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Rule of the Game v. Rule of Law: Had Ukraine Finally Resorted to CAS?

Dmytro Koval (Avellum) · Monday, August 5th, 2019

It is no secret that each sport has its rules of the game with appropriate sanctions for violating them. However, it may be new for someone that sports also have its own dispute resolution system. Almost every sports organization has its own internal dispute settlement bodies, whose decisions may be appealed to Court of Arbitration for Sport seating in Lausanne, Switzerland (hereinafter – CAS) as the last instance.¹⁾

What is so important to know is that sports organizations prohibit their participants to bring their cases before state courts, by including respective provisions in their statutes.²⁾ Recourse to state court may lead to serious sanctions, up to exclusion from competition, which is comparable to a “professional death” of such participant. Nevertheless, Ukrainian athletes, although being subject to limitation, regularly submit their claims to state courts, thereby creating contradictory court practice as state courts have different approaches towards jurisdictional issues.

Recently, the Supreme Court has adopted a vital decision supposed to draw the line to all the previous practice and at the same time be guidance to courts in considering future claims. Since that landmark decision, new claims from athletes have already been submitted to Ukrainian courts, but are courts ready to recognize the exclusive jurisdiction of sports dispute resolution system?

What Supreme Court Ruled

In 2015, a referee was banned for life by the Federation of Basketball of Ukraine (hereinafter: “FBU”) from any competition under the auspices of the FBU due to violation of the rules of “fair play” (attempts to influence some players of the national team) during the competition among national teams (U16) at the European Championship, which took place in August 2015 in Sofia (Bulgaria). Disagreeing with that decision, the referee appealed to the state administrative court.

Administrative courts of first and appeal instances dismissed the claim since they considered it a civil law case rather than public law case, thus sending the claimant to civil courts. The referee did not agree and appealed to a higher court.

In March 2019, the case had gone as far as the Supreme Court where it was finally dismissed. The Court decided that none of national courts has jurisdiction to deal with this dispute. The Court

clarified that the referee, being the member of the FBU, should follow its internal rules, which refer disputes between FBU and its members over “rules of the game” and “fair play” to exclusive jurisdiction of arbitration at CAS.

In essence, the Court finally recognized the exclusive jurisdiction of internal dispute settlement bodies and the CAS as appeal instance to consider internal disputes over rules of sports between sports organizations and athletes.

Bounds of Internal Dispute

At the same time, in another recent case, a civil court accepted its jurisdiction to consider the employment dispute between an athlete and a football club, despite the fact that employment contract contained clear arbitration clause referring all disputes to internal dispute settlement body and the CAS.

In the court’s view, the arbitration clause did not deprive the athlete of his constitutional right to a fair trial. The court found that this employment dispute went well beyond the scope of internal dispute and should be resolved in accordance with Ukrainian law.

Such a court’s decision is actually in line with another Ukrainian law, which directly prohibits recourse of employment disputes to arbitration.³⁾ However, because the court in its findings did not rely on this more appropriate ground for refusal, it becomes clear that courts acknowledge sports dispute resolution system as a place for solving “internal disputes” only, even if the parties agreed otherwise.

From these two decisions, it seemed that Ukrainian courts have finally referred internal disputes over rules of the game to sports organizations and CAS, and limited their jurisdiction to disputes which go beyond the scope of internal disputes, such as employment disputes between athletes and clubs.

Do the Courts Adhere to Such a Test?

In June 2019, a football club had been refused in accreditation by Ukrainian Association of Football (“UAF”) to participate in the competition of Professional Football League (“PFL”). The club’s appeal to dispute settlement body of UAF was also dismissed, thus they submitted a claim to state court.

In July 2019, the state court opened proceedings under the club’s claim by applying to European Court of Human Rights case *Melnyk v. Ukraine*⁴⁾ that the right of access to court cannot be limited in such a way or to such an extent that its very essence is impaired.

What is more interesting, the state court satisfied the club’s requests for interim measures securing their claim, including, *inter alia*, discovery of accreditation documents submitted by other football clubs, and even prohibition to UAF and PFL to carry out drawing and agreeing on a calendar of league championship for the season 2019/20 and the Ukrainian Cup. Currently, interim measures

are pending on appeal by UAF and PFL; however, significant damage to the whole championship continues to inflict.

Put plainly, the state court not only ignored the Supreme Court's decision and accepted its jurisdiction over internal sport-related dispute. The state court has also blocked part of Ukrainian football championship until it ensures the right of a club to a fair trial and decides on the merits of the dispute.

Consequences for Sports

Although Supreme Court's ruling seemed to limit courts' jurisdiction to disputes which go beyond the scope of internal dispute, it is nevertheless clear from the recent cases that courts are not ready to adhere to this test. Lower courts are still eager to accept jurisdiction in internal sports-related disputes on the pretext of enhancing protection of the right of access to court and right to a fair trial.

The crucial question is: Would sports organizations decide on the same subject of the dispute in its own dispute resolution system and apply sanctions to its members who used state courts instead of CAS?

Such ambiguous courts' approach could not only lead to a situation of parallel proceedings with two different decisions but may result in serious sanctions from sports dispute settlement bodies against parties who obtained decisions from state courts.

Reasons Why Sports Disputes Go to State Courts

Perhaps the main reason why Ukrainian athletes and clubs initially go to state courts instead of appealing to CAS is a simple lack of financial opportunities. Appeal to CAS requires a minimum administrative fee of 1,000 Swiss francs, not to mention arbitrators' fees⁵⁾ and legal fees, among other expenses.

Therefore, in most cases, athletes or clubs, having received a decision of internal dispute settlement body of their organization find themselves in the blind corner. Only a few of them go for justice to state courts, even at risk of unavoidable conflict with their organization and imposing sanctions against them. Most of them do not wish to bite the hand that feeds them and give up their claims.

International Practice

One of the possible solutions of this issue may be the creation of a sports arbitration court in Ukraine as an alternative independent appeal institution to the CAS. Such an organization could combine all the benefits of the CAS, as impartiality, qualified arbitrators with in-depth knowledge of sports and time efficiency. At the same time, such an arbitral institution in Ukraine would be more cost-efficient.

Such sports arbitration courts successfully operate in other countries such as the United Kingdom, Ireland, Italy, Portugal, France, Canada, Russia and others. Ukraine may follow good practice of other countries and create its own sports arbitration institution.

By making the sports' justice more accessible to Ukrainian sports, creation of such an institution would probably deprive Ukrainian sports-related persons of the need to appeal to state courts, leading to the end of conflicts over jurisdiction.


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References

¹ CAS decisions may then be challenged to Swiss Federal Tribunal, although based on a limited number of, mainly procedural, grounds.

² Art. 59 of FIFA Statutes.

³ Art. 6 of Law of Ukraine on Arbitration Courts.

⁴ Case of Melnyk v. Ukraine (Application no. 23436/03), judgment dated 28/03/2006, par. 22, 23.

?5 CAS does not charge arbitrators' fees in disciplinary disputes, however, the administrative fee still applies and professional legal support is required.

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