LENZ & STAEHELIN

Insight

Sports Law Newsletter May 2011

Attorney work in sports law has much in common with participating in the Olympic Games: it is not sufficient to fight hard once the contest starts; rather, success depends almost entirely on the quality of one's preparation. In other words, while litigation is an important aspect of our activities, legal advice to sports bodies, organising committees or athletes in anticipation of major sports events, or support with other challenges, is by far the safest way of ensuring a favourable outcome on D-Day and preventing disputes.

In particular, adequate sponsorship arrangements are of paramount importance for any project in the sports field to be carried to its end. This edition's Focus section gives an insight into Lenz & Staehelin's expertise as legal advisors in structuring and financing important sailing projects for major international events (in addition to the organisation of prior editions of the America's Cup, a topic addressed in other issues of our Sports Law Newsletter).

Advertising and marketing in connection with sports events will also be at the core of our Recent Issues section. We look at two recent decisions of the General Court of the European Union regarding the registration of a Community trademark including the words "F1-Live", as well as broadcasting rights for World Cup and Euro football matches. We will stay within the European Union for an overview of the key contents of the European Commission's new Communication on Sport.

Finally, this edition includes the sections which should by now be familiar to our readers: Updates on matters addressed in prior issues of our newsletter, a selection of Court of Arbitration for Sport and Swiss Supreme Court Case Law, as well as News in Brief to keep you informed about legal developments in connection with sports.

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Structuring Sports Sponsorship: A First Step to Success

Introduction

Realising major projects in sports, such as participating in the Olympic Games, not only requires a good portion of talent and strong commitment on the part of the athletes, their families, supporters and clubs and sports federations. There also have to be substantial financial resources available at each level. This holds particularly true for cost-intensive sports where either entire teams must be financed or there are major costs for equipment, travel and other facilities, as is the case in sailing.

Despite this, financing sports can be a tremendous opportunity for sponsors to support a sport and simultaneously develop a brand, product or services and increase their visibility in the marketplace. Some people claim that the Swiss market for sponsors has dried up, and that it is difficult nowadays to obtain the required funding. The result is that many projects come to a premature end for lack of financial resources. Experience shows, however, that structuring a sponsorship arrangement properly, in particular in terms of tax, can make financing a winning bet for sponsors as well. In other words, ensuring adequate legal "packaging" for the sponsor's contribution, and creating clear and balanced contractual basis from the start, is a prerequisite for a successful project.

The objective of this article is to highlight a number of selected aspects relating to the financing and structuring of major sailing projects. They are the result of Lenz & Staehelin's work as an advisor to a number of important projects such as participation in international championships, the Youth Olympic Games in Singapore in 2010, and qualification for the 2012 London Olympic Games.

The "sponsorship" agreement

Definition

Sponsorship is not a defined legal concept, but rather the expression of an economic arrangement which may take many different forms. The common denominator of all sponsorship agreements is that a club, team, athletes or an event receives cash and/or benefits in kind, such as services or equipment, and in return provides services to the sponsor. Major differences in practice may be encountered as regards the services rendered by the athletes to the sponsor. In most cases, a sponsorship agreement will seek to link a company's name, trademark, product or services with a specific athlete, club or event. The economic rationale behind the sponsor's commitment is the (indirect) communication of an advertising or communication message in compensation for the sponsor's financial assistance. Most sponsorship agreements will therefore include the sponsor's right to use and leverage the image of the athlete. In many cases, the sponsorship agreement will also involve other and more specific commitments on the part of the athlete, such as attending specific events (appearances, speeches, etc.), wearing the sponsor's logo on clothing, and so on.

Finally, sponsorship differs fundamentally from other types of agreements, where nothing is required from the athlete in turn for financial support; such agreements do not qualify as sponsorship agreements but as pure "patronage" *(mécénat/Mäzenatentum).*

The sponsorship agreement

Swiss law does not regulate the sponsorship agreement. These agreements are construed as so-called contracts *sui generis,* which include various elements of different contract types whose rules are applied by analogy to the sponsorship agreement. Typically, specific laws apply in addition to classical rules of contract law, in particular those relating to the protection of trademarks, the personal right conferred to anybody to control the use of his personal name (Art. 28 Swiss Civil Code), the protection of business names *(protection de la raison sociale/Firmenrecht),* and possibly even unfair competition laws.

The sponsorship agreement is typically entered into between two persons: the *sponsored person* seeks financing of a project and undertakes to associate the sponsor with his project, notably by disclosing the sponsor's name and trademark in public relations, while the *sponsor's* interest is to enhance his image, convey a message, or promote a product or service with the undertaking to provide benefits in cash or in kind (e.g. supplying equipment) or to render certain services (e.g. taking care of all the administrative steps) for the benefit of the athletes, team or sponsored event.

Sponsorship must be distinguished from other similar contractual arrangements:

> *Advertising* is a direct means to promote a product, while sponsorship aims neither at getting a *direct* commercial message across nor suggesting a selling point.

> The afore-mentioned *patronage (mécénat/Mäzenatentum)* is defined as a selfless initiative in favour of an activity of general interest. In this case, the patron *(mécène/Mäzen)* typically remains anonymous and is not expecting any counterperformance from the beneficiary of the contribution. The distinction between a patron and a real

sponsor may be difficult to draw, but may have important aspects taxwise.

> The aim of *merchandising* is to authorise a merchandiser to sell (and possibly produce), at its own risk and for its own profit, specific branded goods (usually under the brand of the sports team or event), subject to the merchandiser complying with specific requirements laid down by the brand's owner and sharing his profit or paying a fee to him.

Although the sponsorship agreement does not need to comply with any particular form and can also be entered into orally, it is usually concluded in writing. Clear drafting of the relevant clauses is of the essence, as the arrangement is typically entered into for the long or medium term, and often involves parties coming from very different backgrounds, typically an institutional investor and athletes with no experience of the corporate world. These very different backgrounds may bring with them the risk of mutual misunderstandings. It is important to clarify these matters from the outset by means of a precise and unambiguous agreement.

In our experience, the main clauses of a sponsorship agreement are:

> *Commitment to compete at high level.* The fundamental commitment of any athlete or team in a sponsorship agreement is to participate in the relevant competition and to use its best endeavours to achieve the best possible results. Provisions on sponsorship fees usually include a payment schedule following the competition calendar as well a variable element linked to the results of the athlete or team. When sponsorship is agreed with a major sports team, the team may have to commit to reach a certain budget level before being authorised to activate the sponsorship.

> *Commitment to pay a fee.* As mentioned before, the sponsor commits to pay a fee and/or deliver services or goods in kind (see "official supplier agreements"; for example to deliver sails, tyres, electronic equipment or fodder for horses).

> *Hierarchy of sponsorship and exclusive dealing provision.* The agreement usually states the level at which the sponsor is accepted (title, main, gold,

silver, bronze, or A, B, C). This indicates the rights granted to the sponsor and how many other sponsors may be granted similar rights. In addition, categories of goods and brands or competing products may be excluded (for example the prohibition of competing brands or overall prohibition of cigarettes and alcohol advertising).

> *Clean doping clause and commitment to comply with all the sport's rules.* Since the image and good reputation of the sponsored person or team are key for successful sponsorship, an express undertaking as regards compliance with all sports rules, and more specifically the commitment to comply with anti-doping codes, is of utmost importance. Usually the agreement simply refers to the applicable anti-doping rules.

> *Priority clause, rights of first refusal, etc.* There are various contractual measures aimed at ensuring that the sponsored person is obliged to first discuss with the current sponsor before entering into new sponsorship commitments. A priority clause reinforces this clause by granting the sponsor the right of first refusal (typically the right to enter into a new agreement on the same basis as the one proposed by a *bon fide* third party).

> *Confidentiality provision.* The content of agreements, such as the amounts paid by the sponsor and the terms of the contract, is typically confidential. The parties will therefore undertake to keep the terms secret, while at the same time agreeing on specific rules on language *(convention de parler/Sprachregelung)* to make sure, for example, that an athlete really does adequately promote the sponsor when speaking to the press or third parties.

> *Arbitration clause, governing law and jurisdiction* are, as in any agreement, of essence, even though in the event of permanent disagreement the parties will naturally seek to avoid resorting to litigation. Arbitration is recommended whenever the performance of the athlete or team is to take place in several countries.

> *Termination provision.* Clear early termination provisions are key to any sponsorship agreement. Indeed, a sponsorship agreement is typically a fixed-term agreement which as a rule may not be terminated unless the parties have agreed otherwise. In the absence of early termination clauses, only a termination for cause *(justes motifs/wichtige Gründe)* will be permitted, and may therefore be difficult to prove. Carefully drafting an early "exit route" in case of disagreements among the parties is therefore often the first step to the successful completion of the project. It may also be wise to anticipate the impact of potential doping scandals, and recent developments have shown that sponsorship agreements now generally provide for claw-back provisions or for payment of some of the sponsorship to be held in escrow for a certain period of time.

Structuring the sponsorship

Any sponsor considers the circumstances surrounding the athlete and/or the team before agreeing to sponsorship. This means that properly managing these circumstances facilitates the conclusion of a sponsorship agreement and its smooth performance. Without aiming to be exhaustive, we would like to highlight the following two elements:

The environment of the sport

The sponsor has to fully understand the rules, risks and context of the sport if the relationship is to be a success. In this respect, qualification for major sports events such as the Olympic Games or other major events often involves very complex selection procedures which require not only the qualification of the athlete, but also of the nation in the first instance. The qualification of a nation does not mean the automatic qualification of the athlete. Qualification procedures apply at different levels, such as on the level of the international federation or at national levels. In many instances they may not be clear, or may appear not to be clear. To avoid endangering a whole project, for example by missing

deadlines or not complying with formal requirements, athletes, clubs and federations are well advised to carefully structure these administrative law aspects as well to safeguard their rights and make their sponsors well aware of these constraints.

Structuring the project

Major events, teams or clubs usually operate in a well established structure. Many are organised in the form of not-for-profit entities and/or limited companies, which are properly organised to undertake and deliver sponsoring commitments.

However, less important organisations, smaller clubs or individual athletes seeking support may not yet be properly structured at the time they ask for sponsorship. In such cases, it is important to ensure that the sponsorship has a proper and very clear basis from the outset.

In this respect the following factors are important:

> The sponsored entity must be legally organised and in a position to undertake commitments which may last for several years.

> The sponsored entity must be tax efficient for itself and for the athletes, in all countries where sponsorship services will be performed, in terms of direct taxes. In this context, experience shows that sponsorship income is generally subject to personal income tax payable by the athletes benefiting from the payments. Some countries further apply anti-avoidance rules according to which sponsorship SPVs held by athletes are treated as look-through entities. Finally, income localisation and allocation rules need to be carefully reviewed, since countries may apply different and/or competing rules where income tax liability may depend on the tax residency of the relevant athletes and/or on the place of performance.

> International VAT issues in sponsorship are complex and critical. VAT at European rates represents significant amounts, and most European countries require VAT to be charged at the place of performance. Other countries, by contrast, may treat sponsorship as an advertising activity, generally located at the place where the recipient is situated.

> Subject to certain conditions, Swiss clubs or federations may qualify as not-for-profit organisations, which may open up the opportunity for individuals and/or corporations to deduct contributions to such entities from their taxable income, either as tax deductible gifts (but only up to a limited amount, which can nevertheless be substantial) or as tax deductible commercial expenses (as for advertisement purposes).

Conclusion

Sponsorship is *"the art to make oneself known by speaking about other things"* (Jean-Marc Rapp, Quelques aspects juridiques du sponsoring en droit suisse, in RSDA 1991 p. 189). If it involves the right partners, sponsorship can be a tremendous opportunity for two parties with different backgrounds and very different expectations. Given the variable geometry and inherent dynamic of sponsorship, making sure the arrangement rests on solid structural and legal foundations is certainly one of the main keys to success.

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With the assistance of Christelle Conti

Recent Issues in Sports Law

Communication of the European Commission of 18 January 2011, *"Developing the European Dimension in Sport"*

On 18 January 2011, the European Commission (the "Commission") adopted a new Communication on Sport entitled *"Developing the European Dimension in Sport"* (the "Communication"). It is based on the White Paper on Sport that was issued by the Commission in July 2007. The Communication follows a widespread consultation by the Commission which included Member States, key sport stakeholders and an independent expert group.

In its introductory remarks, the Commission declares that it respects the autonomy of sport governing structures but maintains that, in a number of areas, action at EU level can provide significant added value, e.g. where challenges such as violence and intolerance linked to sports events or doping, fraud, match-fixing, etc., are encountered.

First, the Communication focuses on the importance of sport in society, and on the role of sport with regard to social inclusion, education and public health. In this respect, the Communication recognises the significance of the fight against doping. At the same time, the Commission makes clear that anti-doping rules and practices must comply with EU law and respect fundamental rights and principles such as respect for private and family life, the protection of personal data, the right to a fair trial and the presumption of innocence.

With regard to the fight against doping, among other things the Commission

> proposes a draft mandate for negotiations on the accession of the EU to the Anti Doping Convention of the Council of Europe;
> examines the most appropriate way to reinforce measures against trade in doping substances by organised networks;
> supports transnational anti-doping networks, including networks focusing on preventive measures targeting amateur sport, sport for all and fitness.

Second, the Communication deals with the economic dimension of sport. According to the Communication (referring to the World Economic Forum), around 2% of global GDP is generated by the sport sector. The Commission acknowledges that the exploitation of intellectual property rights in the area of sport (e.g. licensing of the retransmission of sport events or merchandising) represents particularly important sources of income for professional sports. It also points out that the sources of revenue of sport activities in Europe must respect the rules of the internal market, especially competition law.

With regard to the economically sustainable financing of sport, among other things the Commission will

> ensure that intellectual property rights that might arise in the coverage of sport events are taken into account in the implementation of the Digital Agenda initiative (Europe's strategy for "a flourishing digital economy by 2020");
> launch a study to analyse sports organisers' rights and image rights in sport from the perspective of the EU legal framework;
> together with the Member States and in cooperation with the sport movement explore ways to strengthen financial solidarity mechanisms within sport while fully respecting EU competition rules.

Third, the Communication declares that good governance in sport is a condition for the autonomy and self-regulation of sports organisations. The Communication adds that sporting rules which are under the responsibility of sport organisations must be compatible with EU law. To assess the compatibility of sporting rules with EU law, the Commission considers the legitimacy of the objectives

pursued by the rules, whether the rules have any restrictive effects inherent in the pursuit of the objectives, and whether they are proportionate to them.

With regard to the organisation of sport, among other things the Commission will

- together with the Member States promote standards of sport governance through the exchange of good practice and targeted support to specific initiatives;
- issue guidance on how to reconcile the Treaty provision on nationality with the organisation of competitions in individual sports on a national basis;
- assess the consequences of rules on home-grown players in team sports in 2012;
- launch a study on the economic and legal aspects of transfers of players and their impact on sport competitions and, in this context, provide guidance on transfers of players in team sports.

Finally, the Commission recognises the need to continue informal cooperation structures between the Member States to ensure the exchange of good practice and dissemination of results.

Formula One Licensing cannot prevent the registration of a Community trademark containing the words "F1-Live"

Decision of the General Court of the European Union, Case T-10/09, *Formula One Licensing BV v. OHIM*

Context: In April 2004, Racing-Live SAS, a company operating notably in books, magazines and reservation of tickets for events, filed an application with the Community trademark office (OHIM) to register a figurative sign (containing the words "F1-Live") as a Community trademark for goods and services related to Formula 1 matters. The company Formula One Licensing BV opposed this application. Its opposition was based on the existence of an earlier international word trademark and two national word trademarks for "F1" and a Community figurative trademark (the "F1 Formula 1 logotype").

In October 2008, the OHIM rejected the objection, stating that because of the obvious differences between the trademark applied for on the one hand, and those owned by Formula One Licensing BV on the other, there was no likelihood of confusion between them. Furthermore, OHIM found that the public perceives the combination of the letter "F" and the numeral "1" as the generic designation of a category of racing car and, by extension, of races involving such cars. OHIM also concluded that the F1 Formula 1 logotype was the only trademark with a reputation and that few consumers would attribute the abbreviation "F1" with distinctive character, unless it is represented in a manner similar to the logotype.

Formula One Licensing BV challenged OHIM's decision before the General Court of the European Union.

Decision: The Court found that OHIM was correct in making a distinction between the sign "F1" as a word and the sign "F1" as a logotype and in concluding that the public would perceive the logotype as the trademark that Formula One Licensing BV uses in relation to its commercial activities and the term "F1" as the commonly used designation of a category of racing car and of races involving such cars.

In this connection, the Court noted that, over the past ten years, Formula One Licensing BV has promoted only the F1 logotype and that, when granting licences, it has emphasised this logotype by issuing strict rules on its use to ensure that the public has consistently seen the F1 Formula 1 logotype and not any other versions of the sign, and this sign is always used by Formula One Licensing BV in combination with the logo.

Further, the Court held that there is no likelihood of confusion between the Community figurative mark (the F1 Formula 1 logotype) and the trademark applied for since there is no visual similarity between them, and only limited phonetic and conceptual similarities.

The Court added that the fact that the public attributes a generic meaning to the "F1" sign means that it will understand that the mark applied for concerns Formula 1. Nevertheless, because of its totally different layout, the public will not make a connection between this mark and the activities of Formula One Licensing BV.

The General Court therefore dismissed the appeal and upheld OHIM's decision.

An EU Member State may, in certain circumstances, prohibit the exclusive broadcast of all World Cup and Euro football matches on pay TV to allow the general public to follow these events on free TV

Decisions of the General Court of the European Union, Cases T-385/07, T-55/08 and T-68/08, *FIFA and UEFA v. EU Commission*

Context: FIFA organises the Football World Cup Finals ("World Cup"), whilst UEFA organises the European Football

Championship Finals ("Euro"). The sale of TV broadcasting rights for these competitions constitutes a major source of their income.

In the EU, the directive on the pursuit of TV broadcasting activities allows Member States to prohibit the exclusive broadcasting of events they judge to be of major importance for society where such broadcasting would deprive a substantial proportion of the public of the possibility of following these events on free TV.

Belgium and the UK have each drawn up a list of events they consider to be of major importance for their respective populations. Among other things these lists contained, in the case of Belgium, all World Cup matches and, in the case of the UK, all World Cup and Euro matches. These lists were sent to the EU Commission, which found that they were compatible with EU law.

FIFA and UEFA challenged these decisions before the General Court of the EU, disputing that all such matches can be regarded as events of major importance for the public of the states in question.

Decision: According to the Court, any finding by the EU Commission that the inclusion of the entire World Cup or Euro in a list of events of major importance for the society of a Member State is compatible with EU law, on the grounds that these competitions are, by their nature, regarded as single events, may be called into question on the basis of specific factors showing that the "non-prime" matches of the World Cup (prime matches include in particular the semi-finals, final and the matches involving the relevant national team of the country in question) and/or "non-gala" matches of the Euro (gala matches include in particular the opening match and the final) are not of such importance for the public of that Member State.

In this context, the Court stated that the prime and gala matches and, in the case of the Euro, matches involving a relevant national team are accepted to be of major importance for the public of a given Member State and may therefore be included in a national list specifying the events to which the public should have access on free TV.

As regards the other matches of the World Cup and the Euro, the Court held that these competitions may be regarded as one single event rather than a series of individual matches divided into prime and non-prime matches or gala and non-gala matches. The participation of the teams in prime and gala matches may thus depend on the results of non-prime and non-gala matches, which may therefore generate particular interest for the public to follow these matches.

In this regard, the Court also observed that it cannot be specified in advance – at the time when the national lists are drawn up or broadcasting rights acquired – which matches will actually be decisive for the subsequent stages of these competitions, or which ones may affect the fate of a given national team. For this reason, the Court held that the fact that certain non-prime or non-gala matches may affect whether a team plays prime or gala matches may justify a Member State's decision to consider that all of the matches of these competitions are of major importance for the public.

The Court further held that although such categorisation restricts freedom to provide services and freedom of establishment, this restriction may be justified since it is intended to protect the right to information and ensure broad public access to TV broadcasts of events of major importance for the public.

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Updates on Sports Law

FIFA IFAB meeting of 5 March 2011: amendments to the laws of the game, but no decision on goal line technology

(See November 2010 Newsletter, page 17)

At its meeting on 5 March 2011, the International Football Association Board of FIFA ("IFAB") received a presentation of goal line technology tests conducted by the Swiss-based research institute EMPA. According to these tests, none of the ten companies involved were successful in meeting the criteria that had been set out by the IFAB in October 2010. A further testing period has therefore been requested, and the issue of goal line technology will again be brought up at next year's IFAB meeting.

At the meeting, another presentation was made on the ongoing Additional Assistant Referees experiment, and the IFAB gave approval for the use of Additional Assistant Referees during the EURO 2012 competition in Poland and Ukraine to be part of the experiment phase.

The IFAB further approved different amendments to the laws of the game. Among other things it agreed on a new text with regard to the replacement of a defective ball (Law 2), adding that *"if the ball bursts or becomes defective during a penalty kick or during kicks from the penalty mark as it moves forward and before it touches any player of the crossbar or goalposts, the penalty kick is retaken".* Further, the IFAB approved a new text on the powers and duties of referees whenever objects enter the field of play. The new rule (Law 5) stipulates that *"if an extra ball, other object or animal enters the field of play during the match, the referee must stop the match only if it interferes with play. Play must be restarted by a dropped ball in the position where the match ball was at the time when the match was stopped, unless play was stopped inside the goal area, in which case the referee drops the ball on the goal area line parallel to the goal line at the point nearest to where the ball was located when play was stopped. If an extra ball, other object or animal enters the field of play during the match without interfering with play, the referee must have it removed at*

the earliest possible opportunity". The necessity of including a new rule on the powers and duties of referees whenever objects enter the field of play is shown by two highly disputed incidents: In 2009, a goal was scored in a Premier League match between Sunderland and Liverpool only because the shot of the Sunderland striker was deflected by a beach ball thrown onto the pitch by a Liverpool fan. And a few weeks ago, a championship game in Colombia was stopped by an owl which was then kicked out of the field of play by one of the players.

Latest developments in the football gambling scandal

(See March 2010 Newsletter, page 22 and November 2010 Newsletter, page 9)

On 21 March 2011, parallel trials of six individuals charged with game manipulations in the football gambling scandal started before the District Court of Bochum, Germany. On 14 April 2011, the court made a first judgement and found three of these individuals guilty of manipulating and attempting to manipulate at least 16 matches in German leagues (ranging from junior league to Second Bundesliga matches) as well as two European competition matches, and sentenced them to prison for periods ranging from three to three years and eleven months. According to the court, the three men had bribed players and referees to influence the outcome of the matches and subsequently placed bets on the expected results. Even though the court did not find clear evidence that the bribed players played poorly on purpose, it stated that the three men could, when placing their bets, well expect that the bribed players would try to influence the outcome of the matches. Thus, the court concluded that the three men took advantage of this special knowledge vis-à-vis the bookmakers and found them guilty of commercial and organised fraud and fraud respectively. The judgement of the court in the parallel proceedings involving the three other individuals charged with game manipulations is still outstanding.

Meanwhile, the Greek authorities seem to have uncovered other cases of manipulation relating to football bets. Following the observation of financial transactions involving first and second division football team owners by the authorities, up to 27 first and second division games are suspected of having been manipulated. The Greek judiciary is expected to press charges in the next few weeks.

Latest developments in FC Sion's transfer case

(See November 2010 Newsletter, page 11)

Swiss Supreme Court decisions, 12 January 2011, 4A_392/2010 and 4A_394/2010

On 1 June 2010, CAS made an award regarding the legal standing of a party appealing to CAS and the calculation of compensation under Art. 17 of the FIFA Regulations, in relation to the termination of employment contracts without just cause by players. CAS decided to dismiss FC Sion's appeal (no standing to appeal due to a lack of legal interest), uphold the sporting sanctions against it and the player (Mr Essam El-Hadary) and recalculate the compensation payable by the player and his new club (applying the Swiss law principle of "positive interest", according to which the injured party is to be placed in the position he would have been in had the contract been properly performed).

On 1 July 2010, both FC Sion and El-Hadary filed an application with the Swiss Supreme Court to set aside the

CAS award. The Supreme Court denied both applications in its decisions of 12 January 2011. In its analysis of the alleged breach of the parties' right to present their case, the Supreme Court recalled that the award had addressed all relevant testimonies and stressed that, in any event, the assessment of evidence, even if arbitrary, could not constitute a ground to set aside an arbitral award. The Supreme Court also confirmed that the CAS award did not violate procedural public policy or substantive public policy.

Although the Supreme Court did not uphold the two applications to set aside, its decision remains of particular importance since it puts an end to a long-standing debate relating to the formal notification of CAS arbitral awards. The Supreme Court held that a fax could not be regarded as evidence of the notification of CAS awards. The time limit to file an application with the Supreme Court against a CAS award starts running only from the receipt of the award by registered mail.

Swiss legal framework against hooliganism does not infringe upon fundamental rights

In the run-up to the UEFA European Football Championship (2008) and the Ice Hockey World Championships (2009), the Swiss Federal Internal Security Act ("ISA") was amended to provide for certain coercive measures aimed at preventing violence in the vicinity of sport events. Among other things, these measures encompassed exclusion orders (with respect, for example, to the surroundings of stadiums), custody orders (limited to 24 hours), obligations to report to the police and travel bans. The ISA also provides for the creation of a database containing the names of violent sports fans. At the time the amendments to the ISA were adopted, there was some debate as to whether the Swiss constitution allocates the power to regulate three of these measures (the exclusion orders, the custody orders and the reporting obligations) to the Swiss Confederation or cantons. To avoid any legal uncertainty, the corresponding provisions of the ISA were transposed into a treaty among all Swiss cantons, the Concordat against Violence at Sports Events (the "Concordat"), which entered into force on 1 January 2010.

Following a series of appeals lodged against the decisions taken by the Swiss cantons to adhere to the Concordat, the Swiss Supreme Court had the opportunity to review the constitutionality of the coercive measures set forth therein. Indeed, as a matter of principle, Swiss federal laws such as the ISA are not subject to judicial review on constitutional grounds. In a decision of 13 October 2010, the Swiss Supreme Court held that the coercive measures set forth in the Concordat did not infringe upon the set of fundamental rights encapsulated in the Swiss constitution and the European Convention on Human Rights (case no. 1C_428/2009, published in the Official Court Reporter: ATF 137 I 31). This decision was confirmed in a series of similar judgments rendered on 16 November 2010. Among other things, the Swiss Supreme Court held that the 24-hour police custody constituted only a temporary restriction to the (constitutional) right of freedom. To the extent that the Concordat specifies that police custody is measure of last resort, it is also in line with the (constitutional) principle of proportionality.

As a final remark, on 22 November 2010 the attorney generals of all Swiss cantons agreed on a set of (non-binding) recommendations in an attempt to harmonise the criminal sanctions imposed on violent sports fans in Switzerland.

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Recent CAS Awards

Lifetime ban on referee for corruption

CAS 2010/A/2172, *Oleg Oriekhov v. UEFA,* 18 January 2011

Context: On 5 November 2009, the referee Oleg Oriekhov officiated at a match between FC Basel and CSKA Sofia in Group E of the 2009/2010 UEFA Europa League. Basel won the match 3-1. Following investigations conducted by the public prosecutor of Bochum (Germany), it appeared that Oleg Oriekhov was in contact with a criminal group involved in betting fraud and was offered an amount of approximately EUR 50,000 to manipulate the match between Basel and Sofia. Following an internal UEFA procedure on 18 May 2010, the UEFA Appeals Body considered that in failing immediately to report to UEFA that he had received offers from certain individuals to take an active part in their match-fixing scheme, Oleg Oriekhov had violated the principles of conduct and the duty of disclosure of illicit approaches set out in the UEFA regulations. The UEFA Appeals Body considered the offence committed by the referee to be extremely serious as he *"did not hesitate to endanger the very essence of football, which relies on matches taking place in a spirit of loyalty, integrity and sportsmanship, free of all constraints except the Laws of the Game"* and concluded that a life ban on exercising any football-related activity was the appropriate sanction to be imposed in view of the seriousness of the situation.

Decision: On 17 July 2010, Oleg Oriekhov filed an appeal with CAS to request the annulment of the UEFA decision. The CAS Panel confirmed UEFA's decision and concluded that it had been proven beyond reasonable doubt that there was repeated contact between him and the members of a criminal group involved in match-fixing and betting fraud. The CAS Panel considered that Oleg Oriekhov deliberately violated the principles of conduct laid down in the UEFA Disciplinary Regulations as he did not immediately inform UEFA of the existence of such contact. The panel rejected the referee's argument that he did not report the contact because of his inadequate command of English and because he did not know who to make such a report to. Oleg Oriekhov submitted that given the circumstances, his clean record and the fact that he was not the instigator of any plan to fix the match, the sanction imposed was far too severe. The panel accepted that until the events under scrutiny in the appeal, Oleg Oriekhov's reputation had been untarnished, his refereeing skills were well recognized, and that he had not instigated the match manipulation. However, it reminded that match fixing, money laundering and bribery and corruption were growing concerns in many major sports, football included, and must be eradicated. The very essence of sport is that competition is fair; its attraction to spectators is the unpredictability of its outcome. The panel concluded that in such circumstances, a life ban from any football-related activity was a proportionate sanction.

Comments: This appeal was the first case of its kind in European football involving a match official as distinct from a player or coach. It therefore had significance beyond its importance to the parties in dispute. UEFA and CAS wanted to demonstrate that sporting regulators must have zero tolerance for any kind of corruption and must impose sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted to consider involvement in such criminal activities. It also backed the need for the highest standards of behaviour

for all people involved at this level of the game, whether players, managers, coaches or officials. The aim of the decision was not exclusively to punish Oleg Oriekhov, although his action and/or omission was major, but to set a clear precedent which will serve as a benchmark for the severity of sanctions in such cases and which should thus have a preventive effect.

Clarification on the Field of Play Doctrine

CAS 2010/A/2090, *Finnish Ski Association & Aino-Kaisa Saarinen v. FIS,* 7 February 2011

Context: The dispute arose out of the disqualification imposed by the FIS Jury on a Finnish cross-country skier for obstructing the competitor behind her and causing her to fall. The decision was upheld both by the FIS Appeals Commission and the FIS Court. Both appellate bodies found that the obstruction was not deliberate, but relied on the Swiss criminal law concept of *dolus eventualis.* They confirmed the finding of obstruction, but relied in addition on the FIS rules prohibiting unsportsmanlike behaviour and jeopardy.

Decision: The CAS Panel carefully determined to what extent a dispute falls within the ambit of the field of play doctrine. After reviewing past CAS awards, the panel extracted various rules, which can be summarised as follows: 1) *"Abstinence by CAS from ruling on field of play decisions is not a matter of jurisdiction, but of arbitral self-restraint";* 2) The rationale for such restraint includes avoiding interference with the autonomy and expertise of the officials, especially during a match in progress, ensure the certainty of competition results, and avoid rewriting the results of a game; 3) the doctrine is disapplied upon proof that decisions otherwise falling within its ambit were vitiated by bias, malice, bad faith, arbitrariness or legal errors, and, within these limits, is compatible with Swiss law; 4) *prima facie,* the doctrine also covers decisions made after an unrestricted appeal to an appellate body seized during or at least proximate to the competition. By contrast, the doctrine no longer applies when the appeal brought before CAS is against a decision made by an internal appellate body detached in point of location and time from the initial decision and which has its jurisdiction defined by its own rules. In the latter situation, the CAS Panel can review whether the appellate body made, within terms of its own jurisdiction, a relevant error; 5) these principles also apply to competition-specific sanctions, subject to limitations if interests of person or property are involved.

Under the FIS rules, the appeal to the FIS Court is restricted to errors of procedure and errors of law, meaning that it should no longer be characterised as a field of play decision. CAS can review the FIS Court decision *de novo,* but its scope of review cannot be wider than that of the FIS Court. In the case in question, the panel found that the FIS Court had cured any possible procedural deficiencies and had correctly decided that there had been no error of law (no application of irrelevant rules or misconstruction of a relevant one). In addition, the disqualification was deemed proportionate: considering that three separate skiing bodies had reached the same conclusion, a CAS panel should not ignore the expertise of the bodies involved in a particular sport as long as their margin of appreciation is not exceeded.

Comments: The award is likely to become a landmark decision regarding field of play, in terms of both summarising the somewhat disparate CAS case law and clarifying important aspects of the nature, scope and limits of the field of play doctrine. CAS panels would be well advised in future to rely on this precedent to maintain efforts to ensure uniform practice in this domain.

Selection of other CAS awards

- CAS 2010/A/2226, *Queiroz v. ADOP,* 23 March 2011: doping, disturbance of the doping control by coach, WADA Code does not preclude creation of additional violations by sports authorities, violation not realised in particular case, appeal upheld.
- CAS 2010/A/2178, *Caucchioli v. CONI & UCI,* 8 March 2011: doping, first case based on athlete's biological passport confirmed, violation upheld, appeal dismissed.
- CAS 2010/A/2161, *Wen Tong v. IJF,* 23 February 2011: doping, invalidation of finding of violation for breach of the right to witness B sample analysis, applicable also if B sample analysis requested by sports authority, appeal upheld.
- CAS 2010/A/2230, *IWBF v. UK Anti-Doping & Gibbs,* 22 February 2011: doping, requirements for reduced sanction for "specified substance", appeal dismissed.
- Ad hoc Division, Commonwealth Games, CG2010/01, *Jones v. CG Federation,* 4 October 2010, eligibility dispute, timeliness of application to CAS denied, merits examined *obiter dictum,* lack of eligibility confirmed but recommendation that rules clarified, appeal dismissed.

Swiss Supreme Court Decisions

The Swiss Supreme Court applies the same independence and impartiality tests to all members of an arbitral tribunal

Swiss Supreme Court Decision, *Valverde Belmonte v. CONI, AMA and UCI,* 29 October 2010, 4A_234/2010 (published in the Official Court Reporter: ATF 136 III 605)

On 29 October 2010, the Swiss Supreme Court made an important decision in which the highest Swiss judicial authority dismissed a motion to set aside an award rendered by CAS. The motion was based on the alleged lack of impartiality and independence of one of the party-appointed arbitrators.

The facts can be summarised as follows. In a decision of 11 May 2009, following an alleged doping violation, the Italian National Olympic Committee ("CONI") banned the professional cyclist Alejandro Valverde from competing on Italian soil for a two-year period. Valverde filed an appeal against this decision with CAS. The CONI appointed Prof. Ulrich Haas as its arbitrator. Following a request for joinder filed by CONI, the arbitral tribunal accepted the World Anti-Doping Agency ("WADA") and the International Cycling Union ("UCI") as additional parties to the CAS proceedings. This led Valverde to challenge the independence of Prof. Haas on the grounds that this arbitrator had completed certain assignments for WADA (which were duly disclosed in Prof. Haas's declaration of independence). In particular, Prof. Haas had been appointed by WADA to be in charge, as a legal expert, of the Independent Observer team at the Athens Olympic Games in 2004; Prof. Haas had also been a member of the Code Project team (until 2007) set up by WADA with the task of revising the WADA Code. The challenge was rejected by the Board of the International Council of Arbitration for Sport ("ICAS"), and Valverde's immediate appeal to the Swiss Supreme Court against this decision was dismissed for procedural reasons. On 16 March 2010, CAS upheld the two-year ban that CONI had imposed upon Valverde. On 28 April 2010, Valverde filed an application with the Swiss Supreme Court to set aside the CAS award, arguing in particular that the arbitral tribunal was irregularly constituted (Article 190(2)(a) of the Swiss Private International Law Act, "SPILA").

This appeal gave the Swiss Supreme Court the opportunity to review in detail and clarify the requirements of independence and impartiality of the members of arbitral tribunals. Both these criteria apply under Chapter 12 of the SPILA (the *lex arbitri* for international arbitration proceedings with their seat in Switzerland), despite the fact that the law only refers to the term of "independence". It is to be noted, though, that the Swiss Supreme Court does not draw a strict line between these two concepts. The question at stake was whether all members of an arbitral tribunal are bound by the same independence and

impartiality requirements (referred to in the decision as the "monolithic" approach) or whether different tests should apply (on the basis of the so-called realistic or pragmatic approach). In its reasoning, the Swiss Supreme Court strongly rejects the idea that a party-appointed arbitrator would be entitled to act as an advocate of the party that appointed him or her. According to the court, such a view would undermine the fundamental principles underlying the concept of arbitration as a dispute-resolution method. Referring, among other things, to the IBA Guidelines on Conflicts of Interest in International Arbitration, the Swiss Supreme Court stressed that the requirements of impartiality and independence should apply equally to the chairman and to the party-appointed arbitrators.

The second prong of the reasoning of the Swiss Supreme Court was dedicated to the question of whether or not a more stringent test should apply in the context of sports arbitration. The court acknowledges that CAS arbitrators are inevitably in touch with representatives of sports organisations, counsel to athletes and other individuals involved in this field. This notwithstanding, the court held that there was no reason to distinguish between commercial and sports arbitration and that the impartiality and independence test should be the same. It is worth mentioning that since the revised CAS Code prohibits CAS arbitrators from appearing as counsel before CAS, some of these controversies should tend to decrease.

On the basis of the principles laid out above, the Swiss Supreme Court reached the conclusion that there was no reason to question Prof. Haas's impartiality or independence. The court indicated that its determination was highly fact-sensitive, thus suggesting that a different fact pattern may lead to a different result.

In our view, the main practical conclusion which can be drawn from this decision is that the principles of independence and impartiality constitute core values of arbitration which apply in a uniform manner, irrespective of the position of the arbitrator and the type of arbitration proceedings. Firstly, each arbitrator is subject to the same independence and impartiality test, regardless of whether such arbitrator has been appointed by the parties, acts as chairman of the arbitral tribunal or as sole arbitrator. Secondly, the same independence and impartiality test should apply in all arbitration proceedings, be it commercial or sports arbitration.

The solution of the Swiss Supreme Court should be approved, even though absolute independence might be difficult to achieve in practice. A different outcome would jeopardise the credibility of arbitration as a dispute-resolution method.

Other Supreme Court decisions in sports-related matters

- Decision of 28 September 2010, *Pechstein v. ISU,* no. 4A_144/2010: request for revision of CAS award, athlete challenging doping sanction, request for revision dismissed.
- Decision of 6 October 2010, *X. v. UCI,* no. 4A_237/2010: request for revision of CAS award, athlete challenging doping sanction, request for revision dismissed.
- Decision of 20 December 2010, *X. v. FC Y.,* no. 4A_10/2010: appeal against CAS award, indemnity to be paid to player by his former club for termination of contract without just cause, appeal dismissed.
- Decision of 3 January 2011, *Valverde Belmonte v. AMA, UCI & RFEC,* no. 4A_386/2010: appeal against CAS award, athlete challenging doping sanction, appeal dismissed.
- Decision of 3 January 2011, *Valverde Belmonte v. AMA, UCI & RFEC,* no. 4A_420/2010: appeal against CAS award, request for interpretation or correction of arbitral award, absence of actual interest to appeal, appeal inadmissible.
- Decision of 11 January 2011, *X. SA v. CIO,* no. 4A_579/2010: appeal against CAS award, dispute regarding licence agreements, appeal dismissed.
- Decision of 17 February 2011, no. 4A_402/2010: appeal against CAS award, appeal dismissed.
- Decision of 23 February 2011, *X. v. FIFA,* no. 4A_326/2010: appeal against CAS award, appeal dismissed.
- Decision of 17 March 2011, *Fédération X. v. Fédérations A, B, C, D, E & F. Inc.,* no. 4A_600/2010: appeal against CAS award, violation of right to be heard (issue of costs), appeal allowed, CAS award partially set aside.
- Decision of 11 April 2011, *Luis Fernandez v. FIFA,* no. 4A_604/2010: appeal against CAS award, actual interest to appeal, appeal dismissed.

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News in Brief

Are we nearing a final decision in Contador's saga?

In March 2011, CAS registered appeals from the UCI and WADA in what might be the beginning of the end of Spanish cyclist Alberto Contador's doping saga. Alberto Contador's case goes back to the 2010 Tour de France, where the results of a doping control found a concentration of Clenbuterol in his system. Clenbuterol is an agent included in the WADA Prohibited List which in certain amounts can enhance an athlete's metabolic performance. On 14 February 2011, after being requested by UCI to open disciplinary proceedings, the Spanish Cycling Federation rendered a decision clearing Alberto Contador of any presumption of doping. The decision was primarily based on Article 296 of the UCI Anti-Doping Rules, which exonerates a rider if he establishes that he had inadvertently ingested a banned product with no fault or negligence on his part. An award from CAS is expected before the end of June 2011.

The "Osaka Rule": recent agreement between the IOC and USOC to request a ruling from CAS

In accordance with Rule 19.3.10 and Rule 45 of the Olympic Charter ("OC"), in June 2008 the International Olympic Committee ("IOC") Executive Board issued regulations which laid down that any person who has been sanctioned with a suspension of more than six months by any anti-doping organisation for any violation of any anti-doping regulations committed as of 1 July 2008 can be prohibited from participating, in any capacity, in the next edition of the Summer and Winter Olympic Games ("OG"). This prohibition applies even if the suspension already ended at the time of the beginning of the OG concerned.

According to the application of this so-called Osaka Rule, Claudia Pechstein is currently banned from participating in the 2014 OG following her doping suspension of two years which ended in February 2011; likewise, LaShawn Meritt, whose ban of twenty-one months will expire in July 2011, is also prevented from participating in the 2012 OG. Claudia Pechstein has already announced that she is trying to obtain the right to participate in the next Winter OG.

While some athletes affected by the Osaka Rule could consider its implementation as amounting to a new sanction added to the sanction for doping already imposed, according to a press release published on the IOC website on 27 April 2011 the IOC and the US Olympic Committee ("USOC") have agreed to ask CAS to settle this issue. Further developments will follow, and according to the IOC Director General, the CAS ruling *"will provide certainty in the lead up to the London 2012 Olympic Games"*.

Last-minute football player transfers: deadlines are binding

At the end of the last football transfer period, two high-level transfers were cancelled because the clubs failed to notify the competent national or international federation in time. According to the FIFA Regulations on the Status and Transfer of Players, football transfers may only be made during two periods per year. In most of the national football associations in Europe, the transfer periods last from 1 July until 31 August in summer and from 1 January to 31 January in winter.

In the case of the domestic transfer of German-Cameroonian player Maxime-Eric Chuopo-Moting from Hamburger SV to FC Cologne during the winter transfer period, relevant contracts which had to be submitted to the German Football League for transfer clearance were sent by fax a few minutes after the transfer deadline. FC Cologne filed for

a derogation, but the German Football League remained firm and explained that the deadlines set in the League Statute were binding for all clubs and essential to guarantee the proper functioning of the game.

For similar reasons, the international transfer of Slovakian player Robert Vittek from Turkish team Ankaragücü to Red Bull Salzburg in Austria failed. Owing to a technical failure, the fax with the relevant documents was delayed and arrived with FIFA three minutes late. FIFA declared that the transfer was void, stating that the integrity of the worldwide transfer system and its deadlines required strict adoption of the relevant regulations.

FIFA and UEFA suspend Football Federation of Bosnia-Herzegovina

On 1 April 2011, FIFA and UEFA suspended the Football Federation of Bosnia-Herzegovina ("FFBH") until further notice. The suspension follows the non-adoption of new statutes by the general assembly of the FFBH. Until now, the FFBH has had a system of rotating presidency composed of one representative of each of the three ethnicities (Bosniaks, Croats and Serbs) in Bosnia-Herzegovina. According to FIFA and UEFA, this system has led to a number of problems, including lack of accountability and poor financial management, and both federations have on a number of occasions insisted on replacing the rotating presidency with a single president elected for four years.

During an urgent meeting held on 12 April 2011, FIFA appointed a normalisation committee as per Article 7 of the FIFA Statutes *("Executive bodies of Member Associations may under exceptional circumstances be removed from office by the Executive Committee in consultation with the relevant Confederation and replaced by a normalisation committee for a specific period of time")*, which will now act as the FFBH Executive Committee as well as the FFBH Emergency Committee. The normalisation committee has the duty to prepare and convoke the ordinary general assembly of the FFBH and make sure that the revised FFBH statutes are adopted by 26 May 2011. Further, the normalisation committee must prepare new elections for all statutory bodies in accordance with the revised FFBH statutes. The mandate of the normalisation committee will expire after new FFBH Executive Committee elections have been held according to the newly adopted FFBH statutes.

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