Cancellation of Sports Sponsoring Agreements for *Force Majeure* (COVID-19): Which Part of the Sponsorship Fees must be Reimbursed to the Sponsor?

JACQUES DE WERRA, NICOLAS ROUVINEZ

The cancellation clauses of the sponsoring agreements gave the sponsor the right to obtain the (partial) reimbursement of the paid sponsorship fees.

Judgment of the Federal Supreme Court of 11 January 2023

Case Reference : 4A_559/2021

Facts

In 2016, a Swiss company (the "Sponsor") entered into a global sponsorship agreement (the "Global Agreement") with a Belgian company (the "Organizer") for the corporate sponsorship of various sports competitions organized by the Organizer for a period running until the end of 2022 (five seasons). Specifically, the Sponsor undertook to sponsor three sporting events for an amount of EUR 8,600,000 for each of the five seasons. The amount due per year was broken down as follows: EUR 3,000,000 for the Los Angeles competition (which was later moved to New York), EUR 3,000,000 for the Paris competition and EUR 2,600,000 for the Hong Kong competition respectively. The Global Agreement provided that the sponsorship fees for each competition be paid in installments.

Art. 10.1 of the Global Agreement provided in the event of termination that "[e]xcept where expressly stated otherwise, the […] termination of this Agreement shall be without prejudice to any existing […] claims that the terminating Party may have against the other".

Art. 13.4 of the Global Agreement further provided for the reimbursement of the sponsorship fees as follows: "If […] an Event is postponed or canceled and is not rescheduled, [the Organizer] will either: […]

Art. 13.4.2 reimburse [the Sponsor] a reasonable proportion of the Sponsor Fee taking into account the concerned […] Event, such proportion to be agreed between the Parties."

In 2019, the parties entered into an additional agreement relating to the financing of a competition in Lausanne (the "Lausanne Agreement"). The Lausanne Agreement contained a provision (Art. 10.1) whose content was identical to Art. 10.1 of the Global Agreement (as cited above).

Art. 14.4 of the Lausanne Agreement provided for the reimbursement of the sponsorship fees as follows: "If any of the Events during the Term is postponed or canceled and is not rescheduled, [the Organizer] will reimburse to [the Sponsor] the Sponsor Fee for the Event."

In 2019, the Sponsor paid the first installment for the competitions organized in 2020. However, the emergence of the COVID-19 pandemic led to the cancellation of the Lausanne competition (that was supposed to take place in June 2020) and of two of the three sponsored competitions under the Global Agreement: the Hong Kong competition that was supposed to take place in February 2020 and the New York competition that was supposed to take place in April 2020. On May 6, 2020, the Sponsor terminated both the Global Agreement and the Lausanne Agreement. Consequently, the third competition under the Global Agreement (*i.e.* the Paris competition that was supposed to take place in December 2020) was cancelled.

On May 27, 2020, the Sponsor filed a claim against the Organizer before the Commercial Court of the canton of Berne ("the Commercial Court") requesting: i) the partial reimbursement of the sponsorship fees that the Sponsor had already

paid to the Organizer for the canceled competitions; and ii) that the Organizer remove the trademarks and logo of the Sponsor from its website and that it be enjoined from using them. The Commercial Court upheld the Sponsor's claim and ordered the Organizer to reimburse the sponsoring fees that it had received.

The Organizer challenged this ruling before the Federal Supreme Court.

Issue

Among the various issues that the Federal Supreme Court had to preside, we shall focus on two issues relating to the interpretation of the two sponsorship agreements entered into by the parties (*i.e.* the Global Agreement and the Lausanne Agreement).

Firstly, the Federal Supreme Court had to determine whether the termination of the sponsorship agreements due to a case of *force majeure* (*i.e.* COVID-19) excluded the contractual right of the Sponsor to obtain the reimbursement of the sponsoring fees. Secondly, the Federal Supreme Court had to interpret Art. 13.4.2 of the Global Agreement which provided for the obligation to "reimburse to [the Sponsor] a reasonable proportion of the Sponsor Fee taking into account the concerned […] Event, such proportion to be agreed between the Parties" and determine what the parties meant when they stipulated that the Organizer was obliged to reimburse the Sponsor "a reasonable proportion" of the sponsorship fees.

Decision

The Federal Supreme Court confirmed the judgment handed down by the Commercial Court and thus rejected the appeal filed by the Organizer.

Firstly, with regard to a possible exclusion of the Sponsor's claims for reimbursement in the event of termination of the agreement due to *force majeure*, the Federal Supreme Court observed that Art. 10.1 (the content of which was identical in the two sponsorship agreements) provided that the termination of the agreement did not affect the existing claims that the terminating party may have against the other party, unless provided otherwise in the agreements. In this case, the Federal Supreme Court confirmed the finding of the Commercial Court that the parties had not agreed on a solution that would derogate from Art. 10.1 in case of termination of the agreement due to *force majeure* so that the relevant claims of the parties would be valid. As a result, the Sponsor could still validly claim, as a matter of principle, the reimbursement of the sponsorship fees. From a contract drafting perspective, this issue constitutes an interesting illustration of the challenges raised by "survival clauses" (*i.e.* contractual clauses that shall remain in effect after the termination of the agreement ; for another example dealing with the issue of whether an arbitration clause remains legally binding after the termination of a license agreement, see ATF 140 III 134).

Secondly, the Federal Supreme Court had to interpret Art. 13.4.2 of the Global Agreement, according to which the Sponsor could obtain the reimbursement of "a reasonable proportion" of the sponsorship fees.

On this issue, the Federal Supreme Court also confirmed the conclusion reached by the Commercial Court and held that the wording of Art. 13.4.2 of the Global Agreement relating to the reimbursement of "a reasonable proportion" of the sponsorship fees, if applied, would require to take into account the specific circumstances of the case, in particular the event in question.

The Federal Supreme Court held that due consideration should be given to the expenses already incurred by the Organizer to organize the event. In this respect, it confirmed the finding of the Commercial Court that the Organizer had to justify the expenses that it had incurred and prove it with relevant evidence.

In light of this interpretation, the Federal Supreme Court confirmed that the Sponsor was entitled to the reimbursement of the full sponsorship fees that it had paid for the competitions which were canceled well in advance (*i.e.* the New York competition that was supposed to take place in April 2020 and the Paris competition that was supposed to take place in December 2020). It also confirmed the findings of the Commercial Court according to which the Sponsor could only obtain the reimbursement of 80% of the sponsorship fees paid for the Hong Kong competition that was cancelled only 17 days before it was scheduled to take place (*i.e.* February 2020). This was the percentage claimed by the Sponsor (who admitted that the Organizer had already made certain investments and had thus incurred certain costs) and it had not been substantially challenged by the Organizer.

Key takeaways

Parties to a sponsoring agreement are strongly advised to contractually anticipate the consequences of the cancellation of the sponsored event(s) for causes beyond the parties' control (in this particular case, the COVID-19 pandemic). If the sponsor has the right to obtain the reimbursement of the sponsorship fees from the organizer, the conditions and the modalities of the right of reimbursement should be clearly specified in the sponsoring agreement (which was not adequately done in this case).

Comments

Based on the decision of the Federal Supreme Court (and without access to the court record of the case), the general approach adopted by the Commercial Court and confirmed by the Federal Supreme Court appears to be correct. The Sponsor generally had the contractual right to obtain the reimbursement of the sponsorship fees as provided for in the parties' agreements. This was crystal clear in the Lausanne Agreement which provided for the full reimbursement of the sponsorship fees (Art. 14.4: "If any of the Events during the Term is postponed or canceled and is not rescheduled, [the Organizer] *will reimburse to* [the Sponsor] *the Sponsor Fee for the Event*." (italics added). The amount to be reimbursed to the Sponsor was not as clearly defined under the Global Agreement because the obligation of reimbursement referred to "a reasonable proportion of the Sponsor Fee taking into account the concerned […] Event, such proportion to be agreed between the Parties." (Art. 13.4.2). The Federal Supreme Court confirmed that due consideration should be given to the expenses already incurred by the Organizer for the organization of the event when determining the "reasonable proportion" of the sponsorship fees that had to be reimbursed to the Sponsor and, in line with the finding of the Commercial Court, that the Organizer had to justify the expenses that it had incurred and prove it. The reasoning of the courts thus focused on the *costs* borne by the Organizer that – if proven – could ultimately affect the obligation of the Organizer by reducing the amount of sponsorship fees it has to reimburse to the Sponsor.

However, by focusing the analysis solely on the costs incurred by the Organizer, the courts have not taken into account the potential *benefits* that could have been derived by the Sponsor as a result of the performance of the Global Agreement by the Organizer. As a matter of principle, the goal of a sponsoring agreement is to transfer a positive image to the sponsor[1], which is generally a key reason for the payment of sponsorship fees by the sponsor to the organizer of a sponsored event. As a result, sponsorship fees can be paid by a sponsor not only to cover expenses of the organizer of the sponsored event but also to obtain this transfer of image. On this basis, it is conceivable that sponsorship fees shall not be reimbursed to the Sponsor in case of subsequent cancellation of the sponsored event if it can be considered that the Sponsor had already derived certain benefits from the transfer of image (for instance if advertising campaigns connecting the sponsor with the sponsored event had already been launched well before the event takes place, etc.).

From this perspective, it is established that sponsorship agreements share common features with intellectual property (IP) license agreements (as expressly noted by the Federal Supreme Court in this case, see para. 2.2 of the judgment). This can mean that each of the contracting parties can grant to the other party the right to use some of its intangible assets under certain conditions in what can be compared to a cross-license agreement. On the one hand, the sponsor can grant the organizer a license to use the IP rights of the sponsor in connection with the sponsored event (*e.g.* trademarks). This appears to be the case here given that the Sponsor requested from the Commercial Court that the Organizer remove the trademarks and logo of the Sponsor from its website and it be enjoined from using them. On the other hand, the organizer can grant the sponsor the right to use some of its IP assets (*e.g.* trademarks). From this perspective, a sponsor can be compared to a licensee that benefits from a license on certain IP rights of the organizer (such as trademarks) and gains a positive image through its association with the sponsored event, whereby these benefits can start well before the sponsored event is held. For this reason, if the Sponsor has benefitted from this license for a certain period of time, the part of the sponsorship fees that it had paid that would correspond to this right of use (and that could be assimilated to royalty payments) would be due to the Organizer of the sponsored event and shall consequently not be reimbursed.

That being said, one should note that the exact quantification of the value of the transfer of image for the benefit of the sponsor that would justify the non-reimbursement of the sponsorship fees would be quite difficult to establish. As a result, it is highly recommended that contracting parties draft cancellation clauses and clearly define the amount of sponsorship fees that shall be reimbursed by the sponsored company/organizer and the conditions for such reimbursement (*e.g.* by providing for fixed percentages of reimbursement that can vary over time depending on the proximity of the date of the sponsored event; the closer the date of the sponsored event, the lower the percentage of the reimbursement). In this case, the contractual solution agreed upon by the parties was not adequate given that it left some undesirable uncertainty by referring to the – always challenging – standard of reasonableness and required a subsequent agreement of the parties that

– of course – did not materialize (Art. 13.4.2 of the Global Agreement: "a reasonable proportion of the Sponsor Fee taking into account the concerned […] Event, such proportion to be agreed between the Parties.").

Another legal issue at hand which is also worth commenting relates to the application of Art. 119 of the Swiss Code of Obligations ("SCO") to the non-performance of contracts affected by COVID-19[2]. It indeed results from the judgment of the Federal Supreme Court that the Commercial Court had considered that the contractual regime adopted by the parties (*i.e.* the Sponsor's right to obtain the reimbursement of the sponsorship fees in case of cancellation of the sports events) mirrored the legal regime provided for by Art. 119 SCO. This norm applies in case of subsequent impossibility to perform without fault and provides that "an obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor" (para. 1). It further provides that "in a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied" (para. 2). The Federal Supreme Court did not discuss the application of Art. 119 SCO in this case because this provision was overridden by the agreement. It simply stated that contracting parties may agree on contractual obligations that mirror the content of legal provisions (in its reasoning about the Paris Agreement, para. 4.3.2: "there is obviously no reason to criticize the similarity between the contractual solution and the legal regime" [unofficial translation]). One can note in this respect that Art. 119 SCO is waivable therefore parties are free to adopt a contractual alternative that would allocate the risks differently, for instance by prohibiting the reimbursement of payments that were made in spite of a subsequent impossibility to perform the obligation for which the payment was already received. This stems from Art. 119 para. 3 SCO which provides that "[t]his does not apply to cases in which, by law or *contractual agreement*, the risk passes to the obligee prior to performance" (italics and underlining added). This is in essence what the parties have agreed upon in the Global Agreement by (imperfectly) defining the modalities of reimbursement of the sponsorship fees (Art. 13.4.2 of the Global Agreement).

One should however note that the (contractually waivable) obligation to reimburse payments in spite of a subsequent impossibility of performance of the obligation applies to *bilateral* contracts (based on the wording of Art. 119 para. 2 SCO). Sponsorship agreements, however, do not constitute classical bilateral contracts within the meaning of Art. 119 para. 2 SCO but must rather be considered as long-term contracts (*contrats de durée, Dauerverträge*). Art. 119 SCO was not designed to apply to long-term contracts, particularly if the performance of those contracts has already begun making a retroactive extinction of the obligation (*ex tunc*) inappropriate/not possible. In such circumstances, one could assume that the obligation to reimburse the sponsor may be limited in order to take into account the benefits derived by the sponsor from the partial performance of the sponsoring agreement during a certain period of time (based on a similar reasoning to the one made above)[3].

In addition, it is worth noting that a claim for reimbursement based on unjust enrichment (Art. 62 et seq. SCO) – which is what is provided for under Art. 119 para. 2 SCO – is not the same as a contractual claim of reimbursement. There are indeed major differences between these two systems, including potential obstacles to reimbursement based on unjust enrichment represented by the exception of divestiture (Art. 64 SCO which provides that "[t]here is no right of reimbursement where the recipient can show that he is no longer enriched at the time the claim for reimbursement is brought, unless he alienated the money benefits in bad faith or in the certain knowledge that he would be bound to return them") – the application of this provision would justify that good faith expenses would have to be deducted from the amount to be reimbursed –, or the shorter statute of limitation (Art. 67 SCO). One may thus wonder how Art. 119 SCO would have applied in this case. This did not have to be addressed by the courts because the case could be solved through the application of the contractual provisions agreed upon by the parties.

[1] See *e.g.* the decision of the Federal Supreme Court, ref. 2A.166/2005 of May 8, 2006, para. 4.2. See also *e.g.* Gwinner, K. P., & Eaton, J. (1999). Building brand image through event sponsorship: The role of image transfer. Journal of Advertising, 28(4), 47–57, available at: http://dx.doi.org/10.1080/00913367.1999.10673595 (08.08.2023).

[2] This broad issue cannot be discussed here, see *e.g.* (with respect to commercial leases) David Lachat/Sarah Brutschin, Le bail aux temps du coronavirus, *in* Semaine Judiciaire 2020 II, p. 111 ff.

[3] See also Pascal Pichonnaz, Impossibilité et exorbitance, Fribourg 1997, N 1111.