# ORGANIZATION AND SPONSORING OF SPORT EVENTS

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## A. Preliminary Remarks

With the 2006 Winter Olympic Games in Torino and the 2006 Ice Hockey World Championship in Latvia having just drawn to a close, sport fans throughout the world are already excitedly looking forward to new major competitions and championships. The 2006 Football World Championship in Germany, for example, which is setting new standards in terms of marketing, is just around the corner. The next Summer Olympic Games in China will already be held in 2008. In Switzerland, all attention is likewise focused on 2008, when Switzerland, together with Austria, will host the upcoming final rounds of the European Football Championship. Further, the following year, in 2009, the Ice Hockey World Championship will be held in Switzerland. Not to be overlooked, apart from these events, is the multitude of other international and national sport events that are held each year throughout the entire world. Examples of this in Switzerland include the "Weltklasse" International Track Meet of Zurich, the Swiss Indoors, which features world elite tennis players, the International Rowing Race on Rotsee and the Ironman Triathlon of Zurich.

In connection with all of these events, two aspects play a central role: the organization of the event and the marketing of the event. This article deals with questions relating to the organization and a special type of marketing, the sponsoring. The article of my colleagues, Peter Honegger and Daniel Eisele, deals with the commercially important marketing of the television rights relating to a sports event.

## B. Organization of Sport Events

### I. Introduction

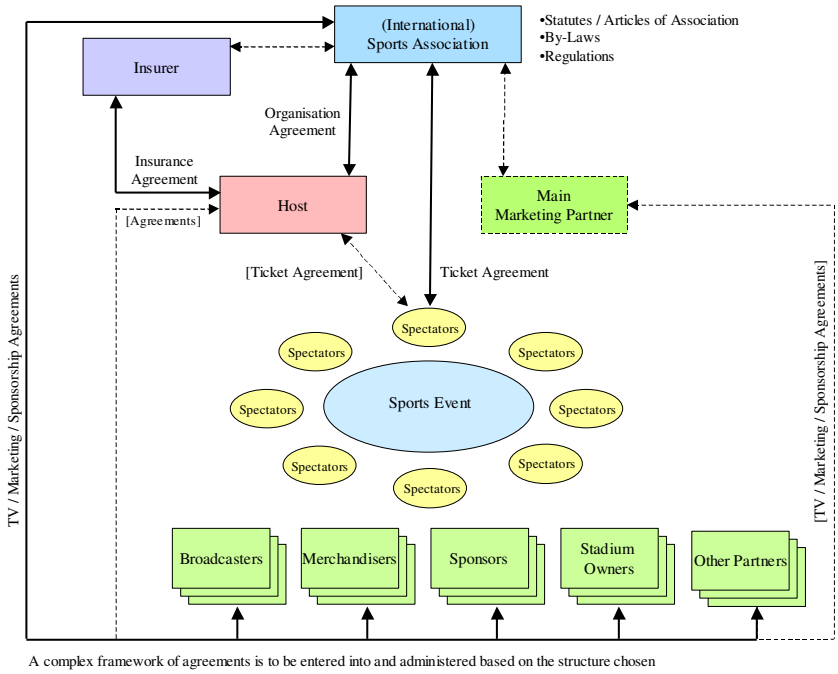
Being selected to realize a sport event constitutes, for the host, not just a great honor. Rather, being selected to realize such a tournament or championship also entails major efforts in terms of the organization and logistics, which require the negotiation and conclusion of many complex agreements. The host bears an extensive amount of responsibility. In addition to the multitude of organizational aspects, many legal issues need to be clarified.

This article will highlight, from a practical standpoint, certain of these legal aspects related to the organization of a sports event. The intent is not to present a comprehensive legal description, accompanied by an apparatus of academic footnotes; instead, the focus will be on certain important questions that arise in practice. In connection therewith, the explanations below basically apply to national and international championships or tournaments of any size. Therefore, these explanations are by all means also important in the case of smaller sports events.

## II. Complex System of Contractual Arrangements

### 1. Overview

From a legal viewpoint, the organization and realization of a tournament or a championship presupposes a complex system of contractual arrangements. This is due to the fact that the organizers of a sports event work together with a multitude of different partners and must guard against contractual and non-contractual risks to the extent possible and justifiable. The diagram below illustrates a possible system of cooperation between the various parties:




A complex framework of agreements is to be entered into and administered based on the structure chosen

### 2. The Individual Contractual Arrangements

From an organizational viewpoint, the hub of this complex system consists of the organization agreement, which is entered into, as a rule, between the (international) sports association under whose auspices the sports event will be held and the host. This agreement will be dealt with in further detail below.

In terms of commercial exploitation, the television agreements and the sponsoring agreements are of substantial importance. The article by Honegger/Eisele is devoted to the television agreement, whereas the sponsoring agreement is the subject of the explanations provided in Part C. below.

The spectators who wish to watch the sports event live in the stadium (or at another event location) are located at the other end of the organizational chain. A separate contract is entered into with each individual spectator or ticket purchaser, which essentially results in a right on the part of the

spectator to attend a specific game or a specific competition. The contract with the spectator also routinely governs additional points, including, for example, provisions relating to safety, advertising (in particular, a prohibition of "ambush" marketing), liability as well as the right – of special importance with a view to the commercial exploitation of a sports event via television broadcasts – to film the spectators within the scope of the television broadcasts.

Additional contractual relationships result with the owners or operators of the stadiums or other competition sites. The agreements, referred to for purposes of this article as "stadium agreements", govern as a primary matter the right on the part of the host and/or (international) sports association to use the stadium (or other competition site) for purposes of the relevant sports event. Other important aspects of such stadium agreements include: the undertaking on the part of the owner or operator of the stadium (i) to make the stadium available free of advertising (i.e., with advertising panels either masked or removed), (ii) to adhere to certain safety requirements, (iii) to waive any type of own use and/or exploitation of the stadium and the event and to possibly assign the own rights to the host (or the sports association under whose auspices the event is being held), (iv) to make available certain ancillary spaces, such as boxes, office premises, parking spaces, as well as equipment such as connections to the electricity mains, telecommunications linkages and office equipment, and (v) to enter into certain insurance policies (including) in favor of the host and/or sports association.

Depending on the constellation, other parties involved in this system may include merchandisers and caterers. The latter are responsible for supplying the competition sites and/or certain VIP zones with food and beverages and other resources necessary for the catering of the public, provided that this activity is not assigned to a sponsor within the scope of a sponsoring agreement.[1] The merchandisers are responsible for the production and delivery of products (such as, for example, balls, t-shirts, caps, watches and other fan articles) bearing the logo or the trademark of the sports event and/or sports association. The merchandising agreement can also be the subject matter of a sponsoring agreement, which is why this will be dealt with further in Part C. below.

Finally, the host and/or the (international) sports association will have to conclude insurance policies that primarily cover the risks based on personal injuries and property damages. Above this, it is recommendable to conclude an insurance policy that covers the financial risks entailed by the organization of the sports event (for example, in the event of a postponement or cancellation of the event), even though the insurance cover will regularly be subject to certain limits in this respect.

[1] In this regard, cf. Part C. below.

## III. The Organization Agreement

### 1. Host and Organizer

In connection with the organization agreement, two different terms must first be clarified: for purposes of this article, a distinction will be drawn between the "host" and the "organizer". This distinction is necessary in order to avoid any discussion or even confusion with respect to the definition of "organizer". As is generally known, the definition of "organizer" repeatedly results in controversial discussions in literature and case law relating to sports law. This is primarily attributable to the fact that it is assumed that the organizer is originally entitled to the rights to commercial marketing of the relevant sports event.[2] This may be true with respect to the (international) sports association under whose auspices the sports event will be held, with respect to the organization that organizes and carries out the sports event, including the host, with respect to the participating associations or clubs or with respect to several of these, collectively.

This discussion will not be continued further here, and reference is made to the corresponding literature as well as the explanations in Part C. below. For purposes of examining the organization agreement, the following terminology will be used: the "organizer" or "umbrella association" is the (international) sports association, such as, for example, the FIFA for the realization of a football world championship or the IIHF for the realization of an ice hockey world championship.[3] The term "host" in this article refers to the organization that is authorized and obligated by the umbrella association (organizer) to realize a sports event.

Frequently, the host will be a (national) sports association or an organizational committee (OC) appointed by this association. Such an organizational committee may possibly constitute an independent legal entity.

The organization agreement will be entered into between the umbrella association (for example, FIFA, UEFA, IIHF, IOC) and the host. It governs the mutual rights and obligations of the parties with a view to the realization of the sports event.

### 2. Content of the Organization Agreement

An organization agreement basically governs the following points:

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[2] Cf., e.g., Daumann/Langer p. 12; Schlindwein, pp. 63 et seq.; Geissinger, p. 106; Arter/Schweizer, pp. 20 et seq. Cf. also Part C. VI.2. below.

[3] In connection therewith, it is assumed that these sports associations have available to them the rights to realize and, above all, also market the sports event, either originally or under charter or by means of the necessary contracts.

- Entering into force of the agreement.
- The granting of the right and imposition of the duty to realize the sports event.
- The number and dates of the competitions or games.
- The financial issues.
- Questions as to the exploitation of rights (including, in particular, sponsoring and/or marketing and exploitation of the television rights).
- Organizational aspects and questions as to the monitoring and supervision of the preparatory work.
- Technical requirements as well as safety measures.
- Confirmations from public authorities.
- Tax aspects.
- Duration and early termination of the agreement.
- Force majeure as well as the postponement or cancellation of the event.
- Insurance aspects.
- Dispute settlement, arbitration.

## 3. Legal Nature of the Organization Agreement

Under Swiss law, an organization agreement can, for good reasons, be classified as a contract for work[4] or as a contract predominated by elements that are similar to a contract for work.[5] The host must accept responsibility for a certain measurable success in terms of performance, namely, the realization of all games or matches within the agreed upon framework. According to prevalent practice, the host, in the case of major international events, is entitled to consideration in the form of the ticket sale revenues. Therefore, the essential elements of the law governing contracts for work and services are given.

In the author's view, it would be especially inappropriate to classify the contract as a mandate.[6] On the one hand, what is owed in the case of a mandate is only the faithful and careful activity, as such, that is suitable to bring about a certain result - the result itself lies over and beyond the responsibility of the performing party and represents, at most, something concomitant to the activity that is owed. On the other hand, in the case of the contract for work – as in the case of the organization agreement – everything depends on this very result. It is the obligation of the host to bring about a

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[4] Articles 363 et seq. of the Swiss Code of Obligations ("CO").

[5] As to the methodical manner of proceeding in connection with the classification of contracts, cf. Part C.IV.2. below.

[6] Articles 394 et seq. of the CO.

concrete result.[7] The obligations of the agent under a mandate agreement are primarily duties to perform work, whereas in the case of the contract for work, a measurable duty to perform also appears, namely, the duty to create and deliver a work. It is uncontested that work within the meaning of the Swiss Code of Obligations can be of a physical or intangible nature.[8] What is important in this regard is, in particular, also the set phrase used already quite early[9] by the Federal Tribunal, to the effect that a work consists of "un certain résultat matériel ou immatériel mais objectivement constatable." Therefore, a work constitutes a tangible or intangible result of performance that is always capable of being ascertained in objective fashion.

These criteria can be readily applied to the organization agreement. The duty to realize the sports event within the agreed upon framework[10] is clearly a duty that is capable of being objectively measured; the fulfillment of this duty is perfectly capable of being ascertained in objective fashion. Therefore, an organization agreement fulfills the criteria of a contract for work pursuant to Articles 363 et seq. of the Swiss Code of Obligations.

This is, moreover, consistent, with the findings of the Federal Tribunal in its previous decisions in comparable cases. Thus, for example, the Federal Tribunal classified the contract to attend a performance[11] as contracts for work. The performer contract, too, is deemed to be a contract for work.[12] The classification as a contract for work does not in any way require that the performance manifest itself in physical form; rather, the agreement upon a performance result that is capable of being objectively determined and measured, which is undoubtedly the case in connection with the organization contract, is adequate.

The classification as a contract for work leads to application of the non-mandatory provisions of law pursuant to Articles 363 et seq. of the Swiss Code of Obligations ("CO") in the event that the organization contract fails to govern a particular legal question. What comes to mind in this regard is, for example, Article 366 of the CO, pursuant to which the right of the host to realize the event can be revoked if the host fails to commence the preparatory work on a timely basis, delays the carrying out of this work or is so far behind that a delay in completion must be expected. Here, the law speaks of the right to early withdrawal from the contract. Such a withdrawal

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[7] Cf., instead of many others, Zindel/Pulver, n. 4, preface, as to Arts 363 – 370 of the CO.

[8] Decisions of the Federal Tribunal ("BGE") 109 II 36; 109 II 465, 114 II 55 et seq.

[9] BGE 83 II 529.

[10] For example, number of games, dates of the games, number of the stadiums, layout of the stadiums, etc.

[11] BGE 80 II 34, 70 II 218 (in the case of the contract to attend a performance, the owner of the theater undertakes to show a film and the visitor undertakes to pay an entrance fee).

[12] SJZ 62 (1966), pp. 329 et seq. (in the case of a performer contract, the performer undertakes to give an artistic performance in return for compensation).

by the international association would mean that the host would have to refund any consideration already previously received and, as the case may be, pay damages.

## 4. Elements of an Organization Agreement

An organization agreement first comprises, as a rule, the contractual document described as the organization agreement. In addition thereto, there are usually additional provisions, above all provisions under the articles of association and regulations of the umbrella association, that constitute an integral part of the organization agreement.

Because the right to organize a sports event is usually awarded many years in advance, it can make sense from the viewpoint of the umbrella association to retain the right vis-à-vis the host to unilaterally modify the organization agreement or the regulations that constitute an integral part of the agreement and/or to issue new regulations that should likewise constitute an integral part of the agreement. Such a provision will regularly relate primarily to organizational and technical issues and is not objectionable from a legal viewpoint.[13] If such a provision is also intended to relate to questions that are financially relevant and a unilateral modification could considerably burden the host, it may additionally be foreseen that, in this case, the parties should negotiate the question of the compensation of the host in good faith.

## 5. Selected Issues to be Governed by an Organization Agreement

### 5.1 Entering into Force of the Agreement

As a rule, the awarding of the right to realize a sports event will be publicly announced, and the interested parties will, during a time period determined by the umbrella association, be able to communicate their interest in applying and submit their application or bid dossier.

Such a process is based on the bid documents distributed by the umbrella association, which regularly include the organization agreement. In submitting the application dossier, the prospective host should already unilaterally sign the organization agreement; he then remains bound by his signature until the umbrella association has selected the host. From a legal-technical perspective, such signing on the part of the applicant constitutes an offer.[14] The intent behind such process is clear: the umbrella association wishes to avoid having to commence long, drawn-out negotiations with the host concerning the organization agreement upon the completion of the selection procedure. If the applicant has already signed the agreement, he has accepted the provisions thereof as a condition for his application, and no further contract negotiations are necessary.

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[13] In particular, Article 27 of the Swiss Civil Code.

[14] Article 3 Para. 1 of the CO.

After the selection of a specific applicant, the umbrella association will countersign the organization agreement, such that the agreement enters into legal force. If the above-described procedure is followed, the selected applicant will effectively become host only upon the signing of the agreement by both parties, not already upon the selection of the host. Even if the organization agreement is, as a rule, actually signed by the umbrella association after the announcement is made, this nuance should nonetheless be borne in mind.

Likewise due to the possibly substantial lapse in time between the selection of the host and the realization of the sports event, the organization agreement may include certain conditions subsequent, thus, conditions that the agreement will lapse in the event that the host fails to fulfill certain tasks and duties within a certain time period.[15]

### 5.2 The Granting of the Right and the Imposition of the Duty to Realize the Sports Event

The corresponding clause in the organization agreement describes the general duty to perform on the part of the host. In this regard, it specifies that the host has the right and the obligation to organize and realize the sports event in accordance with the provisions of the agreement (including the applicable regulations).

The organization agreement will also specify in this clause the financial benefits to which the host is entitled, provided that the agreement does not include a separate provision in this regard. Based on the author's experience, it is unusual for actual compensation to be paid to the host. A possible variation is for ticket sale revenues to be ceded to the host.

### 5.3 The Financial Issues

Such a contractual provision is devoted primarily to the issues of who has to bear the costs entailed by the organization and realization of the sports event and which party must bear which additional financial charges. Often, the applicable regulations of the umbrella association already include the rules in this regard.

Thus, for example, with respect to the 2006 FIFA World Cup in Germany, the following applies in terms of the bearing of costs:[16]

- The associations that participate in the final competition will be responsible for and bear the insurance costs for the entire delegation (players and officials) as well as for board and lodging during the final round.

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[15] These include, e.g., the conclusion of stadium contracts and/or the construction of stadiums by a certain date.

[16] Article 43 of the 2006 FIFA World Cup Regulations.

- The host association will bear the costs in accordance with the FIFA list of requirements and organization agreement.
- FIFA will bear a share in the preparatory costs of the participating associations at a rate still to be determined, certain travel costs for the delegation of the participating associations, a certain share in the costs for board and lodging of the participating associations as well as certain additional costs set out in the regulations.
- All other costs of the participating associations shall be borne by the relevant associations themselves.

Moreover, the host shall enter into the contracts required for organizing matches in his own name and for its own account. In addition, the host shall indemnify and hold harmless FIFA from all third party claims for damages relating to match organization[17].

### 5.4 Questions of the Exploitation of Rights

In connection with the organization of a major sports event that is under the auspices of an international association, it may be assumed that these rights belong to the sports association, either originally, through the articles of association and/or through corresponding agreements.

As an example of this, reference is made to the 2005-2006 Champions League Regulations of the UEFA, which provide that the UEFA is the exclusive, legal and beneficial owner of the commercial rights. "Commercial rights" are defined to mean all commercial and media rights and opportunities in and relating to the UEFA Champions League. UEFA reserves all commercial rights and shall have the exclusive right to exploit, retain and distribute all revenues from the exploitation of these commercial rights. UEFA may appoint third parties who act as brokers or agents on its behalf and/or as service providers with respect to the exploitation of some or all commercial rights.[18]

### 5.5 Organizational Aspects and Questions as to the Supervision and Management of the Preparatory Work

In the corresponding contract provisions, it will initially be a matter of delineating the responsibilities between the umbrella association and the host. Even if the umbrella association transfers the organization of the sports event to the host, this does not mean that the umbrella association backs out entirely from the preparation and realization of the event. Instead, the umbrella association will retain certain powers of high-level management, decision-making and monitoring.

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[17] Article 22 of the 2006 FIFA World Cup Regulations.

[18] Articles 25.01, 25.02 of the 2005-2006 UEFA Champions League Regulations.*J*

Accordingly, the relevant FIFA regulations specify that the Organizing Committee for the FIFA World Cup is responsible for the organization of the 2006 FIFA Football World Cup in accordance with all FIFA regulations; the FIFA general secretariat is, together with the organizing association (host), responsible for the operational organization of the FIFA World Cup in accordance with the guidelines of the Organizing Committee. The organization agreement between the FIFA and the host, moreover, obligates the host to comply with the regulations, the list of requirements, the relevant FIFA regulations as well as applicable national and international laws.[19] The rights and duties of the organizing association will be governed by the organization agreement, by its annexes and amendments, by the list of requirements as well as by additional regulations. The organizing association is responsible for the devising, planning and implementing of adequate safety measures; a reasonable safety plan must be drawn up for this purpose.[20]

In addition to the definition and delineation of the mutual responsibilities, the organization agreement will also govern the ongoing monitoring by the umbrella association of the progress of the project. It is at least common for the host to provide periodical oral and/or written reports, both with respect to the organizational progress and difficulties as well as with respect to the financial side of the project. This can also include the presentation of the audited annual financial statements and/or the right to make an on-site inspection on the part of the umbrella association or through an auditor on behalf of the umbrella association. The primary objective of such reporting and inspection is to enable difficulties and weak points to be recognized early and corrective measures to be instituted as quickly as possible.

Finally, the organizational provisions regularly include a multitude of detailed provisions concerning all aspects of the organization. This may include provisions concerning:

- Cooperation by the host with the various bodies of the umbrella association as well as of its marketing partners,
- Match plan or schedule,
- Opening and closing ceremonies as well as other events,
- Flags and national anthems,
- Award ceremonies,
- Prizes,
- Lodging for the participating athletes and the association delegations as well as the representatives of the umbrella association,

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[19] Article 2 of the 2006 FIFA World Cup Regulations. With respect to the detailed competence of the Organization Commission, see Art. 12 of the 2006 FIFA World Cup Regulations.

[20] Article 20 of the 2006 FIFA World Cup Regulations.

- Means of transportation,
- Medical care, and
- Hospitality.[21]

### 5.6 Technical Requirements and Safety Measures

Whereas the aspects described in Section 5.5 above are primarily the subject matter of organizational measures relating to the process, the points to be dealt with here are primarily technical issues in a more narrow sense. These include, for example:

- Requirements in terms of the stadiums or other competition sites,[22]
- Requirements in terms of the hotel lodgings,
- Requirements in terms of other premises to be made available,[23] and
- Safety regulations.

### 5.7 Governmental Confirmations

In today's world, a major sports event cannot be realized without the cooperation of the governmental authorities of the State in which the event is intended to be held. Accordingly, as a rule, the organization agreement requires the host to obtain certain confirmations or assurances from the governmental authorities in favor of the host and/or the umbrella association as well as the participating associations and athletes. These confirmations or assurances primarily relate to questions of safety and of the ability of the athletes and spectators to enter and leave the country, as well as financial issues.

As an example in this regard, reference is made to the Olympic Charter: "The National Government of the country of an applicant city must submit to the IOC a legally binding instrument by which the said government undertakes and guarantees that the country and its public authorities will comply with and respect the Olympic Charter. […] Any application to host the Olympic Games must be submitted to the IOC by the competent public authorities of the applicant city together with the approval of the NOC of the country. Such authorities and the NOC must guarantee that the Olympic Games will be organized to the satisfaction of and under the conditions required by the IOC […] each candidate city shall provide financial guarantees as required by the IOC Executive Board, which will determine

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[21] Cf. in this regard, for example, Sections 1.2.1.6 et seq. of the FIBA Internal Regulations.

[22] Such as, e.g., the number of stadiums, size, attendance capacity, seats reserved for the umbrella association and other VIPs, placement of the advertising boards, placement of other marketing instruments.

[23] Such as, e.g., media/conference rooms (media centers), telecommunications and broadcasting rooms (broadcasting centers), parking spaces.

whether such guarantees shall be issued by the city itself, or by any other competent local, regional or national public authorities, or by any third parties."[24]

### 5.8 Duty to Cooperate and Coordinate

As shown in the overview,[25] in connection with a sports event, agreements will be entered into with various parties. This includes, for example, agreements with sponsors, merchandisers and television broadcasters as well as specialized marketing companies that may be hired who take on the overall marketing of the sports event. If the agreements with these parties are concluded not by the host but, rather, by the umbrella association, the host has an obligation to ensure that the rights granted to the sponsors and television broadcasters by the umbrella association are protected. The host is in this case to be required by the umbrella association to ensure the observance of these rights. This means, for example, that only the official sponsors may be permitted to advertise in the stadiums, and that only the official television broadcaster is allowed to film and broadcast the matches. Also of importance in this regard are the agreements with the stadium owners or operators, who are to be required to make the stadiums available free of any type of advertising signets; the host may also be required to ensure in this regard that the corresponding obligations are complied with.

### 5.9 Tax Aspects

Regularly, an organization agreement will include a provision pursuant to which all taxes incurred must be borne by the host[26].

Depending on the bargaining powers, the umbrella association may also receive assurances from the host that the host will procure a tax ruling from the competent tax authorities confirming that certain persons (such as, for example, the athletes and the association functionaries as well as the umbrella association) are exempt from certain taxes. If such a tax ruling is on hand, the umbrella association has dual protection, since the host is required, on the one hand, to bear the taxes or to indemnify the umbrella association from tax claims. On the other hand, vis-à-vis the tax authorities, the umbrella association can rely upon the tax ruling granted to it. The latter is particularly suitable to lessen the risk of insolvency for the umbrella association, thus, the risk that the host will become insolvent in the event that he is confronted with unexpected tax claims for which the host is required to indemnify the umbrella association.

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[24] Rule 34 as well as By-law to Rule 34 of the IOC Olympic Charter.

[25] Part B.II above.

[26] An exception exists, as a rule, for the income taxes that the umbrella association must pay in its country of domicile.

### 5.10 Contract Duration and Early Termination

The organization agreement enters into force upon countersignature by the umbrella association.[27]

It is advantageous if the organization agreement also continues in force a certain period of time following completion of the relevant sports event, because often certain post-completion work must be concluded, such as, for example, the drawing up of the final accounts that may be required to be presented to and approved by the umbrella association.

Over and beyond this, an organization agreement must also govern the question of early termination. Events that entitle the parties to such early termination include, for example, the commencement of bankruptcy proceedings with respect to the other party.[28] Further-reaching rights of termination regularly depend on the reciprocal interests and bargaining powers and may be contemplated, for example, in the event of the cancellation of the sports event by the sports association or in the event of force majeure. For the umbrella association, the failure to timely carry out the organization acts and/or performance that is (foreseeably) defective represent grounds for termination that are especially important. Even if Swiss law should entitle the umbrella association in such cases to terminate the agreement early,[29] it is worthwhile to carefully describe the corresponding events in the organization agreement. This increases, on the one hand, the legal certainty as well as, on the other hand, the pressure on the host to properly perform.

In connection with an early contract termination based on disruptions in performance, the following should also be borne in mind: if the host should fail, the financial consequences could be serious – above all since, under Swiss law (in the event the organization agreement does not govern the legal consequences in another manner), the host would have to bear the accrued costs and possible additional compensation for damages. Through the contract withdrawal of the umbrella association, however, all claims to consideration and the right to realize the event would lapse. Similarly serious consequences would result in the event of the cancellation or shift of the event to another country as the result of force majeure (for example, natural disasters or terrorist attacks). In this case, unless the organization agreement or the articles of the umbrella association were to provide otherwise, the general rule under the Code of Obligations would apply, pursuant to which, in the event of the subsequent impossibility to perform – and one would have to assume here such subsequent impossibility – the

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[27] It may be agreed that the organization agreement lapses if the host fails to fulfill certain conditions at certain points in time, such as, e.g., fails to conclude the stadium agreements. Cf. in this regard Part B.III.5.1. above.

[28] It is also entirely possible that the agreement even provides for automatic termination in such cases.

[29] Cf. Part B.III.3. above.

claims of the umbrella association to performance by the organizing association would expire. On the other hand, the organizing association, however, would be required to refund certain consideration that had already been received based on certain rules, and it would lose the claim to future consideration.[30]

### 5.11 Insurance Aspects

Insurance protection is an important component of reasonable risk management. The organization agreement must clarify which party must insure which risks and who the beneficiaries should be under the various insurance policies.

As a primary matter, the indemnity insurance for personal injuries and property damages suffered by the spectators and other visitors to the stadiums or other competition sites is at the forefront. The insurance protection of the athletes is also an important topic. As a rule, however, it may be assumed that responsibility for this protection does not rest with either the host or the umbrella association but, rather, with the athletes themselves.

Other risks that should possibly be covered include, for example, cancellation of the sports event due to force majeure. Whether and to what extent coverage can be obtained for this and other financial risks (upon reasonable terms and conditions) depends on the individual case.

Ideally, the organization agreement will also include specifications in terms of the insurance contract and the insurer. Thus, for example, it may be required that the insurer be a well-known insurance company with a good reputation, that the umbrella association must likewise be a direct beneficiary under the insurance contract and that the insurance contract may not be modified or terminated without the consent of, or notification to, the umbrella association.

### 5.12 Dispute Settlement and Arbitration

In the author's view, it is advantageous for disputes arising under the organization agreement to be decided by an arbitration tribunal in the event that the disputes cannot be resolved by the parties on a consensual basis – possibly after having gone through an escalation procedure contractually provided for by the parties. Especially if the host is a member association of the umbrella association, the probability that a judicial dispute will result is minor. If such a case nonetheless occurs, however, the state courts should not be involved. Here, it seems that an arbitration procedure will lead more directly to the goal. At the forefront in this regard is the Tribunal Arbitral du Sport/Court of Arbitration of Sports (TAS/CAS) in Lausanne, whose competence in the area of sports is extensive in scope and which can by all

[30] Article 119 of the CO.

means be entrusted with handling a dispute under an organization agreement.[31]

## C. Sponsoring of Sport Events

### I. Introduction

It is generally known that major sports events, such as, for example, the Football World Championships and European Championships as well as the Olympic Games, have developed into actual money-making machines for the associations involved. The reporting by the media in this regard about each one of these events provides eloquent testimony to this fact.

In connection therewith, the most important sources of revenue for the associations are, next to the ticket sales, the revenues on the marketing of the television broadcasts as well as based on the event-related advertising, the so-called sponsoring. Whereas my colleagues Peter Honegger and Daniel Eisele dedicate themselves in this book to the marketing of the "television licensing rights", explanations as to the marketing and sponsoring are set out below in this article.

What will be dealt with first in this regard is the constellation that is, based on the author's experience, most frequently encountered, whereby the umbrella association hires one or more specialized companies who conclude the contracts with the sponsors. The "personal" sponsoring, thus, the financial support of an athlete by a sponsor, will not be dealt with in this article.

### II. Characteristic Elements of Sponsoring

In the constellation to be examined here, the umbrella association concludes an agreement with a company specialized in marketing and sponsoring (which will hereinafter be referred to as the "marketer"), pursuant to which the umbrella association commissions the marketer to seek sponsors for the event and to either enter into a contract itself with the sponsors for this purpose or to arrange for the conclusion of a contract through the umbrella association. In return, the marketer receives remuneration that can be determined in a variety of ways. Frequently, the remuneration will be tied to the success of the marketer, who in such case will receive a certain share in the revenues that it generates. Because these revenues frequently constitute one of the most important sources of revenues for the umbrella association, often, the sports association requires the marketer to assure minimum payments, and the marketer then bears the risk that at least revenues in this amount can be obtained.

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[31] Cf. CAS Rule R27.

## III. Main Types of Agreements

As already seen, in connection with sponsoring, contracts can be entered into at various levels. In order to use uniform terminology, the contract between the umbrella association and the marketer will be referred to hereinafter as the "marketing agreement", whereas the contract between the marketer (or the umbrella association) and the sponsor will be referred to as the "sponsoring agreement".

## IV. Legal Nature

### 1. Initial Position

Marketing and sponsoring agreements (provided that this differentiation is even drawn) are generally designated as contracts not falling under a specific classification[32] or as licensing agreements.[33] Under Swiss law, the latter amounts to a contract not falling under a specific classification, since the licensing agreement is not a type of contract defined by law. This general conclusion, however, does not initially help much in terms of the application of law by the courts in the individual case, which is why the question of the qualification of the contract should be examined somewhat more closely.

### 2. As to Method

The Swiss Code of Obligations is governed by the principle of the freedom to contract. Partial aspects of this include the freedom as to content and type of contract, thus, the freedom of the parties to also enter into agreements that are not expressly governed by the special part of the Code of Obligations. Contracts that are not governed by the special part are described as contracts not falling under a specific classification. In connection with the latter, a distinction is drawn, in turn, between mixed contracts[34] and contracts sui generis[35]. The freedom as to the content of the contract, however, does not exist without restriction. If a contract breaches provisions of law that are mandatory, it is deemed to be contrary to law. If a contractual provision breaches a norm that is mandatory, it is usually this individual provision that is void, not the entire contract.[36] The entire contract is void only if this is expressly provided for by the relevant legal norm or if the meaning and purpose of the norm that is breached so require. Otherwise, the impermissible contractual provision must be replaced by the mandatory rule or be reduced to the extent permitted.

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[32] Cf., e.g., Rapp, p. 199; Wahrenberger, p. 156 et seq.

[33] Cf. Pfister, p. 85, with cites.

[34] Mixed contracts are those that combine elements of various types of contracts that are governed by law, although such combination itself is not provided for by law.

[35] Contracts sui generis are contracts that include elements that are, at least in part, not governed by law.

[36] Article 20 Para. 2 of the CO.

Based on the following, it can be seen that the classification of the contract in the individual case is not merely an academic exercise. Instead, it determines whether a provision of law that is viewed as mandatory must be applied, even if the parties have provided otherwise in the individual rule set out in the contract. This conclusion is of importance, above all, for contracts that (also) provide for the performance of work since Article 404 of the Swiss Code of Obligations, pursuant to which a mandate relationship may basically be terminated by either party at any time, is mandatory law under well-established case law of the Federal Tribunal and cannot be replaced by the parties through an autonomous rule.[37]

In answering the question as to how the marketing and sponsoring agreements are to be classified, we must first examine whether or not the characteristic elements of these agreements conform with the standard elements of the contracts that are governed by law, thus, whether or not the essential elements of the agreements to be examined can be subordinated to the scope of application of the contracts that fall under a specific classification. If this attribution is successful, then the legal nature has been basically determined. In the event of a contract gap in coverage, the non-mandatory law would be drawn upon and, in the case of a breach of a mandatory provision of law, the mandatory legal norm would be applied. If, on the other hand, such an attribution is not successful, the law is not directly applicable.

Although it sounds easy and convincing in theory, difficulties frequently arise as a matter of legal practice and specific implementation. A consensus probably exists that the question of contract classification must be viewed from an overall perspective: the question is whether the contract corresponds as a whole to the overall legal concept, whether the non-mandatory law harmonizes with the rest of the content of the contract and, with this, leads to a result without contradiction. If the statutory supplementing rules as a whole do not fit within the scope of the overall view and if the individual structuring of the specific contract goes beyond the scope of the legal type of contract, the classification question must be re-examined. Otherwise, the law governing types of contracts must be applied by way of supplement because the application of law must be guided by systematically clear principles.[38] If the law governing types of contracts does not offer any answer at all, the supplement of the contract must in this case occur "modo legislatoris";[39] thus, the law governing types of contracts that have a gap in coverage must first be supplemented, and then the contractual gap in coverage must be filled based on the norm that is established in this manner.

On the other hand, in connection with the supplementation of a contract not falling under a specific classification that is classified as a mixed contract,

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[37] The party who does not terminate is entitled to demand compensation under Article 404 Para. 2 of the CO only if the termination was made on an "untimely basis".

[38] Pr. 80 (1991), no. 17, p. 88.

[39] Article 1 Para. 2 of the Swiss Civil Code.

the specific individual case must be applied; the contract is to be supplemented based on the contract itself, in accordance with the special nature of the transaction. Therefore, the contract is to be completed by means of a continuation of the thinking behind the contract, based on the principle of good faith, hence, based on the hypothetical intent of the parties. What is at the forefront in this regard is the question of whether the Code of Obligations makes available norms that are applicable by analogy, or whether it even provides mandatory norms that must be applied. If there is a contract sui generis, reliance on the special norms of the Code of Obligations is not possible; the contract must be supplemented exclusively within the meaning of the hypothetical intent of the parties. The application of mandatory provisions of the special part of the Code of Obligations is not possible (unless the contract contains, in part, the elements of a contract that falls under a specific classification and the corresponding mandatory provisions, within the scope of an overall view, need to be applied).

## 3. Specific Application to Marketing and Sponsoring Agreements

With respect to the agreements to be examined here, the principles set out above mean as follows:

### 3.1 The Sponsoring Agreement

The most important elements of a sponsoring agreement include, first, the granting of a right to the sponsor to establish a special affiliation with the sponsored event, whether through, e.g., the setting up of advertising boards in the stadiums and/or through the use of certain labels[40] in connection with the sponsor's advertising[41]. Such a label of the umbrella association or sports event is regularly protected as a matter of trademark law, and the umbrella association (or the marketer) grants to the sponsor the right to use this intellectual property to an extent that is specifically defined. The sponsor must then pay a certain fee for the granting of this right. Based on these reasons, it is therefore logical to speak of a licensing agreement. The licensing agreement is, based on prevailing legal opinion, a contract that does not fall under a specific classification, but to which the provisions of the law relating to (usufructuary) leases may be at least partially applicable because, according to the law governing (usufructuary) lease agreements – as in the sponsoring agreement - a right of use is being provided.[42] The structuring of sponsoring agreements as a matter of practice, however, is complex, and frequently there are additional duties to perform, in particular, on the part of the sponsor, that apply, such as, for example, the delivery of the sponsor's products to the umbrella association and/or the host. Regularly, however, such duties to perform are subordinate in nature: for the sponsor, it is primarily a matter of establishing the identification with the

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[40] For example, "2006 FIFA World Cup Germany" or the like.

[41] Thus, for example, "Official sponsor of the 2006 FIFA World Cup Germany".

[42] Article 275 of the CO.

event, and for the sports association, it is primarily a matter of generating as much revenue as possible from this marketing, which is why the elements resembling the licensing agreement will no doubt always prevail.

### 3.2 The Marketing Agreement

The marketing agreement pursuant to which the marketer arranges for the conclusion of the sponsoring agreements between the umbrella association and the sponsor (or concludes them on behalf of and for the account of the umbrella association) can readily be classified as an agency agreement.[43]

The classification of a marketing agreement on whose basis the marketer must enter into the sponsoring agreements itself and deliver the proceeds – at least in part – to the umbrella association, proves to be more difficult. Such marketing agreements provide as a rule that the right to market the sports event will be granted to the marketer and that the marketer will for these purposes conclude contracts with sponsors. Because the marketer is regularly permitted for this purpose to pass on the right to use certain trademark rights of the umbrella association to the sponsors, such a marketing agreement likewise includes components of a licensing agreement; the marketer awards "sub-licenses" to the use of certain intellectual property rights of the umbrella association. In other words, there is a temporary grant of use to intellectual property. In return, the sponsor must provide certain compensation to the marketer. The marketer must, in turn, provide certain compensation to the umbrella association for the right to award sub-licenses.

The legal situation is similar with respect to the placement of advertising boards in the stadiums or other competition sites. The umbrella association, which has procured for itself the rights to use the stadium for purposes of the sports event,[44] grants to the marketer the right to make available to the sponsors advertising spaces at certain places of the stadium. Here, too, a right of use for a certain period is being granted to the sponsor - in other words, there is also a temporary grant of use here, too, whereby in this case the object of use is not intangible property but, rather, tangible property. The sponsor "leases" a specific space. In the author's view, this variety of sponsoring agreement, i.e., the contract between the sponsor and the marketer, is to be classified as a lease or at least similar to the law governing leases.

On the other hand, it is not so clear, at least not at first glance, how to classify the agreement in this regard between the umbrella association and the marketer. Is there still a grant of rights to the marketer, namely, the right to let out (or sub-let out) certain spaces? Or is there even an obligation on the part of the marketer to perform work in the interests of the sports

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[43] Articles 418a et seq. of the CO.

[44] As a rule through lease agreements that grant to the association the exclusive use of the stadium for a certain period of time.

association, namely, to conclude sponsoring agreements, which would then speak in favor of the law governing mandates or a relationship similar to a mandate? As we have already seen, the law governing agency agreements is out of the question with respect to this constellation because the marketer concludes the agreements in his own name[45].

It is the author's view that, within the scope of an overall view, there are various points that speak in favor of assuming the existence of a licensing agreement in these cases as well. First, it must be assumed that the marketing agreement regularly grants to the marketer the right to conclude sponsoring agreements that entitle the sponsor to use both certain trademarks of the umbrella association as well as advertising spaces. Apart from this, the marketer regularly assumes the obligation to pay to the umbrella association certain minimum sums so that the marketer may market the sports event. Therefore, the financial risk initially rests with the marketer. He has no claim to any remuneration to be paid by the umbrella association; he no doubt has a claim, however, to receive a share in the revenues generated that exceed a certain limit. All of these points, taken together, speak against the assumption that a mandate relationship exists. Instead, what prevails in this case, too, is the granting of a right to the marketer, who must in return pay remuneration to the umbrella association. Therefore, this type of marketing agreement, too, can be described as a licensing agreement. This also means that the mandatory legal provision of Article 404 of the Code of Obligations, pursuant to which a mandate relationship may be terminated at any time, also does not apply to this type of marketing agreement.[46]

## V. Selected Issues to be Governed in a Marketing Agreement

### 1. Subject of the Agreement / Grant of Rights

The most important contractual components of a marketing agreement are the granting of the right by the umbrella association to the marketer to market the sports event and the payment of a minimum remuneration by the marketer to the sports association. This applies, as a rule, both to the agency concept as well as in connection with a licensing agreement relationship. The explanations below exclude, however, the agency relationship. Likewise, they are essentially limited to the contractual relationship between the umbrella association and the marketer, i.e., to the marketing agreement.

We have already familiarized ourselves with two essential aspects of such a grant of rights, namely, the marketing through the placement of advertising boards or other advertising spaces and the identification of the sponsor with the sports event and/or the umbrella association. In addition, there are a

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[45] Cf., on the other hand, the explanations above as to the constellation whereby the marketer merely arranges for the agreements; such a contract can by all means be classified as an agency contract.

[46] Also cf. Rapp, p. 199.

number of additional possible marketing methods, such as, for example, the merchandising and sponsoring on clothing items and on other pieces of equipment of the athletes.

The term "merchandising" is understood to mean the manufacture and distribution of certain products, such as football shirts, caps, balls and many other fan articles, on which the logo of the sports event or umbrella association and possibly the logo of the sponsor have been affixed. This is to be distinguished from the placement of the logo of the sponsor on clothing items and other pieces of equipment of the athletes. The latter activity does not fall under merchandising; here, the logo of the sports event or association is not being affixed on any fan articles, instead, the logo of the sponsor is being affixed on the equipment of the athletes.

Within the scope of a marketing agreement, the marketer is granted the right to market some or all of the above-referenced methods of advertising. As already mentioned repeatedly, the marketer is required to compensate the sports association for this right.

## 2. Financial Issues

The remuneration to be paid by the marketer to the sports association regularly consists of a fixed portion, consisting of a minimum sum guaranteed, and to be paid, by the marketer. In addition, there is normally a variable portion that consists of the share in the revenues that the marketer generates over and above the minimum sum.

Especially if the marketing agreement remains in effect for several years and possibly covers more than one sports event,[47] the payment goals that the marketer must comply with are laid down in great detail. In the event that the marketer is unable to achieve one of these payment goals, the marketing agreement regularly provides for a right of extraordinary termination on the part of the umbrella association. It can also be in the interests of the umbrella association to exercise a certain amount of control over the payments that are made by the sponsors to the marketer, in order to prevent to the extent possible these payments from being lost in the case of bankruptcy on the part of the marketer and from no longer being paid to the umbrella association.

The marketer, for his part, can likewise have an interest in incorporating into the agreement certain guarantees in his favor. His primary objective is no doubt to receive a guarantee that the sports events will actually be held to the extent planned[48] and that his obligation to pay will be correspondingly reduced should the planned number of games or other matches fail to be held.

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[47] For example, more than one world championships.

[48] That, for example, the planned number of games or other matches take place.

Because the umbrella association regularly has a share in the revenues generated over and beyond the agreed-upon minimum sums, the umbrella association will regularly require the marketer to implement a reporting system, within the scope of which he will be required to report on revenues at periodic intervals. It can be useful in this respect to additionally grant to the umbrella association the right to audit the accounts of the marketer or to have them be audited by a third party.

### 3. As to Organizational Matters and Cooperation

The marketer and the sponsors are regularly not contractual parties to the organization agreement and the stadium agreements. They are dependent, however, on having the stadiums and other competition sites being made available to them on a "clean" basis, i.e., free of any other advertising. This presupposes, in turn, that the umbrella association is careful in the other agreements that it enters into to ensure that the rights of the marketer and of the sponsors remain protected. The umbrella association, which monitors the organization and marketing of the sports event, must ensure that there is a system of agreements that is free of contradiction and that the rights of all partners involved are adequately protected.

In the case of major events, special attention must be given to so-called "ambush" marketing, i.e., the attempt of third parties who have not entered into any sponsoring agreements to nonetheless exploit the sports event in terms of advertising for their own purposes. The defense against such undesired marketing activities results, on the one hand, from concrete, practical measures. On the other hand, the agreements regularly provide for duties on the part of the host and – depending on the constellation – on the part of the marketer as well, to prevent such free-riders to the greatest extent possible.

Moreover, it is important from an organizational perspective that the parties involved[49] work together, which is why the agreements define corresponding rights and obligations of the partners and lay down certain processes. Particularly in the case of major events, complex responsibility structures will result, and it is therefore important that the necessary structures are defined at the front end with the necessary due care.

### 4. Intellectual Property Rights / Use of Trademarks

Large umbrella associations govern the use of their trademarks by sponsors and marketers through detailed regulations in this respect, which regulations also must be incorporated into the marketing and sponsoring agreements. In accordance with the principle of copyright law,[50] the agreements first include the principle that the marketer and the sponsors are only being granted and/or may only be granted the rights expressly mentioned in the

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[49] Host, marketer, sponsors, third parties, such as, e.g., stadium operators.

[50] Article 16 Para. 2 of the Swiss Copyright Law, URG.

agreement. Subsequently, there is a more or less lengthy list of the uses that are specifically permitted. On the other hand, the marketer and the sponsors, who are prepared to pay considerable amounts of money for this grant of rights, need to have certainty that the umbrella association is in actual fact authorized to grant these rights. The umbrella association will therefore be contractually required to provide a corresponding warranty and corresponding duty of indemnification.[51]

In the event that a marketing agreement extends over a longer period of time and possibly even covers more than one sports event, it can by all means be the case that certain trademarks of the umbrella association come into being during the term of the agreement. For such cases, the agreement should stipulate who is responsible for the registration and administration of the trademarks in the countries that come into question. As a rule, this is primarily the umbrella association; it may entirely be possible, however, for the umbrella association to delegate this task to the marketer.

### 5. Compliance

The umbrella association has a strong interest in protecting and, if possible, augmenting its good reputation and that of the sports event. Accordingly, it is important to the umbrella association that the marketer and the sponsors structure their market appearances in such a way that the image of the umbrella association and of the event is not damaged. This can lead, on the one hand, to the inclusion of detailed rules on the specific market appearance in the marketing regulations or guidelines already mentioned above.

On the other hand, the agreements will also expressly require the marketer and the sponsors to comply with all applicable laws, including in all countries in which a market appearance is made. Negative publicity due to the fact that a marketer or sponsor has run into conflict with the laws in a certain State is not in the interests of the umbrella association. Even if the association may not have had anything to do with the entire matter, this would still reflect on the association. The association wishes to protect itself from this and also obtain corresponding contractual assurances.

### 6. Duration of the Contract / Termination

The organization agreement enters into force upon the signing by the parties. Although the agreement is not subject to the requirement as to written form under the Swiss Code of Obligations,[52] the parties will regularly require written form.[53] In contrast to the organization agreement, the conclusion of the marketing agreement will not be subject to conditions precedent or subsequent, but will not doubt include the right to early termination.

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[51] As to the question of the original legal owner, cf. Part C.VI.2. below.

[52] Article 11 of the CO.

[53] Article 16 of the CO.

The marketing agreement will be entered into for a specific term, usually for several years, and may also relate to more than one sports event. As in the case of the organization agreement, it is also favorable if the marketing agreement, too, extends for a certain period of time after the completion of the relevant (or the last) sports event because here, too, the final accounts must regularly still be drawn up and be approved by the umbrella association.

Apart from this, the marketing agreement also deals with the question of early termination. Particularly important events that entitle the umbrella association to a right of early termination (or that even terminate the agreement automatically) include a failure to pay on the part of the marketer upon one of the agreed-upon payment dates as well as the commencement of bankruptcy with respect to the marketer. The agreement must also govern, however, whether a change in the structure or number of the events entitles the marketer to early termination.[54] It is worthwhile in the case of the marketing agreement, too, to carefully describe in the agreement itself the events that provide a right to early termination because this increases the legal certainty.

The marketing agreement should also govern the consequences of termination of the agreement. What is at the forefront in this regard is the rule on the rights of use of the marketer to the trademarks of the umbrella association as well as the impact of the termination of the marketing agreement on the sponsoring agreements. In connection with the constellation that is under examination here, the umbrella association does not have any direct contractual relationship with the sponsors. Accordingly, the marketing agreement must govern the question of the impact of the marketing agreement on the sponsoring agreements as well and require the marketer to correspondingly implement these obligations. This can occur in most suitable fashion through the inclusion in the marketing agreement of a form of the sponsor agreement that is to be used by the marketer, and through the marketer's presenting to the umbrella association for monitoring purposes each sponsoring agreement that is concluded. Granting the umbrella association certain rights that can be directly implemented vis-à-vis the sponsors would also represent a feasible constellation.

## 7. Dispute Settlement and Arbitration

In the author's view, it is also advantageous for disputes arising under a marketing agreement to be decided by an arbitration tribunal in the event that the disputes cannot be resolved by the parties on a consensual basis – possibly after having gone through an escalation procedure contractually provided for by the parties. In this regard, the explanations provided with

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[54] For example, in the event of a modification or even postponement or cancellation of the event due to force majeure or a change in the number of games based on another reason.

regard to the organization agreement apply by analogy.[55] Here, too, an arbitration proceeding before the Tribunal Arbitral du Sport/Court of Arbitration of Sports (TAS/CAS) appears particularly appropriate. Naturally, however, the parties may also provide for application of the procedural rules of another organization, such as, for example, the International Chamber of Commerce.

## VI. Special Question: Joint Marketing and Competition Law

### 1. Introduction

The joint marketing by a sports association or a marketer gives rise to questions as a matter of cartel law because such marketing regularly leads to exclusive rights on the part of the umbrella association and/or of the marketer. A distortion in competition may result from this because production and price competition may be restricted. Or, to put it in the words of the EU Commission with respect to the joint marketing of the rights to the UEFA Champions League: "The sale of the entire rights on an exclusive basis and for a long period of time has the effect of reinforcing the position of the incumbent television companies as the only ones with the financial strength to win the bids. This, in turn, leads to unsatisfied demand from broadcasters and a lesser ability to make an attractive offer to customers. Sports and films are two key ingredients for television and for pay-TV channels in particular. They are also proving increasingly critical for the development of new technologies."[56].

In connection with the assessment as a matter of competition law, the following questions play an important role: (i) who is the organizer and who is originally entitled to the marketing rights? (ii) is there joint marketing? (iii) does the joint marketing lead to a substantial or perceptible restraint of competition? (iv) is a possible substantial (or perceptible) impairment of competition justified through gains in efficiency? and (v) is there possibly misuse of a market-dominant position?

The explanations below are based both on Swiss law as well as on EU cartel law. In connection therewith, the problems will primarily be explained on the basis of a decision of the EU Commission on the marketing of the UEFA Champions League.

### 2. Who is the Organizer? / Who is Originally Entitled to the Rights?

The term "organizer" is also of considerable importance from the viewpoint of cartel law since it is determinative in connection with the question of who will be viewed as being originally entitled to the marketing rights. If, for example, an umbrella association is the "organizer" of the competition

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[55] Cf. Part B.III.5.12. above.

[56] Press release of the EU Commission dated July 24, 2003, IP/03/1105.

organized by it, based on prevailing legal opinion, the umbrella association is originally entitled to the marketing rights. If the association is, on the other hand, "only" a co-organizer or is not a organizer at all, then it is not originally entitled to the marketing rights.[57] Nothing in this respect is changed, either, if the association has the marketing rights be granted through the articles of association and/or agreements.[58] If the umbrella association that disposes over the marketing rights is not the original holder of these rights, there is a joint marketing of the rights through the umbrella association based on a joint decision or express agreement. Members of such an umbrella association regularly include national associations whose members are clubs. At least in the case of football, basketball and other types of team sports, such clubs are engaged in economic activities. The national associations are therefore associations of undertakings and are also themselves to be viewed as undertakings, to the extent that they themselves are engaged in economic activities. The international association is then in turn to be viewed as association of undertakings and, because it is itself also engaged in economic activities, as an undertaking[59]. The regulations of the umbrella association and of its member associations are therefore regularly to be viewed as the decision of an association of associations of undertakings[60].

Because the individual associations or the associations that are members of the umbrella association do not exploit the rights themselves but, rather, leave the exploitation up to the umbrella association, the former will be hindered in itself appearing in the market for the exploitation of rights and/or being active in such market. Therefore, competition between them and the umbrella association in the corresponding market is restrained. This can lead to a substantial or perceptible impairment of competition to the extent that, for example, the diminishment in competition brought about by the joint marketing leads to uniform prices, as compared with individual marketing.[61]

This sheds light on the fact that, from a competition law standpoint, it is important whether the marketing rights originally rest with the umbrella association, i.e., whether the umbrella association is the organizer of the sports event. The question of the identity of the organizer, however, is not easy to answer. An express statutory provision in this regard is lacking under both Swiss law as well as EU law. As a matter of legal practice, however, criteria have developed pursuant to which the characteristic of organizer should be determined. These include, above all, bearing the financial and organizational risk of the sports event as well as the opportunity to engage in defensive claims against unauthorized persons. Thus, for example, the EU

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[57] Instead of many others: Kuczera, p. 251.

[58] Abl. of 11/8/2003, L 291/44, 45.

[59] Cf. OJ. of 11/8/2003, L291/42.

[60] Article 4 Para. 1 of the Law on Cartels; Zurkinden/Trüeb, p. 44; Art. 81 Para. 1 of the EC Treaty.

[61] OJ. of 11/8/2003, L291/43.

Commission decided in the UEFA Champions League decision that both associations involved in a game of the Champions League may assert rights of ownership to the commercial rights. Namely, the right as owner of the stadium to deny access to media operators who wish to record the match could not be denied to an individual club. Similarly, the visiting club whose participation permits the match to come about in the first place cannot be refused an exertion of influence on whether, how and from whom the match will be recorded.[62] Based on the far-reaching exertion of influence of the UEFA over the "Champions League" competition, however, the Commission concluded that the clubs and the UEFA are to be viewed as co-owners of the rights to the individual matches.[63]

The criteria laid down by the EU Commission in the UEFA Champions League case[64] may not, of course, be indiscriminately applied to all other sports events. For reasons of topical interest, reference is made to the fact that the form and structure of the final round of an ice hockey championship or football world championship[65] differ substantially from the Champions League. A world championship is played in the form of a tournament in a single country.[66] The stadiums are available during the world championship solely to the umbrella association and to the host and are not in any manner available to the clubs who play in the stadiums. The world championship takes place outside of the football season of the member associations. The participants are the national teams of the member associations who were able to qualify for the world championship. There are no first and second legs, as in the Champions League. The world championship is carried out under the auspices of the umbrella association; the exertion of influence by the sports association is very extensive. Based on all of these reasons, a co-ownership by the member associations of the marketing rights is, in the author's view, inapplicable from the outset. The same also likely applies with respect to the host, who is permitted to carry out the event taking place

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62 OJ. of 11/8/2003, L 291/44.

63 OJ. of 11/8/2003, L 291/45.

64 The marketing rules of UEFA to be assessed essentially provided for the following marketing system: (i) UEFA will continue to market centrally the rights to live TV transmission of the Tuesday and Wednesday night matches. The main rights will be split into two separate rights packages giving the winning broadcasters the right to pick the two best matches. (ii) UEFA will initially have the exclusive right to sell the remaining live rights of the Champions League. However, if it does not manage to sell this package within a certain cut-off date, the individual clubs will be able to market the matches themselves. (iii) Both UEFA as well as the clubs may make available Champion League content to Internet operators and telecommunications companies that wish to build up or promote the UMTS technology. (iv) The clubs have the rights to exploit TV rights on a deferred basis and to use archive content, e.g. for the production of videos. (v) UEFA may offer the rights for distribution in a public bid invitation, in each case for a maximum of three years.

65 Or also a European football championship, or a world or European championship of another type of sport.

66 Or, as in 2002, in two countries, Korea and Japan.

every four years and who is under the [•severe] supervision of the sports association.[67]

### 3. Is There Joint Marketing?

Based on the above, it follows that there is joint marketing within the meaning of competition law to the extent that the umbrella association is not the exclusive and original holder of the marketing rights. If the umbrella organization, for example, shares the rights with other associations or clubs, and if it is authorized to exclusively exercise the marketing rights based on the articles of association and/or agreements, there is joint marketing based on a decision of an association of undertakings.

### 4. Does the Joint Marketing Lead to a Substantial Impairment of Competition?

In this regard as well, the decision of the EU Commission in connection with the UEFA Champions League is illustrative.

The Commission distinguished, among other things, as relevant product markets, between the upstream market for the acquisition of TV broadcasting rights of football events played regularly throughout every year, the downstream markets on which broadcasters compete for advertising revenues depending on audience rates and pay-TV subscribers as well as the upstream and downstream markets for other commercial rights, such as sponsorship, suppliership and licensing.

With respect to the marketing of the television rights, the Commission held that the type of marketing contemplated by UEFA was to bring about an appreciable restriction of competition in the broadcasting market because football accounts for the single highest proportion of TV channels expenditure and the interested parties were confronted with a supply monopoly. Moreover, the Commission also viewed the trade among States as being affected.[68]

What is of special importance with respect to the marketing agreements of interest here, however, is the finding of the Commission that the distribution by the UEFA of other commercial rights to the correspondingly defined markets, such as sponsoring, supplier and licensing rights, will likely not appreciably restrict competition. It therefore waived a further-reaching definition and investigation of these relevant product markets.[69] What was determinative for this decision was the view that these rights are part of more comprehensive markets of products for advertising purposes. Therefore, it appears that the Commission assumes the existence of a

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[67] Cf. e.g. preamble, Clause 5, 2006 FIFA World Cup Regulations.

[68] OJ. of 11/8/2003, L 291/46, 47.

[69] OJ. of 11/8/2003, L 291/40.

significantly broader objectively affected market with respect to marketing, sponsoring and merchandising than in the case of the television rights and, in particular, does not exclusively relate these markets to certain sports events. Based on the explanations of the Commission in the UEFA Champions League case, it may now be presumed that the joint marketing of rights other than television rights in connection with other sports events, too, will be adjudged in a significantly more relaxed fashion and that a substantial restraint of competition will likely be rejected.

## 5. Justification through Increased Efficiency?

If a substantial restraint of competition were to be affirmed as in the case of the UEFA Champions League television rights, such restraint could always be justified through gains in efficiency and the corresponding agreement could be viewed as in conformity with law or be exempted.

In the above-referenced UEFA Champions League decision, the Commission assessed the advantages arising from the agreement restraining competition from various perspectives. In connection therewith, it concluded that the concept presented by the UEFA for purposes of marketing the Champions League did indeed lead to improvement in production or distribution because a high-quality brand range of products would be created that was advantageous due to the joint distribution and the bundling of league-specific packages of rights for media enterprises, football clubs and consumers. Furthermore, the rules of UEFA for purposes of joint marketing provided consumers with a fair share of the benefits. Finally, the Commission also acknowledged that the provisions governing a bundling of the media rights exploited by the individual clubs through a third party are indispensable with respect to the protection of the integrity and the brand character of the television rights to the UEFA Champions League being jointly marketed. Based on all of these reasons, the Commission concluded that the cumulative conditions of Article 81 Para. 3 of the EC Treaty were fulfilled and that the rules of the UEFA could be exempted. The exemption was granted until July 31, 2009.[70]

Under Swiss cartel law, the above decision would likely turn out similar. In particular, it could first be expected that the Swiss Competition Commission would align itself with the above-referenced UEFA decision of the EU Commission. Next, an agreement on competition can also be justified under Swiss law based on reasons of economic efficiency if it is necessary in order to reduce the costs of manufacture and distribution, to improve products or manufacturing procedures, to promote research or the dissemination of technical or professional knowledge or to use resources in more rational fashion and does not in any way thereby open opportunities to the enterprises involved to eliminate effective competition.[71]

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[70] OJ. of 11/8/2003, L 291/54, 55.

[71] Cf. Article 5 of the Cartel Law; Art. 81 of the EC Treaty.

## 6. No Misuse of Market Power

For the sake of completeness, it is noted that the explanations above are limited to the extent that, even if the agreement for purposes of joint marketing were deemed to be justified through gains in efficiency, an act that is prohibited under cartel law could still exist if the umbrella association or the marketer were to misuse a possible market dominant position in connection with the concrete marketing of the rights.[72]

[72] Cf. Article 7 of the Cartel Law; Art. 82 of the EC Treaty. See also the decision of the EU Commission of 20 July 1999 in relation to the sale of tickets for the final round of the 1998 FIFA World Cup, OJ. of 8.1.2000, L5/55.

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