authorized and procedural documents of FIFA, UEFA, FFU and relevant associations. It was made with the aim of observing the principle of contract stability and conditions that the party in breach of terminating a contract without just cause shall pay compensation, because the labor legislation of Ukraine has not the similar norm.

References

1. Гніздовська Г. М. Цивільно-правове регулювання суспільних відносин у сфері професійного футболу України [Text] : автореф. дис. ... канд. юрид. наук : 12.00.03 «Цивільне право і цивільний процес; сімейне право; міжнародне приватне право» / Гніздовська Ганна Михайлівна ; Ін-т законодавства Верховної Ради України. — Київ, 2014. — 20 с.
2. Hendrickx F. Player's Agents in Professional Football and Employment—Finding Laws in Belgium and the Netherlands [Text] / F. Hendrickx // ISLJ. — 2002. — p 23–27.
3. Thornton P. Sports Law [Text] / T. Patrick. — Burlington, Massachusetts : Jones & Bartlett Learning, 2010. — 823 p.
4. Тукманов С. А. Особенности трудового статуса профессионального футболиста [Text] : автореф. дис. ... канд. юрид. наук : 12.00.05 «Трудове право; право соціального забезпечення» / С. А. Тукманов. — М., 2007. — 24 с.
5. FIFA Statutes Regulations Governing the Application of the Statutes Standing Orders of the Congress of 2014 [Electronic resource]. — Access mode: <http://www.fifa.com/> — Title from the screen.
6. Ongaro O. Maintenance of Contractual Stability between Professional Football Players and Clubs — the FIFA Regulations on the Status and Transfer of Players and the Relevant Case Law of the Dispute Resolution Chamber [Text] / Omar Ongaro ; Contractual Stability in Football, by Colucci // European Sports Law and Policy Bulletin. — 2011. — № 1. — P. 45.
7. Colantuoni L. Contractual stability in professional football [Text] / Lucio Colantuoni // Спортивное право: перспективы развития : материалы Шестой междунар. науч. — практ. конф. / Моск. гос. юрид. акад. им. О. Е. Кутафина, Общерос. обществ. организация «Ассоциация юристов России», М-во спорта Российской Федерации [и др.] ; под общ. ред. К. Н. Гусова. — М. : [б.и.], 2012. — С. 14–19.
8. Regulations on the Status and Transfer of Players [Electronic resource]. — Access mode: <http://www.fifa.com> — Title from the screen.
9. Цивільний кодекс України [Text] : Закон України від 16 січня 2003 р. // Відомості Верховної Ради України. — 2003. — № 40–44. — Ст. 356.
10. Juan de Dios Crespo Pérez. Matuzalem CAS Award Commentary [Text] // International Sports Law Review Pandektis. — November, 2010. — Issue 3/4. — P. 170.
11. FC Shakhtar Donetsk (Ukraine) v. Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA; Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v. FC Shakhtar Donetsk (Ukraine) & FIFA, Award [Electronic resource] : CAS of 2008 (CAS 2008/A/1519). — Access mode: <http://arbitrationlaw.com> — Title from the screen.

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ДЕЯКІ ПИТАННЯ РЕАЛІЗАЦІЇ КОНТРАКТНОЇ СТАБІЛЬНОСТІ У ПРОФЕСІЙНОМУ ФУТБОЛІ УКРАЇНИ

Резюме

Стаття присвячена розгляду особливостей контрактної стабільності та її реалізації в сфері професійного футболу в Україні. Вивчено особливості правового регулювання та дотримання принципу контрактної стабільності, наслідки його порушення, зокрема, що призвели до судових розглядів. Обґрунтовано висновок про важливу роль контрактної стабільності в захисті прав та інтересів, як професійних футбольних клубів, так і футболістів-професіоналів. Особливу увагу приділено співвідношенню норм українського цивільного права і норм міжнародних актів ФІФА з метою визначення того, як контрактна стабільність повинна реалізовуватися на практиці.

Ключові слова: контрактна стабільність, міжнародні трансфери, механізм компенсації та солідарності, професійний футбол.

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Резюме

Статья посвящена рассмотрению особенностей контрактной стабильности и ее реализации в сфере профессионального футбола в Украине. Изучены особенности правового регулирования и соблюдения принципа контрактной стабильности, последствия его нарушения, в частности, приведшие к судебным разбирательствам. Обоснован вывод о важной роли контрактной стабильности в защите прав и интересов, как профессиональных футбольных клубов, так и футболистов-профессионалов. Особое внимание уделено соотношению норм украинского гражданского права и норм международных актов ФИФА с целью определения того, как контрактная стабильность должна реализовываться на практике.

Ключевые слова: контрактная стабильность, международные трансферы, механизм компенсации и солидарности, профессиональный футбол.