The Analysis of the Contracts of the Professional Athletes Based on the Hungarian Classification System

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The contracts of the professional athletes pose several issues including the classification of their legal status. Regarding the constantly changing business aspects, the traditional civil law and labour law paradigms are bent by the unique nature of the professional sports activity, therefore it is important to establish a guideline that helps to determine the relevant regulations relating to these professional sports contracts consisting of different special aspects. As per the Hungarian legislation and practise the contractual relationships are assessed by primary and secondary criteria laid down by the Directive 7001/2005 (MK 170) FMM-PM on the criteria for classifying contracts of performing work. However, the directive cannot always offer the necessary guideline to classify professional sporting contracts. Therefore, this study aims to point out the inadequate or obsolete aspects of the primary criteria that causes the directive to fail in terms of classification..
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As the field of sport evolved, it offered a unique opportunity to establish businesses based on the sport events and the sport activity of the professional athletes. This business formula started to take shape in the second half of the XIX century due to a strong commercialisation process. Therefore, the growth of the sport businesses required the sport sector to utilize the corresponding contract types for the employment of the professional athletes. As for concluding a contract, the parties will shall align and the terms of the contract shall determine the type and the legal frame of the contract. This principle also should prevail in respect of the sport sector, but the unique characteristics of the sport activity provide additional aspects that forces the sport sector to deviate from the conventional practice in respect of contract negotiation and employment. Therefore, the classification of the professional athletes' contract poses intriguing questions whereof some shall be discussed in this study.

Scope of the study

This study aims to observe some of the questions arising from the classification of the professional athletes' contracts. The analysis is based on the Hungarian classification system set forth in the Directive 7001/2005 (MK 170) FMM-PM on the criteria for classifying contracts of performing work[1] (hereinafter FMM-PM Directive or Directive). According to the Hungarian classification system, a contract is either deemed a contract of employment or another type of contract. So, this approach constitutes a binary classification system meaning there is no in-between legal status causing collisions among the provisions and dogmatical perspectives of the Hungarian Labour Law codex and Civil Law codex. Therefore, observing the questions posed by the classification of the professional athletes' contract, in my opinion, is quite significant without a doubt.

The reasons for classifying contracts

First of all, it is also important to have an overview of the reasons for classifying contracts since the chosen type of the contract determines the corresponding Act that governs the terms and conditions of that certain contractual relationship. Another reason for classification is relating to the tax regulations because different types of contracts of work require different taxation that usually provides an outstanding opportunity for the employers to avoid paying higher taxes after their employees by disguising employment relationships.[2] Unfortunately it is not hard to achieve since one can do so by creating a deceptive appearance that the performing party is an independent contractor.

In Hungary before the regime change, the classification of the contracts fulfilled the purpose of revealing which terms and conditions govern the parties' relationship. After the regime change, it became important to determine which tax regulations govern the contracts of work.[3] As per the Act I of 2004

1 See the title of the directive in Hungarian: 7001/2005. (MK 170.) FMM–PM együttes irányelv a munkavégzés alapjául szolgáló szerződések minősítése során figyelembe veendő szempontokról

2 For contracts at the intersection of several areas of law, see: Arató, Balázs: A klasszikus polgári jogi szerződéses jogviszony és a közbeszerzési szerződéses jogviszony összehasonlítása, In: Boóc, Ádám; Csehi, Zoltán; Homicskó, Árpád Olivér; Szuchy, Róbert (szerk.) 70: Studia in Honorem Ferenc Fábián; Budapest, Magyarország: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2019); pp. 31-35.

3 Hovánszki Arnold: *A munkaviszony és munkavégzésre irányuló egyéb magánjogi jogviszonyok elhatárolása,* Cég és Jog 2001/7-8. 9.

on the Sports (hereinafter Stv.) 8.§ section 1 the agency fee paid for the professional athletes shall be accounted as wage cost, so there is no reason for trying to avoid the less beneficial taxation since the same taxes shall be deducted from the salary of the professional athletes. Therefore the importance of the classification lies within another aspect that is determining the corresponding terms and conditions of the contract.

In the following chapters the primary classification criteria shall be analysed set forth in the Directive having regard to the limited scope of the study and the nature of the primary classification features since in the event of identifying even one of the primary criteria is enough to consider the contractual relationship as a contract of employment.

The nature of the performance and the functions of the job

The duty of performing work incurs in a continuous and recurring way within the frame of an employment relationship. Therefore the set of work required to be performed by the employee are determined collectively as job that incorporates the duties of the employee who does not undertake to achieve a specific result by performing a task, but rather agrees to perform a job including several subtasks that is a fairly unknown condition is respect of the contractual relationships governed by the civil law.[4] However, there are some exceptions caused by certain financial progress that agency contracts are also likely to be concluded to establish a long term business relationship. Due to this practice one can notice that the purpose and aspects of the employment contract and the agency contract are getting closer to each other.[5] It is interesting to see such paradox since it means that the certain contracts governed by the civil law are not just concluded to undertake a specific task, but assign the work to the care of the agent to perform it regularly for a longer period of time.

In respect of the sport activity, one can notice the before mentioned paradox even more due to the fact that it is hard to determine the work to be performed by the athletes as a continuously and regularly incurring task as it is required within the frame of an employment contract. It also poses a problem to assign the work to the athlete as a single task within the frame of an agency contract. The reason for this lies within the description of the duty of the athletes set forth in the contracts of professional sport employment con-

4 Directive 7001/2005. (MK 170.) FMM–PM [IV. 2.]

5 Prugberger Tamás – Szekeres Bernadett: *Az új típusú foglalkoztatási formák és azok kihatása a tevékenységgel összefüggő szerződések dogmatikájár,* Állam- és Jogtudomány 2022/2. 68-69.

cluded between the athlete and the sport club. In one of the decisions of the Curia one can find that according to the terms and conditions described in the contract of the sport activity, the athlete is required to perform the sport activity within the frame of that certain sport and strives for a successful performance during the championship.[6] At first glance, it seems that this kind of activity could be solely carried out within the frame of an employment contract since the aspects of the duty aligns with a job description, but it also poses the question of how does the nature of the sport activity affect the subject of the service. In my opinion, it should not be ignored that the successful performance also falls within the interest of the athletes since this is the key for them to acquire sponsorship and be enlisted to the national team.[7] This aspiration of the athletes, carrying out their activity based on an agency contract, ipso iure creates a situation in which the they must take part in different sort of trainings and submit themselves to the orders of the coach since without doing so there is no other way to achieve the required performance level needed for the successful competing.

The duty of performing work in person

The Act I of 2012 on the Labour Code (hereinafter Mt.) 52.§ (1) point c) declares one the most significant aspect of the employment contract stating the employer shall carry out the work in person which also means they are unable to assign the work to a subcontractor of their own. However, it is possible to substitute an employee with another one, but this decision falls within the authority of the employer. On the contrary, within the frame of the business contracts or the agency contracts it is not uncommon to have a subcontractor to perform the work due to the regulations of the Civil Code.[8]

The before mentioned aspect is not eligible in the terms of the classification since having regard to the sport activity neither the employment contract nor the agency contract is suitable for having a subcontractor to substitute the athlete which is a rather obvious fact due to the nature of the sport, meaning the interest of the athletes requires them to carry out their activity in person, otherwise they would risk their successful performance. Furthermore, the unique nature of the sport and competitions conceptually excludes the possibility of having a subcontractor due to the regulations relating to the game

6 See the decisions of the Curia (Supreme Court of Hungary) and the Tribunal of Kaposvár: Kúria Mfv.10082/2022/4. [1]; Kaposvári Törvényszék M.70087/2021/24. [1].
7 Baker, Bradley J.: Competitive Balances. In: Pedersen, Paul M. (szerk.), *Encyclopedia of Sport Management*, Edward Elgar Publishing, Northampton, 2021, 93-94.
8 Directive 7001/2005. (MK 170.) FMM–PM együttes irány [IV. 2.]

license of the athletes that they convey to the sport club so as to carry out their sport activity. The nature of this legal institution poses a few intriguing questions but most of it falls outside the scope of this. However, it still have to be mentioned that the game license is a personal right of pecuniary value[9] which cannot be aligned with the concept of subcontractor. In case of substitution the sport activity of the athlete cannot be interpreted properly since it would be perceived as the sport activity of the subcontractor. Beside all of the before mentioned aspects, it is important to notice that depending on the will of the parties a subcontractor shall contribute to the performance of the work but they can also exclude it in the scope of a traditional agency contract. So this ambiguity makes this classification aspect quite controversial.

According to the FMM-PM Directive the presence of even one primary criteria of classification can be significant in terms of deeming a contractual relationship to an employment contract.[10] However, this criteria is not eligible for the classification due to the aforementioned reasons which might imply that based on this criteria the classification of the contract of the professional athletes ceases to be possible.

Duty of providing work and be at the disposal of the employer

The duty of providing work for the employee is also considered a prominent classification criterion declared by the Mt. 51. § section (1). Compared to civil law, it is a crucial difference that in the scope of employment relationship the employee is entitled to their personal base wage if the employer is unable to provide work according to Mt. 147. § section (1). Essentially the employee is entitled to the fee set forth in the employment contract even if there is no work to be performed while in most of the cases the agent is entitled to the agency fee if they perform the specified task. So, the agent as an independent contractor is not necessarily obliged to be at the disposal of the principal since they undertake a specific task meaning the principal is neither obliged to regularly provide work. However, as per Act V of 2013 on the Civil Code (hereinafter Ptk.) 6:276. § section (1) the agent shall be entitled to the agency fee even if their performance did not produce results. Taking a look at these regulations, in some cases within the frame of both contractual relationships the performing party shall be entitled to the agreed fee apart from the lack of work.

In my opinion, it is possible that the border line between the previously mentioned contract types are close to merge since the athletes performing

9 For more details see Burján Anna: *Csődbe ment terv? A sportolók játékjoga biztosítékként való felhasználásának nehézségei*, Sportjog 2021/2-3. 43-50.
10 Directive 7001/2005. (MK 170.) FMM–PM [IV. 1.2.]

sport activity based on agency contract aspire to participate in competitions in a certain period of time according to their schedule. On the other hand, it would be a mistake to ignore that the athletes performing as agents have the right to decide which competition they participate in. Within the frame of employment relationship, it works in the way around since the athletes shall perform sport activity as they are instructed by the employer.

Continuing the previous thought, there is a decision of the Curia delivered during the Covid-19 pandemic that is worth considering due to its relevant factors of performing sport activity.[11] The decision addresses the concerns whether the restrictions due to the pandemic caused a downtime of work during the championship. The answer for this question has significant consequences since it determines whether the sport club was obliged to provide work for the athlete or not at that time. If so, the athlete is entitled to their base wage in case the sport club fails to provide work for them. Curia declared that the employees fulfil their obligations even if they perform only a specific part of the job since in some cases certain subtasks are not possible or necessary to be performed. Furthermore, the different tasks belonging to the job can be complex that are determined by the needs and instructions of the employer. Therefore, performing only a certain amount of the job does not provide sufficient legal basis for deducting the base wage of the athlete.[12] There are several significant aspects of the decision, but one must be highlighted in connection with the topic of this study. The decision declares that partly performing the work is not necessarily considered a default performance which makes the borderline of employment contract and agency contract more ambiguous since according to the regulations of agency contract the agent can be entitled to the agency fee even if their performance did not produce results. However, it is undeniable that this specific trait of the employment relationship still firmly prevails compared to the other classification features, therefore this aspect itself seems to perpetuate the employment contract as a separate contractual relationship. However, this concept is not flawless unless we ignore that the parties of agency contracts can agree on the submission of the athlete to the coach who carries out instructions and determines the method of the training. This type of activity also consists of several subtasks as well as a job.

11 For a segment on the difficulties caused by COVID-19, see here: Arató, Balázs: Jogi lehetőségek a gazdasági társaságok működésének és pénzügyi egyensúlyának fenntartására a járványügyi veszélyhelyzetben; in: GLOSSA IURIDICA 7: különszám; 2020; pp. 95-120.

12 BH 2022.10.271 [34]-[35].

Subordinate to superior relationship

Without a doubt, the subordinate to superior relationship is a unique characteristic of the employment relationship which aspect obviously is impossible to be interpreted within the frame of civil law relationships since according to the concept of such relationships the contracting parties are in a side-by-side status. The hierarchy can be realised by the observing the extent of the integration in the organization of the employer that shows how much the employee depends on the organization of the employer while performing work. This amount of exposure conveys the superior position to the employer entitling it to instruct the employee.[13]

Considering the classification, the aforementioned aspect is of particular importance in general unless it has to be interpreted within the frame of professional sport activity since athletes performing as agents also have to submit themselves to instructed trainings so as to achieve compelling results both for themselves and the sport club. This phenomenon is supported by the following court decision[14] declaring that the regular personal performance of work and submission to the instruction of the coach in general does not provide enough legal basis for deeming the certain contractual relationship as an employment relationship. The court elaborated that the same terms and conditions can be incorporated into agency contracts. Furthermore, having the contractual relationship deemed an employment relationship it is not sufficient to observe only the terms and conditions relating to the fee since the athlete as an agent can be paid on monthly basis as well.

Conclusion

The parties may also conclude mixed agreements based on the principle of freedom of selection regarding the type of the contract.[15] Therefore, following the aforementioned principle the athletes and the sport clubs could also conclude an atypical contract consisting of mixed terms and conditions deriving from traditional contracts. In my opinion, the following concepts seems reasonable according to which concluding agency contract for solo sports and competitions is justified whereas the contract of employment may not be appropriate for spectacle team sports since the subject of the contract hardly

13 Directive 7001/2005. (MK 170.) FMM–PM [IV. 2.]
14 Decision of the Supreme Court: Mfv.11076/2009/5.
15 Hovánszki Arnold: *A munkavégzésre irányuló vegyes szerződések megítélése*, Cég és Jog 2001/9. 5-6.

suits the frame of the employment.[16] However, in certain extent it is also a relevant problem in respect of the agency contract that it cannot be aligned with the nature of spectacle team sports since as it was mentioned previously there are some aspects that fall outside of the frame of civil law contracts.

There is a significant discrepancy that might turn the tide over to the employment contracts in respect of the classification. That tipping point occurs due to the fact that the athlete is subordinated to the instructions of the employer causing the athlete to obey the instructions relating to the method of the trainings and performance. In the scope of agency contract the agent is not obliged to do so according to the general terms, moreover in theory the agent is entitled to decide when to compete, but as it was previously mentioned the athletes are compelled to submit themselves to the instructions otherwise they were unable to achieve the necessary performance level which is indispensable to have sponsorships and earn sufficient wage. Therefore there are a legal and socio-psychological trust between the parties in respect of both contractual relationship types since the contracting parties are forced to establish a strong and trustful relationship to achieve the common goals in which they depend on one another. To certain extent, within the frame of both contract types the performing party is obliged to carry out their obligations based on duty of care which poses the question of how can be separated the two types of contractual relationship. Also, another important question is to what extent can be separated these types of contracts and is it necessary at all to do so in respect of the professional athletes based on the traditional categories of contracts. The last question is escalated by the fact that the nature of the sport requires a performance based on duty of care causing the borderlines of both contract types to become ambiguous.

Apart from the traditional classification features and categories of the contract, another aspect might serve as a guidance. The subject of the contract marks the service to be performed by the obliged party whereas the content of the contract addresses the rights and obligations of the parties.[17] It regulates the dynamics of the contractual relationship and the conduct relating to the performance. However, it shall be considered that the contract law is meant to regulate the economic activities and relationship of the society, therefore the practice of transactions reflects on the contracts and form it. Eventually the market economy resulted in such globalization, commercialization and production workflow that stretches the frame of the currently

16 Ibid. Horváth 5.

17 See the Commentary on the Hungarian Civil Code: *Polgári jog I-IV. - régi Ptk. - Kommentár a gyakorlat számára*, A HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2012, Kötelmi jog fejezet [IV. 1.]

known categories of the contracts creating new types of contracts and contracting techniques in respect of certain traditional civil law contracts.[18] In this manner, the diligent performance of tasks is the only clear aspects of the professional sporting contracts since the field of sport is constantly evolving, therefore the newly adapted practices of the market have significant impact on the agreements concluded between the parties.

18 Papp Tekla, *Atipikus szerződések,* A HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2019, 14.