

Another sporting scandal...

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Sports scandals seem to be reported with increasing regularity. As soon as the dust settles on one scandal, another breaks. In reality, there have always been scandals associated with sports and every sport has its fair share. Sports stars are now seen as global icons and such icons are always vulnerable to the trappings of success.

We live in a time where sports sponsorship is a multi-billion dollar industry, so it is no laughing matter to a sponsor where its sponsored star is caught in an embarrassing and compromising situation. To a sponsor, this could be very damaging to its brand, which may have taken years to develop. In an age where news stories are released instantly around the world by reporters and ordinary members of the public through social and regular media, sponsors are increasingly conscious of situations where their brand or image may be damaged as a result of alleged or actual misconduct of a sponsored athlete or team.

We have seen examples in recent years where sponsors have reconsidered their association with a team, athlete or organisation in the wake of a scandal. After Lance Armstrong's admission to taking performance enhancing drugs through his career, his sponsors left him in droves. Tiger Woods lost high profile sponsors following the revelation of his extra marital indiscretions. Puma recently ended their association with the South African Football Association after FIFA found that there was compelling evidence that the South Africa national team had fixed some football matches in 2010.

The UAE now has a very large sports market and hosts an increasing number of international sporting events. Sponsorship is also increasing within the UAE and this article examines how sponsors can try to protect themselves in a sponsorship agreement from the fall out associated with a scandal involving an athlete or a team.

TERMS IN AN AGREEMENT

Under the UAE's Commercial Transactions Law ("CTL"), the parties to an agreement are generally free to agree terms provided that those terms do not contradict mandatory terms set out elsewhere in the CTL. Therefore, although the UAE is a civil law jurisdiction, it is possible to include contractual terms within a sports sponsorship agreement governed by UAE law that are more frequently found in common-law based agreements.

Morality Clauses

Morality clauses are a familiar feature in common-law based sponsorship agreements. There is no reason why such clauses cannot be included in UAE law governed agreements and the sponsor should give consideration to including these clauses. Morality clauses are commonly drafted to require an athlete to comply with the rules of their sport and refrain from carrying out acts which would bring their sport, their name or the name of the sponsor into disrepute. Examples of such acts include being involved in doping offences, match fixing and moral issues such as infidelity, gambling, drug addiction and other types of behaviour which could damage the image of a sponsor's brand. The meaning of morality in these clauses is not defined in absolute terms by religion or society but instead, it is market driven by commercial concerns of a sponsor and its own "ethics". Morality clauses are often found in sponsorship agreements

relating to individual athletes as opposed to team sponsorship agreements as it is invariably more difficult for a club to control the actions of the entire team.

Under English law, if a morality clause is vaguely drafted, it runs the risk of being unenforceable as it could be held to be uncertain. Under UAE law, if wording in the agreement is clear, "it may not be departed from by way of interpretation to ascertain the intention of the parties". Further, it is not possible to construe ambiguous words in a manner detrimental to the interests of the adhering party. Therefore, morality clauses ought to be clearly drafted whereby both parties fully understand their implications. In a UAE law agreement, a morality clause could also include and define cultural considerations which a foreign athlete may otherwise be unaware of but which could adversely affect the sponsor if not observed. For example, a morality clause could address how an athlete should dress and behave in public taking into account local sensitivities. When drafting such clauses, sponsors should take into account particular risks associated with an athlete and its sport.

Although this article mainly considers how the sponsor can best protect its position, if acting for an athlete, consideration can be given to the inclusion of a "reverse morality" clause. This is where an athlete itself may seek redress against a sponsor because of the acts of a sponsor. For example if a corporate sponsor is involved in a high profile fraud which impacts on the reputation of the sponsored athlete, the athlete would want to ensure that it can terminate the agreement or rely on other remedies in such a situation. Reverse morality clauses are more likely to be included in agreements where the athlete has a very close relationship with the sponsor and the sponsor and athlete are synonymous with each other.

Representations and Warranties

Sponsors should also consider including adequate representations and warranties in an agreement whereby the athlete or team as applicable, has made all disclosures to the sponsor in relation to any circumstances that may adversely affect the sponsor. A host of sponsors relied on certain warranties given by Lance Armstrong that he did not take performance enhancing drugs when terminating their agreements with him in the wake of the now notorious doping scandal.

Term

A sponsor can potentially limit its exposure to potential damage to its brand by entering into short term agreements. For example, if an athlete committed an act, which the sponsor felt, allowed it to terminate an agreement, the situation giving rise to the breach may not always be clear cut and the sponsor may have to prove that the athlete is in breach. This could result in a drawn out and potentially costly process. If the sponsor has entered into a short term agreement, it may be easier for it to see out the term if the term is coming to an end anyway. Short term agreements may not always be to the liking of all sponsors as many sponsors would want to tie in with an athlete for a longer period to prevent the athlete from upwardly renegotiating his/her fee after a short period of time. Commercial considerations would also play a part in the sponsor's decision. In order to find a middle ground, it may be desirable to include a break clause in the agreement after the expiry of a certain term.

Dispute Resolution

In relation to UAE law sponsorship agreements, it is important to consider whether the courts should have jurisdiction to resolve a dispute or whether the matter be referred to arbitration. This should be looked at in relation to each set of circumstances and the ability of either party to enforce any decision of a court or tribunal. However, in relation to high profile sponsorships, arbitration may be more appropriate. In arbitration, a panel of arbitrators can be appointed who have particular experience in resolving sport related disputes and who also understand the level of damages to be awarded. It is worth noting that the UAE is a party to the New York Convention on the recognition and Enforcement of Foreign Arbitral Awards. Where there is a clear sporting element involved in the breach, such as non-compliance with anti-doping laws, existing sports tribunals could play a role. For example, Abu Dhabi is set to become one of only four cities in the world to host international sport-related legal disputes with the launch of an international

Court of Arbitration for Sport (“CAS”). The opening of the new CAS base could see the UAE capital become a regional hub for sports-related disputes. CAS is headquartered in Lausanne, Switzerland with courts also located in Sydney and New York. CAS hears any sport related disputes, including commercial (e.g. sponsorship or issues arising in relation to a player’s employment contract) and discipline (e.g. doping) cases.

Remedies

So what remedies are available to a sponsor for breach of an agreement (including a breach of the morality clause)?

Termination of the agreement is the obvious remedy and it should be remembered that termination clauses need to be carefully drafted to try to ensure that they can be relied upon under UAE law without requiring a separate court order.

Termination of an agreement may not always be the best solution and commercial considerations play a part in deciding whether to exercise this right. It is advisable to include terms that give the sponsor a certain amount of control in deciding what to do in a situation where there is a breach by the athlete or team. Despite recent high profile examples of sponsors terminating agreements, it is still relatively rare for sponsors to exercise termination rights. Sponsors may decide to stick by an athlete for a variety of reasons, including commercial gain and any actual harm to its brand. It is important to include a combination of different remedies in an agreement. It is possible to give the sponsor the right to impose fines or suspend or withhold payment or even include conditions where the athlete repays sponsorship monies in certain situations.

A staged payment mechanism can also be included in an agreement where specified payment is released upon the athlete meeting certain milestones. This can be a useful tool for the sponsor as it helps to avoid the uncertainty involved in making a claim for damages, as further discussed below.

Suitable indemnities may also be added. Under UAE law however, a court has the discretion to reduce the amount of indemnity to reflect the extent to which the party relying on the clause caused the loss to be indemnified.

There is now an increasing tendency for sponsors to require athletes to disclose any material issues as soon as possible, so that the sponsor is able to manage any fall out, more effectively with the media and mitigate any adverse implications on its brand. Various obligations affecting the athlete can therefore be built into a sponsorship agreement. In addition, the sponsor may also want the right to require the athlete to cooperate with the sponsor in order to manage any scandal. For example, it may want the athlete to make an approved public apology or statement and these have become common upon the breaking of a scandal.

Damages

Where loss has been suffered by a sponsor as a result of a breach, the sponsor may have a claim for damages. Under UAE law, there are provisions in the Civil Code which states that the “the right to have damages made good shall include moral damage, and an infringement of liberty, dignity, honour, reputation, social standing or financial condition of another shall be regarded as being moral damage”. In theory, even without a morality clause within a sponsorship agreement, it would appear that there is some scope for the UAE courts to award damages in relation to “moral damage”. However, the term “moral” in this respect is driven by moral standards determined by society in the UAE taking into account customs and religion and therefore may not be specific or cover every scenario which a sponsor may wish to be addressed.

In the UAE, a claim for damages is not always straightforward. It can be difficult to quantify the level of damages that a sponsor may have suffered as a result of an athlete’s breach of an agreement or

otherwise. It is likely that in such a scenario, the UAE court will want to appoint an expert to assess such damages and this could be a costly, lengthy and uncertain process. A liquidated damages clause can be included in a contract which sets out a certain sum to be paid by the athlete in the event of specified breaches of the agreement. However, the UAE courts have discretion to vary agreements that fix compensation and award compensation reflecting actual loss.

CONCLUSION

As is the case with all commercial agreements, the ability to include all desirable protections depends, to a large extent on the relative bargaining power of the parties. Hopefully, the brief analysis above shows that blindly walking into sports sponsorships can be hazardous to a sponsor's health. If possible, it is also recommended that the sponsor carry out some form of due diligence on the athlete or team. However, due diligence is never a perfect science and the sponsor may not always be in a position to carry out any (or sufficient) due diligence as some athletes or teams may have significant bargaining power and find the process to be invasive. However, as discussed above, there is legal protection available which can be included in a UAE law governed contract to protect sponsors from scandalous sports stars. Commercial factors have a huge part to play in sports sponsorship agreements and therefore a combination of remedies and protections can be extremely beneficial to the sponsor.