SPORTS SPONSORSHIP CONTRACTS, CONTRACTUAL FIDELITY AND THE COVID-19 PANDEMIC

The recent confirmation by the International Olympic Committee that the Tokyo 2020 Olympic Games will be postponed until next year is only one of the latest blows to an already severely impacted sporting season due to the Covid-19 pandemic.

Indeed, all major sports competitions have already been affected. For example:

- Almost all European national football competitions have been suspended and UEFA has decided to postpone all of its competitions to unknown dates, including the Euro 2020 which should take place in 2021;
- The UCI decided that no events on the UCI International Road Calendar would be held until further notice and that a new calendar will be established, giving the priority to the three Grand Tours (the Giro d'Italia, Tour de France and Vuelta a España) and cycling's other major events;
- The Formula 1 Grand-Prix of Australia and Monaco have been cancelled and all other Grand Prix which were due to take place between March and June 2020 have been postponed;
- Wimbledon and many other tennis tournaments have been cancelled, the ATP and WTA tours are currently suspended, and the French Open has been postponed (at this stage) to Sept. 20-Oct. 4 2020.

While the majority of such disruptions to the sporting calendar should remain temporary and the respective governing bodies appear to be working on new calendars, the global situation remains uncertain as the list of affected events is getting longer by the day and there is no guarantee yet as to when events will be able to take place.

In the context of the COVID-19 pandemic and its consequences on sporting seasons, the parties to sponsorship contracts may wonder what their options are when the performance of their agreements is disrupted due to unforeseen events, and will inevitably wish to scrutinize and ascertain their rights, obligations and potential liabilities. In particular, the parties will have to assess whether their contracts cover, specifically or implicitly, the issues related to the coronavirus crisis. If not, the parties may need to consider whether other legal provisions apply to their relationship and situation.

This short article aims at exploring which options could enter into play in the current "coronavirus context", in particular under the very common "*force majeure*" clauses and other contractual clauses typically inserted in sports sponsoring contracts as well as under Swiss law.

A. The issue at stake

Sponsorship contracts are concluded with a "sponsored party" (usually an individual athlete, team, club or sports organiser/organisation), and typically authorize the other party, the "sponsor", to associate with the sponsored party in various ways and in exchange for its support (whether it be financial, in-kind or both).

From the perspective of the sponsored party, it may seem obvious that the performance of their side of the contract is currently disrupted due to the COVID-19 pandemic (be it because of governmental restrictions or decisions from the concerned sport's competent governing body leading to the cancellation or postponement of sporting events). The scope of such disruptions should, however, be analysed on a case-by-case basis, taking into account the peculiarities of each situation and assessing whether such disruptions have an effective impact on the balance of a sponsoring contract.

From the perspective of the sponsor, the situation may be different in the sense that, in theory, the performance of the sponsor might not necessarily be affected by the COVID-19 pandemic. Indeed, sponsors usually provide financial support to the sponsored party and, by definition, the payment of a sum of money is never definitively impossible (unlike, for instance, in case a sponsor also or alternatively provides an "in-kind" support to the sponsored party, and where such supply of goods may be affected). Nevertheless, the disruption of the sponsored party's performance may create an imbalance between the parties against which the sponsor may try to protect itself.

In either case, the main question is whether the COVID-19 pandemic may constitute a valid ground for delayed performance, partial performance or non-performance of the parties' contractual obligations.

B. Could the COVID-19 pandemic constitute a case of "force majeure"?

The answer depends of course on the content of the parties' agreement and may not be straightforward.

In practice, sponsoring contracts often include specific "*force majeure*" clauses according to which certain unforeseeable, unavoidable and insurmountable events may trigger different contractually agreed mechanisms.

In general, such clauses include a definition of what could constitute a case of "*force majeure*", including by way of a general definition and/or by listing examples of "*force majeure*" events.

As a result, the parties will first have to analyse if a pandemic or its consequences (e.g. lockdowns and other administrative restrictions) are explicitly or implicitly covered by their "*force majeure*" clause, or if such pandemic is covered by a general definition of "*force majeure*" events.

Where the contract is subject to Swiss law, this will of course require an analysis with reference to the guiding principles of contractual interpretation under Swiss law.

Secondly, if the COVID-19 pandemic falls within the scope of a "*force majeure*" clause, the consequences will depend on what was contractually agreed between the parties.

In many cases, the implications will be clear, as the clause could (for example) provide that the performance of both parties is suspended for a certain period or until a certain time, after which the parties may have a right to terminate the contract if the "*force majeure*" event has not ended.

However, it is likely that many parties have not paid special attention to the drafting of their force majeure clauses (precisely because such events are extraordinary) and thus many "*force majeure*" clause will have to be interpreted in light of the actual situation of the parties and on the basis of the entire agreement.

C. Are there other contractual clauses under Swiss law which may be relevant in the case of the COVID-19 pandemic?

The key principle underpinning the Swiss Code of Obligations (SCO) is the contractual freedom of the parties. Thus, the parties may have included any number of other clauses in their contract which could be relevant in the current context.

Based on our experience, relevant examples may include:

- guarantee and liability clauses, which can transfer or allocate the risks of the parties, exclude or limit certain liabilities;
- clauses which provide for an extension or suspension of time in the event of continued delay or non-performance;

- hardship clauses or other clauses allowing the parties to renegotiate or adapt their contract;
- clauses giving the right to terminate the contract due to the fact that the sponsored party is unable to compete or perform in its sport for a certain period (e.g. due to illness or any other condition).

In the context of sports sponsorship contracts, where the parties usually seek to build long term relationships, the most interesting type of clause may be the hardship clause.

Indeed, such clause gives the parties the possibility to renegotiate or adapt the contract when an unforeseen change in the initial circumstances surrounding the contract has occurred in way that performance would be excessively burdensome for one party. In that sense, hardship clauses allow the parties to maintain the balance of their contract, by providing the parties with a right to renegotiate on the basis of the general principles of fairness and good faith.

Well-drafted hardship clauses should clearly define the events that could trigger such provisions as well as their consequences, in particular whether or not the parties have an obligation to renegotiate their contract and how they could modify or adapt their contract. However, once again, it is possible that these clauses have not been carefully considered in advance, and any final assessment will be highly dependent on the basis of the specific circumstances and the entire contract in question.

D. What is the situation under Swiss law generally?

For various reasons, in particular because most of the major international sports governing bodies are domiciled in Switzerland and the Court of Arbitration for Sport is seated in Switzerland, Swiss law plays an important role in the sports industry. In this context, sports sponsorship contracts are often governed by the Swiss substantive law.

Under Swiss law, all contractual relationships are governed by the doctrine of "*pacta sunt servanda"* (contractual fidelity), a well-known legal principle according to which the agreed contractual obligations are binding upon the parties and must be adhered to.

However, such principle of contractual fidelity is not without exceptions and/or limitations.

If the effects of this COVID-19 pandemic have not been dealt with in a sponsorship contract (i.e. if a sponsorship contract does not contain any specific provision regarding "*force majeure*" or other contractual mechanisms such as hardship, transfer of risk, etc.), the following two legal concepts may nevertheless be relevant:

1) The doctrine **of impossibility (article 119 SCO)**, which is akin to a "*force majeure*" clause and may be applicable when circumstances beyond the debtor's control arise which prevent (totally or partially) the performance of its obligation.

The following two conditions must be met:

- A subsequent impossibility. The performance of the debtor became impossible; it can no longer be performed due to a cause subsequent to the conclusion of the contract. It does not matter whether the impossibility arises from factual circumstances ("acts of god") or from legal circumstances (administrative prohibition for instance). It is, however, important to note that such impossibility must be related to the "object" of the performance and that, unlike for specific goods, the payment of a sum of money is, by definition, rarely definitively impossible.

- Not attributable to the debtor. The debtor must not be liable for the impossibility, by virtue of a contractual or legal obligation, and the impossibility must not fall within his sphere of risk. The subsequent impossibility shall therefore arise from a fortuitous event, for which neither the debtor nor the creditor is responsible.

The effects of a subsequent impossibility not attributable to the debtor are the following:

- The debtor's performance obligation is extinguished. The debtor is discharged from the performance it owes, and is not bound to make reparation for the harm caused to the creditor, provided it does everything in its power to mitigate the damages in accordance with the principle of good faith. However, if there is a substitute for the performance of the obligation which became impossible (such as a replacement value provided by an insurance company or an alternative product), the debtor must pass it on to the creditor; who may accept such substitute or not. In the case of sponsorship contracts in the current context, it is hard to imagine any acceptable substitute to major sporting events which have been definitively cancelled.

- The creditor's counter-performance obligation is also extinguished. In itself, the impossibility for the debtor to provide its performance does not prevent the creditor from providing its own performance, but the latter is also discharged in order to correct the imbalance which might result from the impossibility. However, the parties will remain bound by certain ancillary obligations under their contract (e.g. an obligation of confidentiality). In certain circumstances, the creditor may also claim the return of what was already provided to the debtor, according to the rules of unjust enrichment.

In general, the application of the doctrine of impossibility will depend on the circumstances of the case, however what is essential is that the impossibility – being total or partial – is permanent. In other words, the situation would be different depending on whether a competition is completely cancelled or only postponed.

2) The **doctrine of "exorbitance" or unpredictability** (*"clausula rebus sic stantibus")* is comparable to hardship clauses. It may be applicable when the performance of a contract is not theoretically impossible, but following an unforeseeable change in circumstances the maintenance of a contract "as it is" would lead to an obvious imbalance between the performance and the counter-performance and insisting on such disproportionate performance would appear abusive.

Indeed, in exceptional situations and when circumstances have fundamentally changed since the conclusion of the contract, it may be possible for a party to refuse to strictly perform its obligation and require an adaptation of the contract.

Two conditions must be met:

- New, unavoidable and unforeseeable circumstances have occurred. An adaptation of the contract may only occur if the change in circumstances following the conclusion of the contract was not reasonably foreseeable.

- An obvious imbalance between the parties' obligations / An excessive burden on the debtor. The change in circumstances must be so significant that the burden of performance on the debtor has become excessive. The balance between performance and counter-performance must have been seriously affected by the new circumstances.

If those conditions are fulfilled, the principle of good faith in business requires that the parties shall renegotiate their contract in order to adapt it. In that sense, it is also important to note that the affected party should not have performed its contractual obligation without reservation following the occurrence of the new circumstances. If a renegotiation has taken place (spontaneously or at the request of a court), the courts may adapt the contract by determining the solution which the parties would have adopted in good faith if they had foreseen the change of circumstances at the time of the conclusion of the contract.

E. What does all this means?

At a time of great uncertainty due to the COVID-19 pandemic, it is safe to say that the whole sports industry is facing major disruptions and that the parties to sponsorship contracts will wish to scrutinize and ascertain their rights, obligations and potential liabilities.

As outlined in this short article, sponsorship contracts may already be equipped with different clauses which could give their parties the right tools to adequately tackle the current disruptions to the sports competition calendars. Nevertheless, some interpretation of the relevant clauses may be required and, if the contract is subject to Swiss law, this will need to be done in accordance with the principles of contractual interpretation applicable under such law.

Should a sponsoring contract remain silent on these issues, Swiss law may also provide the parties with protection in the event of exceptional new circumstances leading to *exorbitance* and/or to subsequent impossibility to perform contractual obligations.

In any case, a multitude of factors must be taken into account on a case-by-case basis, depending on the peculiarities of each sponsorship contract and the actual consequences of the COVID-19 pandemic on the parties.

Relevant considerations are likely to include:

- Who is the sponsored party? (individual athlete, club or team, organisation, specific event);
- What is the scope of the sponsorship contract? (entire season or multiple seasons, series of events or one-off events);
- What is the type of the sponsorship relation? (purely financial sponsorship, in-kind sponsorship or both; integrated sponsorship or simple exposure sponsorship);
- What are the actual consequences of the pandemic? (mandatory administrative decision or private decision; partial or entire cancellation of a competition, suspension, postponement or relocation of a competition; restriction to the public; etc.).

In our opinion, the parties to sponsorship contracts should keep in mind that the contractual and legal remedies set out in the present article are exceptional measures which can only be applied under extraordinary circumstances. Moreover, it is only after a thorough analysis of all the peculiarities of a given case that the parties may determine whether they would be entitled to renegotiate their agreement, to delay its performance, to provide a partial performance or to not perform at all.

Once the legal assessment is made, it is advisable for the parties to try to negotiate an outcome which would be beneficial for both or, considering the situation, the least damaging. Indeed, the decrease of a financial contribution from a sponsor might have serious consequences on the sponsored party, however, the financial capabilities of a sponsor might also be highly affected by the pandemic. In these circumstances, the intervention of a third-party, such as a mediator, could be an efficient tool for the parties to consider and could even lead to the parties managing to maintain a long term and positive relationship – which is surely what we all want to achieve in these challenging times.

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