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Articles

FIFA Fouls MasterCard

Lessons to be learned from the MasterCard vs. FIFA Dispute

By Matthew Pace

Last summer, the world watched in awe as sportsmanship was assaulted in front of the largest worldwide audience when Zinedine Zidane and Marco Materazzi exchanged taunts and head butts in the World Cup Championship match between France and Italy in Germany. There was outcry from around the world about the behavior and it was fodder for the late night talk shows and other social commentators. What the world did not see was a comparable corporate "mugging" going on at the same time in the offices of the Federation Internationale de Football Association ("FIFA"), the governing body for soccer's World Cup.

MasterCard International had been a corporate sponsor of the World Cup and other international soccer events owned and marketed by FIFA since 1990. Over this period MasterCard paid FIFA over $100 million for the right to market itself as the official and exclusive credit card, debit card and ATM of the World Cup. In the initial contract between MasterCard and FIFA in 1990, MasterCard insisted on a right of first refusal and exclusive negotiating period to maintain its sponsorship and category exclusivity for subsequent World Cup events. MasterCard asserted that the failure of FIFA to grant the rights of first refusal and exclusive negotiating would be a "deal breaker" and that "to proceed without a right of first refusal….would violate our [MasterCard's] responsibility to our [MasterCard's] worldwide membership." FIFA ultimately relented and, in exchange, MasterCard paid a significant premium for the sponsorship rights with the rights of first refusal and exclusive negotiation attached.

MasterCard's most recent contract extension with FIFA related to the 2002 and 2006 World Cups in Japan/South Korea and Germany, respectively. This contract extension included the same right of first refusal and exclusive negotiating period language that MasterCard had bargained for in the 1990 contract. Despite this contractual obligation, while finalizing the terms of a ground-breaking $180 million contract extension with

MasterCard for the 2002 and 2006 World Cups, FIFA executives were secretly negotiating with MasterCard "arch rival" VISA for the same rights (at, naturally, a higher price). In fact, MasterCard and FIFA were exchanging execution copies of their sponsorship extension when MasterCard received a phone call from FIFA advising it that FIFA had decided to enter into an agreement with VISA rather than with MasterCard. Imagine MasterCard's shock. They were an incumbent sponsor with an exclusive negotiating window and a right of first refusal and they were not even aware that their "partner," FIFA, was having secret discussions with their number one competitor, VISA.

Not surprisingly, less than 30 days after MasterCard received the phone call from FIFA advising them that they were was entering into a sponsorship contract with VISA, MasterCard filed suit in Federal Court in the Southern District of New York seeking to enjoin FIFA from proceeding with its sponsorship agreement with VISA and directing FIFA instead to perform its obligations under the agreement recently negotiated with MasterCard.

On December 7, 2006, less than 30 days before VISA's new contract with FIFA was to take effect, the US District Court ruled in favor of MasterCard and enjoined FIFA from performing its contract with VISA and directed FIFA to honor the $180 million deal that they had agreed upon with MasterCard. In addition, FIFA was directed to pay all costs and expenses (including legal fees) incurred by MasterCard in enforcing its rights.

Less than one week later, the four FIFA executives that were responsible for negotiating the contracts with MasterCard and VISA, including the head of marketing, head of sales and in-house legal counsel, were terminated by FIFA.

In its opinion, the US District Court chastised FIFA for its behavior saying that it breached its duty of good faith and fair dealing under Swiss law and even violated its own stated obligation for FIFA negotiators of "Fair Play" and of "dealing honorably with FIFA partners." While the subsequently dismissed FIFA executives characterized their behavior as "white lies," "commercial lies," "bluffs" and "the game," the Court called FIFA's behavior "egregious."

There were several points along the way that someone at FIFA should have stood up and pointed out that this behavior of "commercial lies" and "bluffs" was wrong and in violation of the letter and spirit of their agreement with MasterCard. Quite to the contrary, the FIFA board approved the behavior and the "in-house" lawyer (who the court points out

was not licensed to practice law in any jurisdiction) endorsed the fraudulent behavior.

Unfortunately, these situations are not limited to FIFA alone. Although not nearly as egregious as the FIFA/MasterCard situation, other properties have had similar situations where they have arguably violated existing sponsor arrangements in order to be able to get more money from newcomers. NASCAR, for instance, is now dealing with a situation where certain promises had been made to secure new series sponsors in violation of rights already granted to existing team sponsors. That situation is distinguishable in degree from the FIFA MasterCard situation; however, the concept of forsaking long term relationships with sponsors and violating their contractual rights for more money with new sponsors is a concept that is too common in this industry.

How does this happen? How does a revered sports property allow its employees to treat its trusted and valued corporate partners like fungible commodities? You need only look at the MasterCard/FIFA decision for a key answer. As punishment for their “egregious” behavior, FIFA was forced to settle for a record level sponsorship commitment from MasterCard of $180 million over 8 years (2 World Cups). The entire downside of purposely violating a contract provision of one sponsor in order to extract a higher price from their competitor was some legal fees and expenses…if you get sued.

In advising corporate clients how to avoid situations like this in the future, first you must understand the culture and leadership of the property with which you are dealing. Most properties treat their corporate partners as necessary elements that contribute more than just money to the success of the property. There are, however, certain properties that are more cavalier with the way they treat their corporate partners. It usually starts with leadership at the property that fosters an environment of respect and fair dealing with sponsors. It is fair to say that properties with strong executive leadership do not have many problems like this.

If you are dealing with a property that does not have this type of strong leadership, you may still wish to proceed because regardless of the leadership, the power of the property is undeniable and fits your client’s marketing needs. This was the case with FIFA and the World Cup, which probably explains why that after all of this MasterCard still sought enforcement of the contract that continued their “partnership” with FIFA for another 8 years.

If you find your client in this situation, you can build some protection by making certain that the property is properly advised by competent in-house counsel or proper outside counsel that provides advice and consent on all sponsorship negotiations. A good way to do this is for your client to engage lawyers at the beginning stages of negotiations. This will force the property to engage lawyers and you will very quickly be able to tell if they are being adequately advised. If you find that the property does not have adequate counsel, you should be very careful before investing your sponsorship dollars. This type of oversight might have saved MasterCard, VISA and FIFA a whole lot of effort, money and embarrassment.

Failing all of this, perhaps a liquidated damages provision in a sponsorship contract that provides for significant damages for parties that intentionally violate their contracts can police rogue properties. It certainly would have made FIFA think twice before violating their agreement with MasterCard…or at least would not have made the consolation prize of their failed misdeeds look as good as it does. One would hope that these types of clauses between parties that have been partners for 16 years would not be necessary, but perhaps this case teaches us differently. If you cannot get comfort that you are dealing with people of integrity that respect the letter and spirit of their agreements, liquidated damages for intentional breaches may be the only way to fully protect yourself against their nefarious acts.

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