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Sports Marketing Agreements: Legal, Fiscal and Practical Aspects

Ian S. Blackshaw

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Prof. Ian S. Blackshaw
80 rue Principale
62310 Sains-les-Fressin
France
e-mail: ian.blackshaw@orange.fr

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Series Information

Books in the *ASSER International Sports Law Series* chart and comment upon the legal and policy developments in European and international sports law. The books contain materials on interstate organisations and the international sports governing bodies, and will serve as comprehensive and relevant reference tools for all those involved in the area on a professional basis.

The Series is developed, edited and published by the ASSER International Sports Law Centre in The Hague. The Centre's mission is to provide a centre of excellence in particular by providing high-quality research, services and products to the sporting world at large (sports ministries, international—intergovernmental—organisations, sports associations and federations, the professional sports industry, etc.) on both a national and an international basis. The Centre is the co-founder and coordinator of the Hague International Sports Law Academy (HISLA), the purpose of which is the organisation of academic conferences and workshops of international excellence which are held in various parts of the world. Apart from the Series, the Centre edits and publishes *The International Sports Law Journal.*

Series Editors
Dr. Robert C. R. Siekmann, Director Asser International Sports Centre
e-mail: r.siekmann@asser.nl

Dr. Janwillem Soek
e-mail: j.soek@asser.nl

M. A. van der Harst LL.M.
e-mail: m.van.der.harst@asser.nl

Editorial Office
ASSER International Sports Law Centre
T.M.C. Asser Instituut
P.O. Box 30461
2500 GL, The Hague
The Netherlands
www.sportslaw.nl

Foreword

I am pleased to write the Foreword to Professor Ian Blackshaw's book on the Legal, Fiscal and Practical Aspects of Sports Marketing Agreements, particularly as various sports marketing methods and principles, as he points out in this book, in many ways originated and developed in the United States. Sports marketing has now taken root in the rest of the world as well, and, despite the economic downturn and recession, it continues to flourish.

In his book, Professor Blackshaw adopts an efficient and useful approach to this subject by combining theory with practice. As shown in the Table of Contents, a wide range of sports marketing agreements are covered, including: Sports Broadcasting Agreements, often the life blood of a major sporting event; and New Media Rights Agreements, which often provide sports marketers with an extra dimension for commercializing sports events particularly through online media such as "webcasting."

Of particular importance, the book covers the impact of the European Union (EU) on the commercialization of sports events, particularly the Competition Rules of the EU, which apply whenever sport constitutes an economic activity. As sport becomes a bigger and bigger business around the world it is difficult to conceive of any situation in which the necessary economic activity could be absent. As a result, the EU aspects of sports marketing are very important in practice and must be taken into account when negotiating and drafting sports marketing agreements with a European dimension.

This book also tackles the important impact of tax law and rules on sports marketing. It specifically covers the fiscal aspects of Sports Image Rights Agreements and the need to shelter the considerable revenues that sports personalities, such as David Beckham, may earn from the commercial exploitation of their image in a wide range of consumer goods and services on an international scale.

Professor Blackshaw is a leading authority on the use of Alternative Dispute Resolution (ADR) for the extra-judicial settlement of sports disputes of various kinds, particularly commercial ones that transcend national boundaries. Demonstrating this expertise he includes a comprehensive chapter on ADR and extols its

merits for dealing with sports disputes that are bound to arise under a wide range of sports marketing agreements due to the large amounts of money involved and put at risk. Coupled with this focus on ADR, throughout the book he reinforces the need to draft clear and unambiguous agreements as another method to avoid disputes.

Overall, Professor Blackshaw's book contains many useful insights and important information regarding a variety of sports marketing agreements that will be of interest to readers from every aspect of the sports industry, including; sports administrators, rights holders, marketers, advertisers, broadcasters and their professional advisers, and others who are involved in the organization, promotion and commercialization of sports events and personalities. This book will also become a useful resource for academics, researchers, scholars and students in sports marketing and law.

Congratulations to Professor Blackshaw on this important and highly practical book. I recommend this book to individuals involved in sports marketing and sports law around the world. I look forward to relying on it in my own sports law research and courses in the future.

Milwaukee, Spring 2011

Prof. Paul Anderson
Associate Director
National Sports Law Institute
Marquette University Law School
Milwaukee, WI
USA

Author's Preface

Sport is now big business—worth more than 3% of world trade and 3.7% of the combined GNP of the 27 Member States of the European Union with a population of some 500 million—and a whole new body of law and practice has grown up in the field of the commercialisation of sports events and the exploitation of the image and personality rights of elite athletes, all of which is commonly referred to—in the jargon—as Sports Marketing.

Indeed, without the considerable revenues derived from various forms of Sports Marketing, especially Sponsorship and Sports Broadcasting and New Media Rights—many major sporting events, such as the Olympic Games and the FIFA World Cup, could not be organised and staged; and likewise many athletes could not afford to train and participate in them—much to the disappointment of sports fans around the world.

The aim of this book, therefore, is to provide sports administrators and their professional advisers, especially their lawyers, marketers, media advisers, advertising, PR and sports agents, sports law students and researchers, as well as others involved in the commercialisation, marketing and promotion of major sporting events and sports personalities, with an overview of the legal, fiscal and practical aspects of drafting and enforcing a wide range of standard Sports Marketing Agreements and also particular sports-specific clauses, including so-called 'Morality Clauses' in Sports Image Rights and Endorsement Agreements, particularly relevant to the recent fall from grace of Tiger Woods and, indeed, of other sports personalities.

The book also includes many samples of these Agreements, whose structures and contents are discussed, analysed and explained in the text of the relevant chapters. This special feature of the book will be of particular interest to legal practitioners, sports administrators, agents and managers.

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- a chapter on Stadia Naming Rights Agreements, a unique and lucrative form of sports sponsorship, which, like Sports Marketing itself, originated in the States, but is proving to be popular elsewhere.[1] A General Precedent of such an Agreement is also included.
- the important aspect of dispute resolution, especially the various forms of alternative dispute resolution (ADR) methods and mechanisms, especially commercial Mediation, that particularly lend themselves to the *extra judicial* settlement of sports-related disputes, which, not surprisingly, with all the money sloshing around in world sport, are on the increase. Samples of 'Dispute Resolution Clauses' are included and discussed in the chapter devoted to this subject.
- the European Union (EU) aspects of the subject, especially the application of the EU Competition Rules to restrictive provisions, such as territorial restrictions in Sports Licensing and Merchandising Agreements.
- a chapter on some of the tax aspects of the subject, particularly in relation to the possibilities of the tax sheltering off-shore of the substantial financial benefits of the licensing of sports image and personality rights of leading sports persons.

This is a fascinating and money-spinning field of sports law and it is the author's further aim that this book will quickly establish itself as the leading work of its kind, combining as it uniquely does the theory and the practice.

The Law is stated as of 1 January, 2011 according to the sources available at that date.

The Hague, Spring 2011

Prof. Ian Blackshaw
Honorary Fellow
ASSER International Sports Law Centre
The Hague
The Netherlands

[1] For example, the Arsenal Football Club's new 'Emirates' Stadium in London.

Acknowledgments

The author of this book wishes to thank Professor Robert Siekmann, the director of the TMC Asser Instituut International Sports Law Centre, The Hague, The Netherlands, and Dr. Janwillem Soek, the Centre's senior researcher, for all their interest, encouragement and support for this book and its final editing; Mr. Philip van Tongeren, the director of TMC Asser Publishing, for publishing the book in the Asser International Sports Law Series; and my good friend and learned colleague, Keith McGarry, for locating several of the precedents included in the book; and last, but, by no means least, my wife Christine for all her patience and understanding whilst I was writing the book.

Of course, in the time-honoured phrase, the responsibility for the book as a whole, including any errors that may have crept into the final text, rests with the author alone.

Contents

Abbreviations

ABTA	Association of British Travel Agents
ADR	Alternative Dispute Resolution
ATMs	Automated Teller Machines
CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
CO	Swiss Code of Obligations
EBU	European Broadcasting Union
ECHR	European Convention on Human Rights
EEA	European Economic Area
EU	European Union
FCPA	US Foreign Corrupt Practices Act
FIFA	International Federation of Association Football
HMRC	Her Majesty's Revenue and Customs
ICANN	Internet Corporation for Assigned Names
ICC	Incorporated Cell Company
IMG	International Management Group
IOC	International Olympic Committee
IP	Intellectual Property
IPRs	Intellectual Property Rights
IR	Image Rights
IRRA	Image Rights Representation Agreement
ISL	International Sport Leisure and Culture
KNVB	Royal Netherlands Football Association
LOCOG	Organising Committee of the London 2012 Summer Olympics
NBC	National Broadcasting Company
NFF	Norwegian Football Federation
NIC	National Insurance Contributions
OECD	Organisation for Economic Co-operation and Development
PAYE	Pay-As-You-Earn
PCC	Protected Cell Company
PCT	Patent Cooperation Treaty

PLT	Patent Law Treaty
SFCs	Specialist Financial Centres
SOPARFI	Société de Participations Financières
TRIPS	Trade Related Aspects of Intellectual Property Rights
UDRP	Uniform Domain Name Dispute Resolution Policy
UEFA	Union of European Football Associations
VIK	Value in Kind
WIPO	World Intellectual Property Organization

Chapter 1
Introductory Remarks

1.1 Introductory Remarks

Sport is now big business accounting for more than 3% of world trade. In the European Union, sport has developed into a discrete business worth more than 2% of the combined GNP of the 27 Member States comprising some 500 million citizens.

Indeed, according to Sepp Blatter, the President of FIFA, the World Governing Body of Football—and the Author of this Book would entirely agree with him—sport is now a 'product' in its own right, and there is much to play for not only on but also off the field of play. Whether this is a good thing as far as the integrity and so-called 'Corinthian Values' of sport is concerned is, of course, another matter—and, perhaps, a subject for another Book!

For example, licensing and merchandising rights in relation to major sports events, such as the FIFA World Cup and the Olympic Games, are 'hot properties', commanding high returns for the rights owners ('licensors') and concessionaires ('licensees') alike.[1]

Again, the commercial exploitation of the image rights of famous sports persons, such as David Beckham and Tiger Woods, is also big business.[2]

Likewise, sports broadcasting and new media rights are also money-spinners. For example, the English FA Premier League sold its broadcasting rights for the 2010–2013 seasons for another record sum of £1.782 billion!

The commercialisation and marketing of sport, sports events, sports teams and sports personalities has developed over the last 30 years or so into a discrete sports marketing industry with its own peculiarities and characteristics.

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[1] See Chaps. 10 and 11 by Ian Blackshaw in '*Sports Law*' by Gardiner et al., 2006, Third Edition, Cavendish Publishing, London.

[2] See '*Sports Image Rights in Europe*', Ian S. Blackshaw & Robert C. R. Siekmann (Eds.), 2005 TMC Asser Press, The Hague, The Netherlands.

I. S. Blackshaw, *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects*, ASSER International Sports Law Series, DOI: 10.1007/978-90-6704-793-7_1,

Much of the pioneering work in the field of sports marketing was done by the late Horst Dassler of the sports goods and clothing manufacturer, ADIDAS, through the Swiss-based sports marketing company, International Sport Leisure and Culture (ISL), which he founded.[3] He revolutionised the marketing of the Olympic Games, by introducing a unified and global approach, and other major international sporting events, including basketball, football and track and field, through the development of sponsorship, merchandising and other commercial and promotional techniques. Another pioneer in sports marketing was the late Mark McCormack, who founded International Management Group (IMG), which is still going strong today. His particular *forte* was the promotion and marketing of major sports personalities, such as the legendary golfer, Arnold Palmer, who was his first client; and IMG was also Tiger Woods' first Agency.

[3] In the summer of 2001, ISL was declared Bankrupt by a Swiss Court with debts of reputedly £350 million. The insolvency of ISL was largely due to ever increasing guarantees given by the Company in connection with the marketing of major international sports events, which it could not fulfil.

Chapter 2
Negotiating Drafting and Interpreting Sports Marketing Agreements: Some General Legal and Practical Points and Considerations

2.1 Introductory Remarks

It has been generally well said, that if a commercial deal makes business sense, it also makes legal sense and it is relatively easy, therefore, to draw up the corresponding legal agreement—and, where necessary, enforce it. And this is certainly true of Sports Marketing Agreements, which come in all shapes and sizes. All the commercial and financial arrangements that have been negotiated need to be covered by clearly drafted provisions to avoid any legal challenges to the validity of the Sports Marketing Agreement concerned on the grounds of its uncertainty. Otherwise, the parties may find themselves with a void Agreement, which they cannot rely on or legally enforce. Clarity is the name of the game!

Before dealing with the subjects of drafting and interpreting Sports Marketing Agreements, which, as will be seen, go hand in hand, a word or two on the general principles of negotiating contracts generally would not be inappropriate.

2.2 Negotiating Sports Marketing Agreements

When negotiating Commercial Agreements generally and Sports Marketing Agreements, in particular, especially those with an international dimension, attention should be paid to the following general principles of negotiating.

Negotiating is an art—not a science—and there are a number of useful guidelines to be followed in order to achieve a successful outcome.

In basic terms negotiating is 'getting to yes'. Like any other form of advocacy—persuading another person to accept your point of view—a negotiation needs to be carefully *planned*. Before you start, you need to know clearly what your objectives are and how you are going to achieve them. Make sure, however, that your objectives are *realistic* and *reasonably achievable*.

I. S. Blackshaw, *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects,* ASSER International Sports Law Series, DOI: 10.1007/978-90-6704-793-7_2,

An important part of the planning process is to gather as much *intelligence* about the other side in the negotiation as possible. You will need to know, amongst other things, the kind of people you are dealing with; their strengths and weaknesses; and their aims and objectives. Be prepared generally!

Again, as part of the planning process, the negotiation needs to be *structured* into distinct phases. The first phase should identify any points of agreement and get those out of the way; the next, any points of disagreement and the reasons for them. The following phases should be to evaluate, from your own point of view and that of the other side, the importance of these differences and the possibilities for any compromises. Try to identify the matters that are negotiable and the ones that are not negotiable. The points that can be conceded and '*given away*' and the ones that cannot—the ones that are *deal breakers* if not agreed!

Watch out for and try to interpret any *body language*—that is, non-verbal communications and gestures. This is very important in multi-cultural negotiations.

Negotiation also needs *time* and *patience* and should not, therefore, be rushed to avoid bad deals.

Every negotiation should be conducted in a courteous and conciliatory manner. When tempers and blood pressures begin to rise, it is time to take a break!

The use of *role play*—the *hard* person and the *soft* one—should be handled carefully. You should decide, in advance, on the particular roles to be played by each of the members of your negotiating team. And, having done so, you should stick to them! In particular, you should appoint one of the members of the team to lead the negotiations and someone else to take notes and keep a record of everything that is said and 'agreed' during them. As to the composition of your negotiating team, if the issues raised involve technical, legal and/or financial matters, make sure that there is someone who is qualified and, therefore, can deal with them.

Likewise the imposition of any *deadlines*, which are designed to move the negotiation along and reach a conclusion more speedily, should also be carefully managed. As in litigation, so also in good negotiation, you should never issue a threat that you are not able and have no intention whatever of carrying out!

Timing is also very important. Choose your moment carefully to press home a particular point. Always know when and how to retreat.

In international negotiations, be aware of and allow for *cultural differences* and the need, where necessary, for the other side to *save face*. This is especially important in negotiations with the Chinese and Japanese and also with parties from the Middle East, where pride may be at the heart of the matter or dispute.

Always remember that negotiating is *getting to yes*, and so always try to make it easy for the other side to say *yes*.

You should be aware of all these negotiating techniques, not only to use them effectively in your own interests, but also be aware of any of them when they are being used against you!

In addition to all the other points that I have mentioned, there is one vital or *golden rule* that should always apply to any negotiations and it is this:

Do not insist on getting the last penny!

And always remember: *in a successful negotiation*, *everybody wins something*!

Many Books and Articles have been written and many Seminars and Courses are offered on the subject of Successful Negotiating, particularly on Negotiating Strategies and Tactics. A general article on this important aspect of Negotiating, intended to whet the appetite of the reader of this Book to investigate the subject of Negotiating in more detail, is reproduced in the first appendix of this Chapter (2.5.1), for general information and interest purposes. Likewise, in the second appendix of this Chapter (2.5.2), the reader will find some general tips on How to Negotiate Successfully.

2.3 General Principles of Drafting and Interpreting Sports Marketing Agreements

As regards effective drafting, the following general principles should be borne in mind:

- Before starting to draft an agreement, the whole design of the document should be worked out (remember, the agreement will be looked at and interpreted as a whole);
- Nothing should be omitted or included at random;
- The order of the agreement should be strictly logical;
- The ordinary and usual technical language should be followed; and
- Legal language, should, as far as possible, be precise and accurate.

Sir Ernest Gowers of *Plain Words* fame[1] gave the following advice (in rather quaint terms) on making the meaning clear in a legal document:

> "The inevitable peculiarities of the legal English are caused by the necessity of being unambiguous. That is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one the further you are likely to get from the other…… it is accordingly the duty of the draftsman…. To try to imagine every possible combination of circumstances to which his words might apply and every conceivable misinterpretation that might be put on them, and to take precautions accordingly. He must avoid all graces, not be afraid of repetitions, or even of identifying them by aforesaids, he must limit by definition words with a penumbra dangerously large, and amplify with a string of near-synonyms words with a penumbra dangerously small; he must eschew all pronouns when their antecedents might possibly be open to dispute, and generally avoid every potential grammatical ambiguity……. All the time he must keep his eye on the rules of legal interpretation and the case-law on the meaning of particular words, and choose his phraseology to fit them."

[1] 'The Complete Plain Words' by Sir Ernest Gowers, first published in 1954 and never out of print since!

To avoid ambiguities and, therefore, disputes on the meaning, interpretation, scope and application of legal documents, keep sentences short and avoid convoluted ones with lots of relative clauses. Also, use simple and clear language and make sure that the document follows a logical and chronological order and, is therefore, easy to read and follow.

For further practical guidance on the art of effective drafting of legal documents, see the very useful little handbook entitled, *The Elements of Drafting*.[2]

It should be added that, under the rules of interpretation (technical term: *construction*) according to English Law, the aim is to discover the intention of the parties from the language they have used in their written agreement, and, in that process, giving the words used their ordinary and natural meaning.[3] Only on an exceptional basis, where there is ambiguity or contradiction on the face of the document, may the Court call upon *parol* evidence (that is, oral external evidence) in order to discover the real intention and meaning of the parties to the particular Agreement.[4]

In this connection, take care with the use of *Recitals* (the so-called *Whereas* clauses). These should be very carefully drafted, stating the background to and the reason(s) for the Agreement. For example, Recitals are important in the case of a Trademark Licence Agreement (which is what a Sports Merchandising Agreement essentially is), where there has been a previous dispute regarding the mark. If the *operative part* of the Agreement is ambiguous or in conflict with the Recitals, the Recitals will prevail when it comes to determining the meaning of the Agreement. Lord Esher, MR, well expressed the legal position in the English case of *Ex p Dawes Re Moon* as follows:

> "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."[5]

So watch out and avoid such ambiguities inconsistencies!

Whilst on the subject of ambiguities, mention should be made of the *contra proferentem* rule of construction of contracts. This rule derives from the Latin maxim: *verba chartarum fortius accipiuntur contra proferentem—the words of written documents are construed more forcibly against the party offering them.*

This rule provides that any ambiguous term will be construed against the interests of the party that imposed it in the Agreement. Thus, the interpretation of

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[2] E. L. Piesse & J. Gilchrist Smith, Stevens and Sons Ltd, London, 2nd edition 1954.

[3] Often called the 'objective' method of interpretation.

[4] See *Street v Mountfort* [1985] AC 809. On the contrary, under Civil Law in Continental Europe, it is much easier to introduce and rely on parol evidence to clarify and explain any ambiguity in an Agreement. This approach is often called the 'subjective' method of interpretation. In other words, what did the parties intend to say?

[5] *(1886) 17 QBD 275, at p. 286, CA.*

the term concerned will be construed in favour of the party against whom it was unilaterally included. In other words, there was no negotiation—it was 'a take it or leave it' situation. Again, the rule only applies where a Court determines that the term is ambiguous. This often forms the basis of a contractual dispute.[6]

The *rationale* for the rule is to encourage the person who drafted the contract to be as clear and explicit as possible and to take into account as many foreseeable situations as possible.

Again, the rule reflects the Courts' inherent dislike of standard form take-it-or-leave-it contracts, known as 'contracts of adhesion'—in other words, these are terms and conditions of business, take them or leave them! The Courts take the view that such contracts are the result of unequal or unfair bargaining positions of the parties. To mitigate these effects, the doctrine of *contra proferentem* gives the benefit of any doubt to the party upon whom the contract was imposed.

This rule applies in numerous States of the US. For example, §1654 of the California Civil Code, enacted in 1872, provides as follows:

> "In cases of uncertainty… the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

The rule particularly applies to clauses in Agreements that impose on one party restrictions that are not clearly drafted and are, therefore, ambiguous, where the party claiming the restrictions contends that they apply in a particular situation, which is not expressly covered by the wording of the clause, is met with the counter argument that such party could have made the position clear by expressly providing for that situation but has failed to do so.

Again, there is a need for clear and precise drafting of Agreements.

A further point in the interests of clarity: the draftsman should use a *definition/interpretation clause*, especially to define *terms of art*; and also use *Annexes/Appendices* for technical information, which is particularly useful in Sports Licensing and Merchandising Agreements (e.g. to define and calculate complex royalties arrangements).

Drafting and interpretation of Agreements should always go hand in hand; they are two sides of the same coin!

Also, it is advisable to include a *dispute resolution clause*, especially if the parties wish to refer any disputes arising under, out of, or in relation to their Sports Marketing Agreement to the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, in relation to which there are standard clauses provided by the CAS for such purposes (see Chap. 17).

Another point: use so-called *boiler-plate* clauses carefully and only where, according to the particular circumstances of the case, they are appropriate and add something to the meaning and effect of the agreement.

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[6] See the English Court of Appeal case of *Peak Construction* (*Liverpool*) *Ltd v McKinney Foundation Ltd* [1970] 1 BLR 111 and, in particular, the following remarks of Lord Justice Salmon in his judgement at p. 121: "*The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly contra proferentem.*"

For example, the so-called *Entire Agreement* clause, which expressly excludes from the agreement, *inter alia*, any and all representations or warranties (both oral and written) given before the agreement was signed and which may have induced one of the parties to enter into the agreement in the first place. In this connection, the High Court decision in the case of *White v. Bristol Rugby Club*[7] is instructive. White, a professional rugby player, signed a three-year contract to move from his previous club to Bristol. The contract expressly stipulated that it was subject to an 'entire agreement' clause, so that no oral representations made in the course of negotiations applied in respect of its express terms and conditions. White subsequently decided not to join Bristol and asserted that he had been told during the pre-contract negotiations that he could opt out of the contract on the repayment of the advance made to him by Bristol. The Court held that the entire agreement clause precluded White from relying on an oral opt-out term.[8]

Furthermore, take care of express warranties and conditions—distinguishing between the two of them for legal purposes—especially when acting for the grantor of the rights being licensed. A warranty, if breached, gives rise to a claim in damages only, whereas a condition *goes to the root of the contract*—in other words, is a fundamental term of the contract—and, if breached, entitles the other party to terminate the contract and also claim damages.[9] Expect to find in a Sports Licensing and Merchandising Agreement, the following mutual warranties:

- both parties are free to enter into the Agreement and have all the necessary rights and title to do so;
- neither party has entered into any conflicting/competing arrangements;
- neither party shall hold itself out as representing the other or binding the other;
- neither party will do or omit to do or allow anything to be done to impair the rights; and
- the use of the rights granted in accordance with the terms of the Agreement shall not cause the infringement of any intellectual property rights of any third party.

The so-called *severance* clause is particularly useful in the case of a Sports Merchandising Agreement containing territorial restrictions on the exploitation of the rights granted (especially when part of a wider geographical licensing programme), in order to avoid the whole of the Agreement being held to be void on National or European Competition Law grounds. The standard *severance* clause runs as follows:

> "If any provision or term of this Agreement shall be become or be declared in conflict with Law or Public Policy or otherwise illegal invalid or unenforceable for any reason

[7] [2002] IRLR 204.

[8] For further comment on this case, see Blackshaw, Ian (2002) 5(1) Sports Law Bulletin, p. 3.

[9] See, respectively, the English cases of *Bettini v Gye* (1876) 1 QBD 183 and *Poussard v Spiers* (1876) 1 QBD 410.

whatsoever such term or provision shall be divisible from this Agreement and shall be deemed to be deleted from this Agreement provide always that if such deletion substantially affects or alters the commercial basis of this Agreement the parties shall negotiate in good faith to amend and modify the provisions and terms of this Agreement as may be necessary or desirable in the circumstances and the validity of the remainder shall not in any event be affected by any severance taking effect pursuant to the terms of this clause."

Likewise, the so-called *waiver* clause, which usually runs as follows:

"No failure or delay by either party to enforce at any time any one or more of the terms of this Agreement shall be a waiver by the said party of the term or right therein or prevent that party at any time subsequently from enforcing all the terms of this Agreement."

A general point: be careful of using the phrase *best endeavours* in relation to obligations undertaken in the agreement. This phrase has been interpreted by the Courts quite onerously as: *leaving no stone unturned*! This, according to the particular circumstances, could turn out to be quite a heavy financial burden to discharge. In view of its importance and also the variations on theme—'best endeavours', 'reasonable endeavours' and 'all reasonable endeavours'—and the need to avoid sloppy and traditional drafting, the legal meaning of these expressions are summarised in Chap. 18 of this Book.

Another important and sport-specific provision to be included in Sports Licensing and Merchandising Agreements—and, indeed, in all events-related Sports Marketing Agreements (for example, Sports Sponsorship Agreements)—is the one making the Agreement subject to the general and commercial/marketing rules and regulations of the Sports Governing Body concerned.

For example, in the case of the Olympics, the Olympic Charter (the latest version of which dates from July 2007) includes a number of articles dealing with the question of the marketing of the Games. See, for example, the provisions of Rule 7 of the Charter, which deals with the rights over the Olympic Games and the so-called 'Olympic Properties' and their commercialisation. Paragraphs 1 & 2 of this Rule provide as follows:

" 1. The Olympic Games are the exclusive property of the IOC which owns all rights and data relating thereto, in particular, and without limitation, all rights relating to their organisation, exploitation, broadcasting, recording, representation, reproduction, access and dissemination in any form and by any means or mechanism whatsoever, whether now existing or developed in the future. The IOC shall determine the conditions of access to and the conditions of any use of data relating to the Olympic Games and to the competitions and sports performances of the Olympic Games.
2. The Olympic symbol, flag, motto, anthem, identifications (including but not limited to "Olympic Games" and "Games of the Olympiad"), designations, emblems, flame and torches, as defined in Rules 8–14 below, shall be collectively or individually referred to as "Olympic properties". All rights to any and all Olympic properties, as well as all rights to the use thereof, belong exclusively to the IOC, including but not limited to the use for any profit-making, commercial or advertising purposes. The IOC may license all or part of its rights on terms and conditions set forth by the IOC Executive Board."

Note, in particular, the inclusion of data rights in paragraph 1 of Rule 7.
A standard Sports Governing Body compliance clause runs as follows:

> "This Agreement is expressly subject to the rules and regulations of [the Governing Body] wherever relevant and for the avoidance of doubt in the event that any of the said rules and regulations in any way conflicts with any obligation arising pursuant to this Agreement that rule and/or regulation shall prevail over the conflicting obligation arising pursuant to this Agreement and such obligation shall be suspended during any period such conflict exists."

Two other 'boiler-plate' clauses that may usefully be included in a Sports Marketing Agreement are the following:

'Good Faith' Clause

> "The Parties hereto hereby mutually agree and declare that both during and after the termination of this Agreement for whatever cause they will act at all times and for all purposes towards one another in the utmost good faith with a view to giving full legal and practical effect to the terms and conditions whether express or implied of this Agreement and any amendment or amendments thereto."

'Covenant for Further Assurance' Clause

> "The Parties hereto hereby mutually agree and declare that both during and after the termination of this Agreement for whatever cause they will at their own expense and in a timely manner sign and execute any and all such further documents and deeds and do any and all such further acts and things as may be required to give full legal and practical effect to the terms and conditions whether express or implied of this Agreement and any amendment or amendments thereto."

These two clauses are discussed in more detail in Chap. 19 on 'Boiler Plate' Clauses.

Also, having drafted your Agreement, do not forget to read it through as a whole to make sure that it makes sense and there are no contradictions, inconsistencies or conflicts in the document. In other words, that it all hangs together and makes sense. Self-editing of legal documents is absolutely essential in all cases. In any case, the basic canon of interpretation of contracts is that "the contract must be read and construed as a whole".[10]

The other canons of construction, which should always be borne in mind when drafting Agreements, are as follows:

> "Secondly, a contract must be construed objectively, according to the standards of a reasonable third party who is aware of the commercial context in which the contract occurs. Thirdly, a commercial contract must be given a commercially sensible construction; a construction which produces a sensible result should be preferred over one which does not. This means that when a court is faced with competing constructions, it should consider

[10] Per Lord Drummond Young in *Emcor Drake and Scull* v *Edinburgh Royal Joint Venture* 2005 SLT 1233, who set out seven canons of construction as follows:
"[13] First, a contractual provision must be construed in the context of the contract in which it is found. The contract is construed as a whole and, if possible, all the provisions of the contract should be given effect."

> which meaning is more likely to have been intended by reasonable businessmen. Fourthly, … in construing a formal commercial contract, which lawyers have drafted on behalf of each of the parties, the court would normally expect the parties to have chosen their words with care and to have intended to convey the meaning which the words they chose would convey to a reasonable person. Fifthly, … the Court must be alive to the position of both parties and to the possibilities (a) that the provision may represent a compromise and (b) that one party may have made a bad bargain. … Sixthly … the parties must give effect to the parties bargain and must not substitute a different bargain from that which the parties have made. Seventhly, it is permissible … to have regard to the circumstances in which the contract came to be concluded for the purpose of discovering the facts to which the contract refers and its commercial purposes, objectively considered…".[11]

One final point: be careful when, as is often the case, of including a general clause in Sports Marketing Agreements, usually insisted upon by Sports Governing Bodies, especially in Sports Sponsorship and Sports Licensing and Merchandising Agreements, making the Agreement subject to the general prohibition of not doing anything which *may bring the Sport of…… into disrepute*. This is a difficult provision to interpret and apply, in practice, as it is essentially subjective in nature. It is rather like including a general provision on 'public policy', which has been described by one English Judge, namely Mr. Justice Burrough, as: "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."[12]

2.4 Concluding Remarks

Included throughout the Book are a number of Precedents—general/standard forms—for a wide range of Sports Marketing Agreements that will need to be negotiated and drafted.

But beware! Precedents should be used only as a general guide or checklist and should not be blindly and slavishly followed.

All Sports Marketing Agreements are the result of a particular commercial deal that has been negotiated between the parties to them and need, therefore, to be individually tailored and customised to fit and reflect the particular facts and circumstances of each case. In other words, when drafting Sports Marketing Agreements it is not a case of *one size fits all*. Drafting, to be legally and practically effective, needs to be contextual in all cases and should never be carried out in a vacuum. Furthermore, drafting and interpretation go hand in hand and should always be considered as two sides of the same coin.

You have been warned!

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[11] Para [13] Ibid.

[12] *Richardson v Mellish* (1824), 2 Bing. 229, 252, 130 Eng. Rep. 294, at p. 303.

2.5 Appendices

2.5.1 Appendix 1

Best Practice Negotiation Skills: How to Determine the Best Negotiation Strategy

By Jan Potgieter[*]

One of the most overlooked negotiation skills is the skill of selecting the most appropriate negotiation strategy for your negotiation.

Are you approaching all your commercial negotiations with a standard approach?

Should you only use a win/win approach to negotiations?

Traditionally, negotiated outcomes can be classified into one of the following categories:

- Lose/Lose (all parties lose)
- Win/Lose (I win and you lose)
- Lose/Win (I lose and you win)
- Win/Win (we both win—could also be described as compromise)
- Win More/Win More (we unlock synergies—could also be described as being collaborative)

Whilst I agree with the notion that a win/win approach is the only sustainable way to gain competitive advantage, it is well worth considering how you would practically apply this approach in today's global marketplace.

It would be short sighted to conclude that all negotiations are made equally and should therefore be approached in the same way. It would be similar to say that one nation's culture & beliefs are the appropriate culture and therefore the standards that apply to that culture should be applied in interacting with people across the world, irrespective of their background.

There is another dimension within the context of commercial negotiations that should be considered—the old economic dilemma of 'guns or butter'.

The 'guns or butter' story illustrates that with limited resources, organisations and individuals are forced to make choices. In order to have more butter, one must sacrifice guns and vice versa. In a practical sense this means that resources can only be allocated in relation to the relative strategic importance of the activity at issue.

In the case of negotiations that are considered strategic in importance to the organisation, we are more likely to pursue a collaborative or compromising approach. Conversely, when we deem the outcome of certain negotiations to have a limited impact or no impact at all on the achievement of strategic organisational

[*] Jan Potgieter is the Founder & CEO of Business Negotiation Solutions Limited. Reproduced with the kind permission of the author.