



# Ambush Marketing: A Global Legal Perspective





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## EXECUTIVE SUMMARY

'Ambush marketing': A controversial marketing practice involving unofficial association or intrusion that pits non-sponsors against event producers, official sponsors, and other rights holders. Even though ambush marketing campaigns are quite prevalent, most countries do not, in fact, have specific legislation designed to address the practise. Some countries have adopted more specific legislation to guard against ambush marketing where the event owners (such as the International Olympic Committee and FIFA) have pushed for the enactment of highly-restrictive event-based legislation in order for a locality to obtain the rights to produce the event – these include Brazil, Russia, and South Korea (when each hosted the Olympic Games), and Italy (which will host the Olympic Games in 2026). Without specific rules governing typical ambush marketing practises around the world, official sponsors, the so-called 'ambush marketers', and the owners of events themselves must look to traditional intellectual property and unfair competition laws to determine what each party can and cannot do.

One reason ambush marketing may not be specifically outlawed is that it is hard to define. Is the use of generic imagery of a sport or entertainment event by a non-sponsor an 'ambush' or even illegal? And should it be? Is a brand an 'ambusher' of the Olympic Games or the FIFA World Cup even though it sponsored several national teams or individual athletes? And what about new technology: is a filter or 'skin' within a social media app featuring advertising from a non-sponsor and which is triggered when the app user enters an event venue considered an ambush? These are critical questions that challenge the current legal frameworks around the world.

Ambush marketing is most often thought of in the context of sporting events, but it is certainly not limited to that field. Popular entertainment events and notable international events, such as the Academy Awards, the Grammys, 'fashion week' runway shows, and royal weddings, also generate a fair share of ambush marketing activity.

The practise of ambush marketing does not appear to be going away any time soon. As recent actions by the Australian and US Olympic Committees, the Danish Football Union,

the regulatory body of the Russian Federation, and the US' National Collegiate Athletic Association show, ambush marketing and the enforcement against it is still a hot button issue.

This guide, which updates GALA's 2014 edition, summarizes the laws, rules, and regulations governing ambush marketing in 68 countries. The guide addresses legal considerations, regulatory considerations, commercial considerations, and recent enforcement actions in the field of ambush marketing.

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December 2020

## FOREWORD

Ambush marketing can provoke widely varying views. For the rights holders whose financial model relies on granting exclusive sponsorship rights, ambush marketing is often seen as the enemy. It erodes their commercial revenues and thus damages the sport/event for which they are responsible. Brands tend to be labelled as either sponsor or ambusher, but the reality is that many are slightly schizophrenic – one moment deploring competitors for ambushing events they are officially associated with, and the next minute running a campaign aligned with another property that they don't sponsor and seeing what they can get away with.

So is ambush marketing bad? Actually let's step back: what is ambush marketing?

Ambush marketing is notoriously difficult to define, but it is helpful to distinguish between two core types of ambush marketing. The first is where the content of the advertisement creates a direct or indirect association with the property or the event. A direct association may be created by, in the most blatant situations, using the property or the event's logo or name, whereas an indirect association may be created through more generic references to the property or the event, for example by depicting the sport and country in which an event is being hosted together with using celebrities competing at the event. The use of tickets for an event in promotions without permission can also be used to create this type of 'ambush by association'.

The second core type of ambush marketing is 'ambush by intrusion'. This involves a brand seeking to get exposure during an event – either inside the stadia or within its vicinity, but often with the target of the brand being to be seen on broadcast coverage. In cases of ambush by intrusion, the 'content' of the advertisement is likely to be brand-led and will not refer to or allude to the event itself. Indeed, successful ambush marketing campaigns have been undertaken where no or very minimal branding of the ambusher has been on display, but, through use of colours, shapes, or the acts of the intruding brand representatives, the brand is nevertheless identified and gets wide exposure. Perhaps the most famous example of this was the Bavaria beer girls who appeared in bright orange mini dresses in the

spectator stands at Holland's first match of the 2010 FIFA World Cup in South Africa. Although the orange dresses had minimal branding on them, the dresses were associated with Bavaria through a television campaign in Holland. Bavaria gained huge PR exposure due to the actions of FIFA in dealing with the issue, as the ringleaders of the stadium stunt were arrested and charged with specially introduced ambush marketing offences under South African law. A more recent example of in-stadia 'intrusion' is provided from India in 2017. During an Indian Premier League cricket match, Reliance Jio, a competitor of main sponsor Vodafone, placed fans in blue and white clothing in the form of the Jio logo and got them to do a Mexican wave to draw attention to themselves.

Ambush marketing can come in other forms too. For example 'opportunistic ambush', in which a brand takes advantage of a particular event. Zippo lighters did this to great effect when, during the Sochi 2014 Winter Olympic torch relay, someone was photographed relighting the Olympic torch with a Zippo lighter. 'Internal ambush' can occur where a representative of the rights holder does something to promote a competitor of one of the official sponsors, usually inadvertently or by mistake.

When considering ambush marketing, it is also necessary to ask who is being ambushed? It may be an event, or a team, club or an individual athlete/player. And ambush does not just occur in a sporting context. All celebrities have 'rights' that may be ambushed in one way or another, and other major events like the Oscars or even a royal wedding can be ambushed by brands wishing to capitalise in the goodwill, excitement, and or cachet of being associated with the event/person. Ambush marketing has always stimulated creative advertising. Over recent years, we have, however, seen fewer ambush marketing cases reach the courts or hit the headlines. This is likely because the advertising industry has become more aware of the boundaries and has become more sophisticated and creative in designing campaigns. In the coming years, it will be interesting to see how ambushers adapt to new trends and technologies, but there is no doubt that creativity will still play a part.

The ever-increasing popularity of e-sports means that we will inevitably see more gaming-based ambush marketing, and, as technologies such as virtual advertising become more common, it may be that rights holders need to be vigilant to ambush marketers taking advantage of the opportunities this may present. Although rights holders should be able to

maintain control of digital advertising inventory through contractual mechanisms, as segmentation of multiple virtual streams becomes more complex, monitoring abuse, and even dealing with ‘hacks’ of virtual advertising by ambushers, could become an issue.

So, back to the original question: is ambush marketing a bad thing? Ambush by association is often creative and amusing and there is no doubt that it can be an inexpensive way to enhance a brand. Sounds good. However, from a rights holder’s perspective, ambush marketing cannibalises the value they have created and diverts potential sponsors away. After all, why would a brand sponsor an event if it could gain a similar level of association with the event for free?

As mentioned, the average member of public probably doesn’t understand the term ‘ambush marketing’. When they see an example of it, they may have a wry smile, but it is unlikely that they interrogate the advertisement or ask themselves whether the brand in question is a sponsor of the ambushed property. And this is why ambush can be so effective, and at the same time so damaging. The brand in question gains the benefit of an association, without paying the rights holder to do so, and without being seen to do anything wrong.

As you’ll see in this guidebook, traditional legal rights can be used to address many forms of ambush marketing. However, in most countries there is a lack of standard legal remedies which clearly prevent the more ‘clever’ forms of ambush. This either helps or hinders whichever side of the ambush you are on. As sports properties have become more and more valuable, and the right to host major events becomes an increasingly competitive process, the prevalence of bespoke legal rights to address ambush marketing is increasing.

Major events, like the Olympic Games, FIFA World Cup and Commonwealth Games, demand, as part of their bidding process, that host countries ensure their laws will address all forms of ambush marketing. Some countries, such as South Africa, New Zealand, and, more recently, Australia, have future proofed the protection of major events which may come to their shores by introducing designated events legislation. This provides the framework for protecting against ambush marketing, with the event simply needing to be identified by secondary legislation. Italy goes even further as a new law has been introduced recently which, besides targeting designated events, also creates a general prohibition on specified ambush marketing activities for all sporting and major events of

national or international importance. There are, however, indications that major event rights holders won't always be able to demand special legislation. Japan has bucked the trend of introducing anti-ambush marketing legislation ahead of the Tokyo 2020 (now 2021) Olympic and Paralympic Games. It seems that the authorities there are confident that existing IP and unfair competition laws are adequate.

Concerns are often raised about special ambush legislation preventing free speech and limiting the commercial opportunities for non-sponsor businesses (which, it is often pointed out, are contributing to the event via the taxes they pay to the funding host government). And there are regular complaints that rights holders enforce the legislation in heavy-handed ways which stifle the enjoyment of the event.

The purpose of this foreword is not to come down on either side of the argument. As lawyers, our job is to advise on the laws that are in place and the impact of those laws on our clients' activities. Hopefully this guidebook will help you do this and provide a useful starting point whether you are advising a rights holder, a sponsor or indeed an ambushing brand.

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December 2020



## ABOUT GALA

The Global Advertising Lawyers Alliance (GALA) is the leading network of advertising lawyers in the world. With firms representing more than 90 countries, each member has the local expertise and experience in advertising, marketing and promotion law that will help your campaign achieve its objectives, and navigate the legal minefield successfully. GALA is a uniquely sensitive global resource whose members maintain frequent contact with each other to maximize the effectiveness of their collaborative efforts for their shared clients. GALA provides the premier worldwide resource to advertisers and agencies seeking solutions to problems involving the complex legal issues affecting today's marketplace.

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ARGENTINA

### LEGAL CONSIDERATIONS

Argentina does not have a specific law addressing the issue of ambush marketing practices. Therefore, since there is no prohibition or sanction for these actions, the general principle is that they are admitted.

However, Law 23,207 (which ratifies the Nairobi Treaty) and Law 24,664 protect as trademarks all the Olympic symbols and the words that in an unequivocal manner describe the activities of the International Olympic Committee.

Moreover, there are some provisions in the Trademark Law no 22,362, Unfair Competition Law (specifically Article 9), Article 10 bis of the Paris Convention, as well as the general provision of Article 279 of the Civil and Commercial Code that can be used to prevent ambush marketing practices. Therefore, the actions of unfair competition, trademark and/or copyright infringement are the remedies available to sponsors and event organizers in such cases.

Article 279 of the Civil and Commercial Code states that “The object of the legal act must not be an impossible fact, or one prohibited by law, contrary to morals, good habits, public order, or prejudicial to other people' s rights or human dignity. Neither can it be an asset that for a special reason has been prohibited to be so”. In the context of ambush marketing, this means that the object of the act cannot be prejudicial to the rights of other persons, which can be seen as a limit to ambush marketing.

There are only a few judicial precedents of ambush marketing cases in Argentina:

- (1) In 2002, FIFA filed an injunction to oblige Pepsi to stop broadcasting an ad considered to be ambush marketing practice. Coca-Cola was at that time the official sponsor of the 2002 World Cup. The ad broadcast by Pepsi during the 2002 World Cup showed famous professional soccer players playing a soccer game against a team composed of sumo players. In the ad, Pepsi did not mention or include the use of any word such as “World Cup” or any official trademark or symbol of FIFA, but it associated the Pepsi trademark with the 2002 World Cup. The judge granted an injunction to FIFA, forcing Pepsi to stop broadcasting the ad until a final resolution was obtained, as the judge considered that the ad would induce consumers to believe that Pepsi was an official sponsor of the World Cup. However, no final decision was made, as the case was settled by the parties.
- (2) In 2014, two days before the start of the “Brazil 2014” World Cup, the Argentina Football Association (“AFA”) filed an injunction in order to force Unilever de Argentina SA to stop the broadcast of a television commercial for “Ala” washing powder, starring the football player Javier Mascherano, a prominent member of the Argentine National Team. In this commercial, the player appeared with a blue shirt, entering a playing field with a ball, and, at the end of the advertising, an “off” announcer says “Ala, Official Sponsor of all what we learn when we are

growing". The National Chamber of Federal Civil and Commercial Appeals held that, given the start of the Brazil 2014 World Cup, Mascherano's image as it was presented in the advertisement, added to the expression "official sponsor" could generate confusion in the public in the sense that the washing powder "Ala" was an official sponsor of the Argentine National Team.

- (3) Also in 2014, FIFA filed a claim against Cencosud SA because of a promotion in which Cencosud offered, as a prize, transport and accommodation for four people to attend the first two matches that the Argentine National Team would play, initially mentioning in the ad that the trip was to see the World Cup "Brazil 2014". Among other arguments, Cencosud argued that Brazil 2014 is one of the many names by which the World Cup to be held in Brazil in 2014 was designated and known, and so, when talking about tickets for Brazil 2014, there had been no improper use of the trademark and that the prize on offer was partly tickets for matches of the event "Brazil 2014". Basically, it offered what was recognized to be someone else's, in the same way as if the prize had been a Ford car or a trip to Disney World. The Chamber agreed with the first instance judge, and accepted Cencosud's defence arguments, consequently rejecting FIFA's claim in all of its parts.

It is important to note that in the FIFA v Cencosud case, the judges considered that, as long as there is no violation of the Trademarks and Designations Law, nor the rules that prohibit misleading advertising and unfair competition, the naming of an event and its indirect mention in certain circumstances are not prohibited behaviors under the regulations in force in Argentina.

Thus, although there are some precedents, there is no final decision in respect of ambush marketing practices in Argentina to date.

In some countries like South Africa or Brazil, where FIFA has forced them to promulgate a law protecting the ambush marketing practices in order to allow hosting the world cup, ambush practices can be stopped easily and in a short period of time. By contrast, due to the lack of a specific regulation, it is very difficult to stop indirect ambush marketing practices in Argentina in an effective way.

### **REGULATORY CONSIDERATIONS**

Article 10 of the Self Regulation Code of the Council for Self Regulation Advertising ("CONARP") establishes that all ads must be truthful, avoid any confusion or exaggeration that affect the good faith of the consumers, or induce to the abuse of the consumers' trust or exploit the lack of culture, knowledge or experience of the consumers.

Although, this article does not address specifically the ambush marketing issue, it can be used to object to a case related to ambush marketing practices. It is worth mentioning that CONARP has a strong

reputation, and its proceeding to challenge an ad is used by most of the companies who play a relevant role in the advertising area.

### COMMERCIAL CONSIDERATIONS

Some ideas that event organizers and/or sponsoring companies can use to prevent ambush marketing practices are:

- (a) From the event organizer's perspective:
  - Protect its own IP rights by proper registration of trademarks and logos;
  - Pursue ambush marketers through cease and desist letter and lawsuits (seeking injunctive relief where available and/or required);
  - Negotiate with broadcasters to avoid the purchasing of sub-category rights by competitors of official sponsors;
  - Control the venue and distribution of ambush marketing material.
  
- (b) From the sponsor's perspective:
  - Incorporate into the sponsorship agreement an obligation on the event organizer to protect IP rights and to enforce them in case of infringement;
  - Secure exclusive television rights for the event in the sponsor's own business category;
  - Secure endorsement with athletes.
  
- (c) From the perspective of advertising companies that do not sponsor the event:
  - In order to minimize the risk of claims from the organizers of events and the eventual issuance of precautionary measures, it is recommended to avoid using words such as "sponsor", "partner", "official" or other similar terms or any combinations of words that may generate the idea of an association between the advertiser and the event or its organizer or a participating team, which does not exist.

AUSTRALIA

### LEGAL CONSIDERATIONS

There is currently no overarching legislation in Australia that regulates ambush marketing generally; however, there is legislation that deals with ambush marketing with regard to specific events. In particular, since mid-2014, the Major Sporting Events (Indicia and Images) Protection Act 2014 (CTH) (the "MSE Act") has regulated the commercial use of indicia and images associated with "Major Sporting Events". Major Sporting Events are not defined under the MSE Act, rather the MSE Act has been drafted in a way that allows any sporting event that is listed in the schedules to be treated as a "Major Sporting Event" and the schedules are amended regularly to include any upcoming Major Sporting Event that requires regulation. For example, Schedule 1 of the MSE Act currently includes the ICC T20 World Cup 2020.

The MSE Act effectively prevents ambush marketing, by prohibiting the commercial use of protected indicia and images during the Major Sporting Event's protection period, unless the person is an official user, which includes either:

- (a) the event body for the Major Sporting Event;
- (b) an authorized person who is authorized by the event body (and registered on the event body online register); or
- (c) a person who is authorized to use, or is not otherwise prevented from using, the indicia or images for commercial purposes under a provision of a relevant law of a State or Territory prescribed under the MSE Act.

An event body for a Major Sporting Event must establish and maintain a register that is published on the internet and sets out details about relevant authorizations given to authorized persons for the event. The purpose of the legislation is to ensure that businesses which do not sponsor events but attempt to use event indicia and images to create an impression of sponsorship without having paid for the privilege (ie ambush marketers) are deterred from such activity. This is to ensure that official sponsors are encouraged to enter into commercial arrangements with event bodies, and provide the necessary funding to make the events a success.

Other Commonwealth and State legislation has previously been introduced that protected specific events such as the Olympics (in particular the 2000 Sydney Olympics) and the Australian Formula 1 Grand Prix. Such event-based legislation has traditionally protected against unauthorised use of indicia associated with the particular event in an attempt to reduce ambush marketing and to protect sponsorships and prevent their devaluation. For the Sydney Olympics, the New South Wales State Government introduced legislation that prohibited unauthorized advertising (such as billboards, posters, signs) in and around Olympic venues, in the airspace above such venues (ie balloon advertising, sky writing and banners) and also in major thoroughfares. Similar legislation was put in place by the Victorian State Government in respect of the Melbourne 2006 Commonwealth Games and

by the Queensland State Government in respect of the Gold Coast 2018 Commonwealth Games.

The Queensland State Government also administers the Major Events Act 2014 (QLD) and the Major Sports Facilities Act 2001 (QLD). While the latter Act is in relation to prescribed major sports facilities, the Major Events Act 2014 (QLD) is more broadly in relation to prescribed "major events" and specifically refers to "ambush marketing" in the heading of section 32, which prohibits persons from promoting a person, a thing or service, or otherwise doing something that suggests the person, thing or service is a sponsor or affiliate or has the approval of a major event, an event associated with a major event, or a major event organizer. Both Acts prohibit advertising in the airspace or on certain buildings or other structures during a declared period unless the particular advertising is authorized. Permanent building signage and the usual markings on commercial aircraft are excluded from the operation of those Acts. Similarly, the Victorian State Government introduced the Major Events Act 2009 (VIC), and the Western Australian State Government introduced the Major Events (Aerial Advertising) Act 2009 (WA). In addition to fines, there are also a range of civil remedies available under the legislation, including injunctions and the right to sue for damages if the organiser of the particular event has suffered loss. The New South Wales State Government has also introduced the Major Events Act 2009 (NSW) which, like its Queensland and Victorian counterparts, applies to any event declared to be a major event, and not just sports-related major events. The South Australia State Government has introduced the Major Events Act 2013 (SA) that not only prohibits unauthorized aerial advertising, but also specifically defines ambush marketing and prohibits it in relation to a major event.

In addition to the specific (albeit piecemeal) legislation noted above, victims of ambush marketing can seek redress through the traditional tort of passing off.

Finally, section 18 of the Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010) prohibits a corporation from engaging in conduct that is misleading or deceptive or which is likely to mislead or deceive and section 29 prohibits a corporation from falsely representing that goods or services have a sponsorship that they do not have or that the corporation has a sponsorship, approval or affiliation that it does not have.

In 2017, the Full Court of the Federal Court of Australia considered an appeal by the Australian Olympic Committee against a finding of the Federal Court of Australia that Telstra, who had been an official sponsor of previous Olympic Games but was not an official sponsor of the 2016 Rio Olympic Games, had not engaged in ambush marketing in contravention of the Olympic Insignia Protection Act 1987 (CTH) and the Australian Consumer Law. In *Australian Olympic Committee, Inc v Telstra Corporation Limited* [2017] FCAFC 165 the Full Court upheld the Federal Court's decision, noting that it was open to the Federal Court to find on the facts that Telstra's "I go to Rio" ad campaign (utilising the famous Peter Allen song "I go to Rio") in the lead-up to the Rio Olympics which promoted Telstra's association with the official broadcaster of the Rio Olympics (Channel Seven) as the "official technology partner of

Seven's Olympic Games coverage" did not mislead consumers into thinking that Telstra was an official sponsor of the Rio Olympics. The association that was promoted by Telstra was with Channel Seven (which was true), and not the Rio Olympics. As the Full Court found no error of law or fact, there was no basis to overturn the Federal Court's decision, and the case merely illustrates the fine line between what amounts, in this case, to a lawful association with an official broadcaster of the Rio Olympics and unlawful ambush marketing.

### **REGULATORY CONSIDERATIONS**

The Australian Association of National Advertisers' Code of Ethics ("Code") does not contain any specific provisions regarding ambush marketing. The Code states at section 1.3 that "Advertisements shall not contain a misrepresentation which is likely to cause damage to the business or goodwill of a competitor". However, to our knowledge this provision has not been invoked in respect of ambush marketing to date.

### **COMMERCIAL CONSIDERATIONS**

Event sponsors, assuming that they are not protected by the piecemeal legislation set out above (and depending upon the level of their sponsorship and their budget) need to consider measures to support and protect their investment. Such measures include strategically buying the relevant corresponding advertising space that is pertinent (ie if the event will be broadcast, the television advertising, along with the venue advertising), as well as placing contractual limitations on the resale or promotion of ticketing.

There are obvious ethical issues arising from ambush marketing that corporations may wish to consider. For example, ambush marketing can negatively affect other corporations' desire to sponsor an event which could result in the sponsored event being jeopardised. However, from a legal perspective, as long as its actions are legal, a corporation may find that, if done correctly, strategic ambush marketing can be an effective tool that achieves the required objectives from a smaller investment than the cost of traditional sponsorship. That said, as the Major Events Act 2013 (SA) demonstrates, the concept of ambush marketing is now being specifically defined and targeted in state legislation and, with penalties carrying fines of up to AU\$500,000 (approx US \$ 353,500), strategic ambush marketing may no longer be a viable option.

 AUSTRIA 

### **LEGAL CONSIDERATIONS**

There is currently no specific legislation in Austria relating directly to ambush marketing. Even with respect to the European Football Championships (“Euro 2008”), which took place in Austria and Switzerland, no specific regulation was put in force to particularly protect the official sponsors or to restrict advertising in the cities where the tournament took place. Instead, it is left up to event organizers to take measures to protect their official sponsors. As the term “ambush marketing” includes a wide variety of possible advertising strategies, there are some precautionary measures which event organizers may take in the interest of the official sponsors.

### **REGULATORY CONSIDERATIONS**

Promotions and advertising in Austria are regulated under the Act Against Unfair Competition. According to this Act, advertising must not offend against morality and decency in trade. It is for the courts to decide whether, in a specific case, the rules of morality and decency in trade have been violated. Furthermore, advertising must not be misleading. In a case decided by the Austrian Supreme Court, where a newspaper company promoted a prize draw in which people could win tickets for a football match of the Austrian National Team, with an ad showing a person wearing the official team jersey, this was deemed to be an unfair and illegal “image transfer”.

If the terms and conditions applicable when obtaining entrance tickets for sporting events prohibit ticket holders from commercial or promotional activity of any kind, this may provide some protection against ambush marketing. If, for example, an enterprise distributed a large number of branded T-shirts near a sport stadium with the intention that ticket holders would wear the T-shirts in the stadium, this could be qualified as unfair and illegal behaviour under the Act Against Unfair Competition.

The ticketing terms and conditions for the UEFA Euro 2008 contained such strict prohibition on the use, possession or holding of promotional or commercial objects and materials in the stadium.

A further legal basis which may also be of use in connection with ambush marketing is the Trademark Act, which protects trademark holders from third parties infringing their exclusive trademark rights. Moreover, in cases in which the organizer is producing TV broadcasts, the Intellectual Property Act offers protection from unauthorized distribution to the public (“public viewing”). Some strategies of ambush marketing may be stopped and sanctioned under these Acts. The event organizer may obtain trademark protection for important terms relating to a specific sports event and, if a third party uses one of these terms without authorization, such use may infringe the rights of the trademark holders and may be pursued before court.

### **COMMERCIAL CONSIDERATIONS**

Practical precautionary measures to protect sponsors from ambush marketing should include, in particular:

- Obtain trademark protection for the most important terms which are to be used for a specific sports event;
- Provide for tickets to be non-transferable;
- Include a strict prohibition on any kind of commercial and promotional activity of the ticket holders in the stadium; and
- Arrange for a protected zone outside the stadium in order to stop ambush-marketing strategies in the forefront of a sports event.

### **RECENT ENFORCEMENTS**

Although major sporting events have taken place in Austria in recent years (eg, the European Football Championships, Road Cycle World Championships, Nordic Ski World Championships, Youth Olympic Winter Games) no cases of “ambush marketing” in connection with these events were brought before the Austrian Supreme Court. Due to the lack of any specific legislative regulation and an established court practice, it still remains a kind of “grey area” where the line has to be drawn between legal and illegal ambush marketing activities.

 BELGIUM 

### LEGAL CONSIDERATIONS

The technique by which an advertiser associates itself with an event and its values, without authorization from the organizer and without having to pay sponsorship fees, is obviously well known and broadly used in Belgium as elsewhere. It allows the advertiser to benefit from the publicity surrounding an event and to take advantage of it without participating in the sponsorship. Yet, Belgium has never had, and in 2020 still has no, specific ambush marketing laws, despite the fact that Belgium regularly hosts major sporting or cultural events, such as the "Euro 2000" football championship, the Spa-Francorchamps Formula 1 Grand Prix, the "Memorial Vandamme" athletics meet, world-renowned classic cycling races, such as the Tour of Flanders and some of the largest music festivals and events. It is broadly felt that no special event-specific protection through specific anti-ambush legislation is needed to protect sponsors of events; nor are there umbrella statutes covering a group of events. Belgium has no exclusion zones around event venues, although local authorities can, within particular limits, enact local advertising limitations.

Ambush marketing is not always or illegal *per se*. As an example, a group of supporters wearing clothes bearing trademarks of a party that is not an official sponsor will not automatically constitute a trademark infringement. Taking advantage of the spotlight of major media events is generally allowed within the limits of what is considered as an otherwise fair market/trade conduct.

Long-standing examples of surfing on media events in print media are so-called "top topical" ads. Topics such as particular holidays, Mothers' day, fairs or major events in society or news can validly be used by advertisers to make a variety of connections, and thus obtain additional or special attention and attraction.

However, unauthorised commercial association with major events can, under certain conditions, be countered successfully. Event organizers and the official sponsors can, in case of ambushing of events by third parties, seek remedies based on intellectual property right protection and on fair market/trade practices, particularly in actions for: passing off, copyright infringement, trademark infringement and unfair market practices consisting of misleading or comparative advertising which does not meet the legal requirements. In addition, tortious liability generally can be invoked in certain circumstances to combat "guerrilla" advertising.

Often, robust contractual mechanisms, such as:

- licensing agreements regarding use of the organizer's trademarks or other forms of sharing the rights granted,
- prohibitions and restrictions on the sale and resale of tickets,
- prohibition of joint promotional operations with companies other than official partners,
- agreements prohibiting or limiting the use of distinctive signs by artists, athletes, national federations or spectators, and

- agreements with broadcasters giving priority for sponsors broadcasted during, before or after the event,
- are one of the most effective ways to contain ambush marketing. But none of these efforts can prevent often subtle ambush practices completely.

The Belgian self-regulatory organization, JEP, also has no specific self-regulatory rules or guidelines related to ambush marketing, other than what is mentioned in the ICC Code.

### **REGULATORY CONSIDERATIONS**

Book VI of the Belgian Code on Economic Laws deals with market practices and consumer protection, and generally prohibits misleading and false advertisements. Advertisements that falsely suggest or imply official approval can be successfully attacked on the basis of these articles (ie where ambush marketing leads to possible confusion with the products and services of an official sponsor (passing off)).

A catch-all provision in the Belgian Market Practices Act prohibits every act contrary to fair trade practices by which a seller hurts or tries to damage the professional interests of one or more other sellers. This covers acts exploiting the reputation of a seller without creating any confusion and without disparagement. Sometimes, an act may both be parasitic and deceptive. Sanctions on the basis of parasitic competition have been applied to all kinds of market practices.

Four detailed sets of rules govern broadcast advertisements, audio-visual sponsoring and product placement in Flanders, Wallonia, the Brussels Region and the German Community.

Whilst self-regulation codes theoretically also provide for general rules under which ambush marketing can be countered, in practice, self-regulation vetting does not directly deal with conflicts between advertisers.

### **COMMERCIAL CONSIDERATIONS**

Practical steps for event organisers and sponsors to prevent/limit ambush marketing:

- Event organizers should consider buying up all advertising space in the vicinity or agreeing exclusivity arrangements with the media, within the boundaries of competition law restrictions;
- Sponsors should contractually oblige event organizers to actively endorse the exclusivity agreements with the sponsors and attack ambush marketers;
- Sponsors and event organizers should foster an environment of sponsor-awareness in the public;
- Register trademarks of logo, name, year and other images of events;
- Event organizers should liaise and work towards ad hoc legislation and event-limited subordinate rules in order to properly protect events against otherwise hard to combat ambushing practices.

 BOLIVIA 

### **LEGAL CONSIDERATIONS**

There is currently no specific legislation which prohibits and/or regulates ambush marketing in Bolivia. It is important to note that ambush marketing is a fairly new term in Bolivia and thus jurisprudence and norms to regulate this matter are practically non-existent. Until the present date, we have no knowledge of cases where official sponsors of sporting events or any similar mass event in Bolivia have brought any claim regarding ambush marketing. In part, this is because there have been few mass events, due both to the Covid pandemic and to the political conflicts derived from the population's repudiation of electoral fraud and the subsequent resignation of former President Evo Morales.

### **REGULATORY CONSIDERATIONS**

Currently, there are no specific norms related to advertising, unfair competition or consumer protection which may be applied to ambush marketing cases. Despite the fact that competition law is known in the media and regulated by the Companies Supervisory Authority ("AEMP"), this institution is limited to the commercial market in general; there are no specific regulations for ambush marketing, which has, as its main feature, the mass event. In the case that official sponsors or event organizers feel harmed through ambush marketing practices, they may seek relief through laws protecting intellectual property, guarding against unfair competition, or typical civil actions.

### **COMMERCIAL CONSIDERATIONS**

Recommendations for event organizers/sponsors to limit ambush marketing include:

- Registration of all the intellectual goods related to the event before the pertinent authority.
- The organizers and official sponsors of events that take place in Bolivia that are directly affected by ambush marketing must seek the promulgation of a specific norm that regulates their rights as official sponsors. However, it is important to ensure that such norms do not limit constitutional rights such as freedom of commerce, freedom of work and freedom of expression.
- Organizers and official sponsors should impose obligations on media organizations to restrict advertising and promotion to official sponsors only.



# BOSNIA & HERZEGOVINA



### **LEGAL CONSIDERATIONS**

Ambush marketing is not regulated in Bosnia and Herzegovina (“B&H”).

General remedies that may be available to sponsors and event organizers are available in the laws regulating consumer protection and intellectual property. Provisions on marketing and advertising, in general, are not set out in a single law in B&H, but are covered in consumer protection laws and laws that regulate other fields but partly refer to marketing and advertising. Furthermore, as B&H is a state that consists of two entities and one special administrative unit, each of them often has different applicable legislation.

In general, the consumer protection laws, together with a prohibited advertising specific law in one of the entities, all establish general principles that cover unfair commercial practices, misleading advertising, and prohibited forms of comparative advertising. These provisions can be broadly interpreted, and, in case of a potential ambush marketing, an infringed party may file a claim for damages or file for an injunction to prevent such actions. However, it is difficult to predict the outcome of such cases as there has not been any known practice before the courts in B&H. Moreover, if a specific ambush marketing involves copyright or trademark infringement, this allows for an infringed party to further claim damages and enforce its rights from the intellectual property aspect. Also, the unfair competition provisions stipulated by trade acts of B&H, may also apply to ambush marketing cases, as they set forth penalties for business entities that mislead the consumers on the market or exploit the brand reputation of the competitor.

### **REGULATORY CONSIDERATIONS**

There is no marketing or advertising regulatory body in B&H. However, the Communications Regulatory Agency of B&H (Agency) regulates the telecommunications and broadcasting sectors, and, in the case of potential/confirmed ambush marketing via television or radio channels, the Agency may take preliminary measures to prevent such content from being broadcasted.

### **COMMERCIAL CONSIDERATIONS**

- Register relevant intellectual property rights prior to big events;
- Carefully draft the agreements with all parties, event organizers and others;
- Carefully monitor potential ambush marketing; and
- Take immediate action, such as filing for an injunction, at the earliest time possible.

 BRAZIL 

### LEGAL CONSIDERATIONS

There is no specific legislation dealing with ambush marketing in Brazil. Rather, the provisions of the Industrial Property Law, the Consumer Protection Code, the general rules of the Civil Code, the Brazilian General World Cup Law, and the Brazilian Olympic Act should be applied in order to evaluate the legitimacy of advertising actions conducted as “ambush marketing”.

The Industrial Property Law establishes (Articles 129 and 130) that exclusive rights over a trademark comprise any reference made in advertising and promotion, so using a registered or well-known sign related to a certain event in advertising or promotional activities by a third party could be viewed as direct infringement. Also, the names and symbols of sporting entities, as well as the names or aliases of athletes, are legally protected and enforceable in Brazil without the need for any previous registration or record (Article 87 of the Pelé Law). Ambush marketing may be also seen as unfair competition by means of “passing off” when, eg, the distribution of gifts, tickets and/or any material related to an event is capable of misleading consumers into believing that there is a sponsorship or commercial agreement with the organizers (Article 195, III of the Industrial Property Law and Article 10 *bis* (3) of the Paris Union Convention). Moreover, under the general unfair competition clause (Article 209 of the Industrial Property Law), ambush marketing could, depending on the factual circumstances, also be restrained as a “free riding” practice due to unjust enrichment of the agent vis-à-vis the notoriety of the event arising from investments made by organizers, official sponsors and advertisers.

Under the general provisions of the Civil Code, the ambush marketing practice may be considered to be a tortious interference with the exclusive agreements entered into between the organizers of an event and its advertisers and sponsors.

The General World Cup Law was passed in June 2012 to regulate the 2014 FIFA World Cup. This Law controversially provided exclusive rights to any type of promotional activity in the venues themselves, their vicinity and main access roads (Article 11). Additionally, the Law not only prohibited but also criminalized (i) ambush marketing by association and (ii) ambush marketing by intrusion, with sanctions of imprisonment of between 3 months and 1 year or a fine (Articles 32, 33).

Likewise, the Brazilian Olympic Act (as amended), also establishes penalties (3 months to 1 year’s imprisonment or the payment of a fine) for the practice of (i) ambush marketing by association (unauthorized marketing activities that associate advertisers with the Olympics), and (ii) ambush marketing by intrusion (unauthorized marketing activities that promote advertisers at the official Olympic sites). The trademarks protected by this law include those owned by the responsible entities, such as the Olympic Symbol and the Event’s official names.

### **REGULATORY CONSIDERATIONS**

The Brazilian Self-Regulation Advertising Council (“CONAR”) recommended the restraining of an ambush marketing action taken by the producers of Brahma beer in 1994 during friendly soccer matches of the Brazilian team prior to the FIFA World Cup Tournament of that year. Brahma paid some of the official players to make its famous advertising signal after each goal, in spite of there being sponsorship agreements for Antarctica and Kaiser beers from the channels responsible for broadcasting the matches.

CONAR reprovved the advertising action and in consequence modified Article 31 of its Advertising Self-Regulation Code in order to include “free-riding” or “ambush” marketing actions as censurable practices, mainly when achieved (i) through artifices or deceit, (ii) without regular agreements entered into by the legitimate parties or (iii) without the approval of the broadcasting vehicle and titleholders involved.

### **COMMERCIAL CONSIDERATIONS**

There is no doubt that ambush marketing may conflict with the interests of organizers, sponsors and official advertisers of the event. It is advisable to require broadcasters to limit advertising spots solely to official sponsors and advertisers of the event, as well as to acquire all billboard and advertising spaces available at the area of the event. In most cases, sending a warning letter would be sufficient to restrain the ambush marketing practice. During the Pan-American Games in Rio de Janeiro in 2007, the organizers notified more than 200 companies regarding advertisements related to the event and, in 90% of the cases, the practice was immediately restrained.

Just before the 2014 World Cup, a well-known Brazilian airline, which sponsored a few soccer players, created and published on its YouTube page (with over 2 million views), a commercial saying that it would bring “our stars to play at home”. The commercial showed 3 Brazilian soccer players experiencing a sequence of difficulties on the way to the airport. The airline’s marketing strategy was to find a way to transport back home to Brazil the Brazilian athletes playing in European cities from which it has direct flights, such as Paris, London and Madrid. The commercial ended with the claim: “The competitors will hate to admit it, but [the airline] will bring our stars to play at home”. The official carrier of the Brazilian team filed a complaint with CONAR. At a meeting held on May 8, 2014, CONAR decided that the commercial should be modified, since it transmitted the false idea that the advertiser was transporting all players of the Brazilian team, although the official carrier was another airline. The advertising airline accepted CONAR’s decision and changed the script of its commercial.

There have only been a few cases of ambush marketing that have been brought to Court. In 2017, a Brazilian footwear company was sentenced by the Court of Rio de Janeiro to pay compensation in the amount of R\$ 90,000.00 (approximately US\$ 30,000.00 at the time) for ambush marketing due to its

## AMBUSH MARKETING - BRAZIL

advertisement, in which it suggested connections between its trademark and an American rock band which was going to perform in an event that was not sponsored by the company.

 BULGARIA 

### LEGAL CONSIDERATIONS

Bulgarian legislation does not govern advertising and marketing activities in a single act, but rather provides for different sets of rules that apply to different aspects of these activities. Thus, irregular marketing activity, including ambush marketing, may be combated by event organizers and official sponsors of major sports or cultural events through the mechanisms provided for by:

- the Law on Marks and Geographical Indications (the “LMGI”), which regulates the registration and the use of trademarks;
- the Protection of Competition Act (the “PCA”) which sets forth the general legal framework for misleading and unlawful comparative advertising; and
- the Consumers Protection Act (the “CPA”) which provides the principles for protection of the consumers, including regulation of misleading and aggressive practices.

### REGULATORY CONSIDERATIONS

#### (a) Protection of Intellectual Property

Under the LMGI, event organizers and official sponsors of major sporting or cultural events may seek protection and compensation for damages for infringement of their trademarks. A trademark owner is entitled to prohibit the use, in the course of trade, of any sign that is identical or similar to its registered trademarks if the use is made for identical or similar goods or services and there is a likelihood of confusion of the public. This law may also be infringed if the sign used by a third person is similar or identical to a registered trademark and used for dissimilar goods or services if the trademark has a reputation in the territory of the Republic of Bulgaria and the use of the sign without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trademark.

In case of unauthorized use of a registered trademark, the trademark owner may file a claim with the competent court of law and request the court to, *inter alia*:

- (i) assert the fact of infringement of rights;
- (ii) prohibit the unauthorized use; as well as
- (iii) award compensation for damages.

Injunction measures, including preliminary ones, are also available.

In addition to the court proceedings, the LMGI also allows a trademark owner to request the Bulgarian Patent Office to investigate and, in cases where an unauthorized use of a registered trademark is established, impose administrative sanctions on the wrongdoer in the form of monetary fines.

The Bulgarian Penal Code provides for criminal liability for trademark infringement.

### **(b) Unfair Competition and Protection of Consumers**

Separately from the purely intellectual property protection approach, event organizers or sponsors of major sporting or cultural events may seek protection against ambush marketing practices under the rules of competition law and consumer protection legislation, under which the use of a trade name, a trademark or a geographical indication in a way that may lead to damages to the legal interests of the competitors and/or to misleading of consumer is prohibited. In particular:

#### **(i) Unfair Competition**

"Predatory" forms of direct ambush marketing, where a non-sponsor presents itself as being an "official" sponsor (usually by making direct references to trademarks related to an event, but without having official authorization from the respective trademark owner to use its trademarks) could be sanctioned under the PCA rules, which prohibit the use of a trade name, a trademark or a geographical indication identical or similar to those of other persons, in a manner that may lead to harming the legal interests of the competitors of the wrongdoer. If such an infringement is established, the Bulgarian competition authority may impose a monetary sanction and request the infringer to cease the violation.

#### **(ii) Protection of consumers**

Ambush marketing practices, where a merchant presents itself as a sponsor, or that it and/or its products or services are sponsored, but without having any official authorization to do so, may also be combated under the CPA rules. The CPA is aimed at protecting consumers in their dealings with merchants, *inter alia*, by prohibiting any practice that may result in misleading consumers. The CPA prohibits any commercial behavior that involves display of false information in a way that is likely to deceive the average consumer. The prohibition is applicable even if the information is factually correct but due to the manner of its presentation could still deceive the average consumer. In particular, commercial practices that may lead to misrepresentation in respect to a merchant or a manufacturer/supplier of specific goods or services or involving claims that a merchant or specific goods or services are subject to sponsorship or any other form of direct or indirect support are prohibited. If an infringement of any of these prohibitions is established, the Bulgarian Commission on Consumer Protection may impose monetary sanction and request the infringer to discontinue the respective practices.

### **(c) Self-Regulation**

Another available option for an event organizer is to seek assistance from the National Council for Self-Regulation (the "NCSR"), a member of the European Advertising Standards Alliance. The NCSR has adopted the National Ethical Standards for Advertising and Commercial Communication (the "NESACC"), which are a "soft law" type of rules that are not legally binding on those who are not members of the organization. Under the NESACC, marketing communications that make unjustifiable

use of the name, initials, logo and/or trademarks of another firm, company or institution are prohibited. In addition, the NESACC clarify that a marketing communication should not in any way take undue advantage of another company's, individual's or institution's goodwill in its name, brands or other intellectual property, or take advantage of the goodwill earned by other marketing campaigns without prior consent. If the NCSR finds an infringement of the NESACC, it can request the wrongdoer to stop applying the marketing practice concerned.

### **COMMERCIAL CONSIDERATIONS**

Event organizers and sponsors of major sporting and cultural events have several legal tools with which to act against market practices that unlawfully try to gain unfair advantage or associate a merchant or its goods or services with an event or trademarks of an official sponsor of a major sporting or cultural event. Unfortunately, most of these tools do not provide instant relief from the unauthorized association with the event in question, rather, they only provide for the opportunity to enforce rights if a violation is established. However, when protection is sought under the LMGI, a trademark owner may request the court to order interim measures consisting in the prohibition of the unauthorized use of sign identical or similar to its trademark.

CANADA

## LEGAL CONSIDERATIONS

Ambush marketing is not specifically regulated in Canada. The general legal remedies for violation of intellectual property rights (trademark and copyright infringement, as well as passing-off) are available, although they may be of limited benefit where ambush marketers have not blatantly infringed intellectual property rights. The provisions of the Competition Act relating to false and misleading advertising in a material respect are also available in dealing with ambush marketers.

Up to now, very few Canadian cases have addressed ambush marketing. The British Columbia Supreme Court dealt with the issue in a matter opposing the National Hockey League (“NHL”) and Pepsi-Cola Ltd (“Pepsi”) (1990, 42 CPR. (3d) 390). In that case, the NHL sued Pepsi over its under-the-cap instant game entitled “Diet Pepsi \$4,000,000 Pro-Hockey Playoffs Pool” in which prizes were tied to the outcome of 1990 Stanley Cup Playoffs: the winning cap would identify the winning team of the Playoffs by city (not by team name or by use of trademarks), as well as by the number of games played to win. The action alleged passing-off and, trademark infringement and interference with economic relations. The Court found that the two latter grounds were unfounded. With respect to passing-off, the Court ruled that there was no evidence of consumer confusion, and found that the use of a disclaimer by Pepsi in the advertisement (stating that the contest was neither associated with nor sponsored by the NHL or its members) was a valid defense for Pepsi.

In 2007, in anticipation of the Vancouver 2010 Olympic Winter Games and all Olympic Games thereafter, the Canadian government introduced The Olympic and Paralympic Marks Act. The purpose of the legislation is to prevent ambush marketing in Olympic-specific contexts by restricting the type of promotion and advertising that can be done during prescribed periods. It provides that no person may, in association with a trademark or other mark, promote, or otherwise direct public attention to their business, wares or services in a manner that misleads or is likely to mislead the public into believing that a person’s business, wares or services are approved, authorized or endorsed by an Olympic organizing committee or that a business association between them exists. Courts will consider the expressions borrowed from the Olympic vocabulary, even common expressions like “medals”, “Winter” and “Games”.

In February 2014, the Canadian Olympic Committee (“COC”) filed an injunction against clothing retailer, The North Face, in connection with a line of clothing called the “2014 Villagewear Collection” that allegedly leveraged Olympic marks in advertising, marketing, promotion and merchandising, as well as directly on some items. The North Face also issued tickets to Olympic events as sweepstakes prizes. The claim alleged that the line, and its marketing, intentionally misled consumers to believe that The North Face was an official sponsor of the Canadian Olympic Team, that the collection was endorsed by the COC, and that sales would support the Canadian Olympic Team. The COC sought declarations that The North Face’s conduct was contrary to the Olympic and Paralympics Marks Act, the Trademarks

Act, and the Competition Act, and sought injunctive relief. The parties agreed to settle the litigation after a 2-year legal battle in October 2016. The North Face agreed to make a “significant donation” to the Canadian Olympic Foundation, the registered charity affiliated with the COC. In an official press release, The North Face also stated that Canadian consumers might have mistakenly believed that The North Face line was affiliated with the COC and that The North Face “deeply regrets if that was the case”.

### **REGULATORY CONSIDERATIONS**

Ad Standards is the Canadian self-regulatory body, and its Canadian Code of Advertising Standards (“Code”) includes a prohibition against making inaccurate, deceptive or otherwise misleading claims, statements, illustrations or representations. This prohibition applies to a representation that implies that the advertiser is an official sponsor where that is not actually the case.

Ad Standards administers both a consumer and advertiser dispute resolution mechanism. Pursuant to the Advertising Dispute Procedure, an ambushed party can seek resolution of the unauthorized association on the basis of a violation of the Code. If the Ad Dispute Panel finds that the advertising is a misleading ambush, then the ambusher will be required either to withdraw the advertising or to amend it so that it no longer constitutes a misleading ambush. If the ambusher fails to do so, then Ad Standards has the remedies of (a) advising the exhibiting media of the contravention, (b) notifying the governmental advertising regulator of the violation, and (c) publishing a summary of the case in which the ambusher and the advertising at issue is publicly named and described.

### **COMMERCIAL CONSIDERATIONS**

From the event organizer’s perspective, there are a few practical ways to help prevent or reduce the risk of ambush marketing: these include:

- taking appropriate measures to protect intellectual property rights through proper registration of trade-marks and logos,
- encouraging official sponsors to dissipate any potential confusion in the consumer’s mind,
- pursuing ambush marketers through cease and desist orders and lawsuits (seeking injunctive relief where required),
- negotiating with broadcasters to avoid the purchasing of sub-category rights by competitors of their official sponsors as well as
- controlling the event venue and the distribution of ambush marketing materials (sponsor police).

From the sponsors’ perspective, efforts should be made to formalize the event organizer’s obligation to protect intellectual property rights (including the hiring of a sponsor police for the event) as well as its obligation to pursue ambush marketers; official sponsors should also attempt, to secure exclusive

television rights for event in their own business category, to secure endorsements with athletes and to purchase advertising on billboards outside the venue.



CARIBBEAN



## LEGAL CONSIDERATIONS

Several sporting events have been hosted in the Caribbean in the past decade. Jamaica has hosted:

- the 40th Caribbean Free Trade Association (“CARIFTA”) Games (2011),
- the 5th International Taekwon-Do Federation World Cup (2014),
- the Jamaica International Badminton Championships, which served as a qualifier for the World Championships and 2016 Olympic Games (2015),
- a double-header in the first round of matches of Group C of the Confederation of North, Central America and Caribbean Association Football (“Concacaf”) Gold Cup (2019).

However, none of these events were of the scale of the Cricket World Cup 2007 (“CWC 2007”), which was hosted by Commonwealth Caribbean countries further to the West Indies Cricket Board being granted the franchise by the International Cricket Council (“ICC”).

CWC 2007 necessitated the 9 Caribbean CWC 2007 host countries, namely Antigua, Barbados, Grenada, Guyana, Jamaica, St Kitts, St Vincent and the Grenadines, St Lucia, and Trinidad & Tobago to pass sunset legislation to address, among other things, ambush marketing by November 2006; and for most, it was the first time that ambush marketing was being specifically addressed legislatively. The legislation sought generally to control advertising, protect the marks and indicia of the CWC 2007, establish clean venues for the event, and prohibit ambush marketing. After extensive national and regional debate eventually all the host countries passed the relevant legislation.

This legislation (now repealed) prohibited persons without the written authorization of CWC 2007 from, eg, wilfully broadcasting, displaying, making, publishing or televising any advertisement, communication, statement, mark or image or authorising these or any other activity which was:

- (a) related to or connected with CWC 2007;
- (b) implied or suggested a contractual or other connection or association of that person with CWC 2007 or a person officially associated or involved in CWC 2007; and
- (c) was intended to:
  - (i) associate that person with CWC 2007 or exploit the publicity or goodwill of CWC 2007, in order for that person to gain a benefit of any kind;
  - (ii) diminish the status of an official sponsor, official supplier, official broadcaster or other licensee with regard to CWC 2007; or
  - (iii) imply that the person was an official sponsor, official supplier, official broadcaster or other licensee with regard to CWC 2007.

However, as the laws were repealed June 30, 2007 after the CWC 2007 events, there is currently no statute which outlaws Ambush Marketing.

Notwithstanding this, proprietors and sponsors of major events can avail themselves of provisions under Trademarks, Consumer Protection and Fair Competition legislation in those Caribbean countries

which have such laws, as well as the common law tort of passing off, depending on the type of ambush marketing at issue. The most likely legal course of action falls under these types of legislation with causes of action such as false advertising, trademark infringement, passing off and breach of contract.

In Jamaica, for example, the provisions of its Trade Marks Act 1999 (amended 2001 and 2013), the Consumer Protection Act 2005 and the Fair Competition Act 1993 (amended 2001) and the tort of passing off may be applicable where the activity involves the unauthorized use of a sign resembling, or in conjunction with, an existing trademark, or comparative advertising which is not in accordance with honest commercial practices or where the use of the mark or conduct of the trader is deliberately misleading.

The Consumer Protection Act empowers the Consumer Affairs Commission to conduct investigations into the conduct of providers and suppliers of services and goods. Misleading and deceptive conduct and false representations, which may involve the use of trademarks, trade names and geographical indications, in connection with goods and services can constitute offences under the Act.

The Fair Competition Act provides remedies for certain anti-competitive practices which may involve the misleading use of trademarks, trade names and geographical indications.

In relation to passing off, Caribbean courts have been guided by the principles outlined in 2 UK decisions—*Erven Warninck BV v J Townend & Sons (Hull) Ltd* and *Reckitt & Colman Products Ltd v Borden*—which set out the essential factors to establish the tort. *Reckitt & Colman* outlined 3 criteria:

- goodwill;
- deception due to misrepresentation; and
- actual or potential damage.

Whilst *Erven Warninck* outlined 5 factors:

- a misrepresentation;
- made by a trader in the course of trade;
- to prospective or ultimate customers of goods or services supplied by it;
- which is calculated to, or may in a reasonably foreseeable way, injure the business or goodwill of another trader; and
- which causes or is likely to cause actual damage to the business or goodwill of the trader by which the action is brought.

### **REGULATORY CONSIDERATIONS**

The issue of ambush marketing was once again brought to the forefront in Jamaica during the 2015 Inter-Secondary Schools Sports Association (“ISSA”)/Grace Kennedy Boys and Girls Championships. The event is highly popular in Jamaica as Jamaica’s future track and field stars are often identified from this competition. Telecommunications provider, LIME, is one of the main sponsors of the event and

invests significantly to hold certain exclusive sponsor rights. At the 2015 Championships, following an exciting 200m race, athlete Michael O'Hara removed his T-shirt to reveal another shirt bearing the words "Be Extraordinary", the known tag line of a direct competitor of LIME, Digicel. The incident prompted large-scale discussion of the issue of ambush marketing and the need to develop legislation on the same.

Despite these discussions, ambush marketing continues to be addressed with event-specific legislation, and so the general laws discussed above must be relied upon.

### **COMMERCIAL CONSIDERATIONS**

In the absence of laws which expressly prohibit ambush marketing in all its forms, sponsors and event organizers have to use strong contractual obligations to safeguard their investments.

When seeking sponsorship rights, companies need to pay specific attention to the protection of their intellectual property, particularly their trademarks, and the provisions of the relevant sponsorship agreements, particularly in relation to exclusivity, event rules, indemnities and warranties by the event organizers.

Event organizers also have a responsibility and should seek to protect the venue and control advertising, endorsements and marketing through tight contracts with event participants (such as athletes or performers) as well as contracts with broadcasters and sponsors.

CHILE

### LEGAL CONSIDERATIONS

Besides the self-regulation system, which is not mandatory, there is currently no specific legislation in Chile which outlaws ambush marketing *per se*. Therefore, when event organizers and their official sponsors feel aggrieved by ambushing marketing, they have to go through the more traditional forms of intellectual property protection, such as trademark or copyright infringement along with unfair competition norms.

**Unfair Competition:** The Chile Unfair Competition Law (Law No 20.169) defines unfair competition as any behaviour that conflicts with good faith (*bona fides*) and seeks to divert customers in the market from one competitor to another, by illegitimate means. Conduct considered as unfair competition includes “conduct which unduly takes advantage of another's reputation, inducing to confuse own goods, services, activities, distinctive signs or establishments with a third party's one”. In this sense, even though ambush marketing is not specifically regulated by any Law in Chile, the Unfair Competition Law provides norms that allows a company to pursue their rights. Consequently, companies are able to file civil actions against people or companies that take advantage of their reputation or goodwill, and thus mislead consumers in the market, creating confusion regarding their goods, services, activities, trademarks or commercial establishments (trade dress). Therefore, if a party that is not a sponsor of an event decides to use ambush marketing, the organizer and/or the legitimate sponsor could file a civil action for monetary compensation on grounds of unfair competition, and more specifically, on grounds of pursuing a misleading marketing campaign that breaches the standards set forth by the Unfair Competition Law.

**Trademark law considerations:** According to Chile's general law, any trademark owner is entitled to file a civil or criminal action against third parties which use identical or similar trademarks to its brand, for related products or services, where such use could mislead or confuse consumers. In those cases, torts are determined by the competent judge, depending on the way adopted.

### REGULATORY CONSIDERATIONS

The latest version of the Chilean Code of Advertising Ethics (“CCA”) which is administered by the Council for Self-regulating and Ethical Advertising (“CONAR”) requires, among other things, that all advertisement embodies the principles of fair competition, allowing consumers to choose freely with sufficient information regarding each product or service. The CCA also requires that advertising must comply with laws that are currently in force, as well as with the values, rights and principles recognized by Chile's Constitution. This Code also protects the goodwill or image acquired by a company's trademark or marketing campaign, specifying the conditions for claiming an infringement, namely:

- Considering how the different elements that make up the specific advertisement are combined;
- How those elements have been used over time and the degree of investment made;
- The degree in which consumers identify those elements with a specific advertiser.

Exceptionally, imitation is allowed when it is used as a deliberate and obvious creative resource, in the way of parody, citation and/or tribute, provided it does not denigrate or cause damage to the original creator of the trademark, or cause confusion among consumers.

Bearing all this in mind, any marketing ambusher could eventually be taken before CONAR for a declaration as to whether ethical standards in regard to marketing have been breached or not. If a breach is detected, the ambusher must immediately desist from pursuing their campaign, and, if they do not comply, the victim of the ambush marketing is entitled to publish a copy of the entire ruling in a Chilean newspaper in order to create awareness of the ethical violation.

Even though CCAE provisions are of self-regulatory nature, with no legal effect and thus non-binding, they are generally respected and CONAR's decisions could be used as a basis for judicial actions.

A decision by CONAR involved a complaint by the National Association of Professional Football ("NAPF") against ABCDIN retail store: because ABCDIN showed a TV spot which contained some impersonations of famous players of the Chilean Soccer Team (such as Arturo Vidal and Alexis Sanchez), wearing the official uniform, protected by trademarks and copyright. CONAR declared that the National Soccer Team has goodwill that is clearly identifiable with its trademark, which explains the commercial interest of third parties in being associated with the team. However, unauthorized companies should not be allowed to make use of such goodwill, using it without consultation, thereby harming its owner and other companies that have received proper authorization.

### **COMMERCIAL CONSIDERATIONS**

- Protect trademarks by proper registration way before the sport or cultural event is released.
- Create guidelines for the sponsors as to official trademark use, in order to identify possible infringers more easily.
- Promote clearly the name of the official sponsors in order to avoid confusion before the event takes place.
- In case of advising anyone suffering infringement, pursue potential ambush marketers through cease and desist letters and lawsuits. Do market research in order to learn from previous ambush market campaigns, and therefore, detect prior offenders.

CHINA

### LEGAL CONSIDERATIONS

In China, there is currently no specific regulation on ambush marketing, nor is ambush marketing defined in any legislation. However, the practise of ambush marketing is addressed indirectly in various regulations and laws, such as the Anti-Unfair Competition Law, and some promulgated specifically for high-profile events, such as the Regulations on the Protection of Olympic Symbols.

The Anti-Unfair Competition Law's definition of "unfair competition" addresses ambush marketing indirectly. In that law, "unfair competition" refers to any business operator's production or operational activities that have an anti-competitive effect on the market and thus infringe the legitimate rights and interests of other business operators or consumers. Further, a business operator must not do anything that will lead people to mistake its products for another business's products or to erroneously believe that there is a relationship between its products and another business's products (Article 6). This can be applied to ambush marketing where, eg, an advertiser seeks to imply a connection between its brand and a prominent event.

In preparation for the hosting of the 2008 Beijing Olympic Games, the State Council promulgated the Regulations on the Protection of Olympic Symbols in 2002. These regulations were amended for the Beijing 2022 Olympic and Paralympic Winter Games, with specific supplements related to ambush marketing. For example, Article 5 identifies specific acceptable methods for the use of Olympic symbols; and Article 6 provides that anyone conducting any activity by use of any element relating to the Olympic Games, thus leading others to wrongly believe that there is a sponsorship or other support relationship with the rights holders of the Olympic symbols, will be liable in accordance with the Anti-Unfair Competition Law. This is significant, as it makes explicit the idea that Article 6 of the Anti-Unfair Competition Law is referring to ambush marketing. Penalties are:

- if there is no illegal business revenue or the illegal business revenue is less than CNY50,000, a penalty of up to CNY250,000;
- if the illegal business revenue is over CNY50,000, a penalty of up to five times the illegal business revenue; and
- criminal liability may be imposed if the "circumstances are serious".

Ambush marketing is also indirectly addressed in China's Copyright Law and Trademark Law; in other words, ambush marketing may reasonably be considered to be a type of "passing off" and thus constitute copyright infringement and/or trademark infringement.

### REGULATORY CONSIDERATIONS

Ambush marketing has not been the key target for regulations or enforcement in China, meaning there are very few cases that can be referred to for guidance. However, the following cases reveal both regulatory and commercial consideration for ambush marketing:

### **(1) Boloni advertising during the Olympics**

In March 2017, the Lize Bridge Branch of Boloni Decoration Engineering (Beijing) Co Ltd (“**Boloni**”) produced and displayed in-store advertisements in the form of hanging pennants and floor stickers with Olympics-related content, such as "Home Renovation Olympics", "I fight for quality", and "Grab good-quality home renovations to win the Rio Olympics". The local industry and commerce authority issued an Administrative Punishment Notice requiring cessation of the practise and imposed a penalty of CNY3,000 on Boloni for marketing using Olympics marks without a trademark license or other relationship.

### **(2) Yi Jianlian banned from one CBA game for changing from Li Ning to Nike shoes**

In a 2017-2018 CBA (Chinese Basketball Association) game, during the first and second quarters, Yi Jianlian, former NBA and current CBA basketball player, adjusted his Li Ning brand shoes several times due to foot discomfort. Failing to fix the problem, he then changed into another pair of shoes, which were Nike brand, to continue playing, but was banned by the referee from going back on the court as Li Ning were the official sponsor, with the requirement that all CBA players wear Li Ning shoes during the game.

The referee’s order caused significant controversy among basketball fans in China until the CBA reached a settlement with Li Ning and Yi Jianlian whereby Yi could wear non-Li Ning shoes so long as Li Ning received compensation. As this dispute was settled, there was no official legal intervention or interpretation, but it was an important event in China and brought significant publicity to the concept of exclusive sponsorship deals. Brands should be aware of this case when managing their own relationships in China, particularly as public sentiment was generally in favour of Yi Jianlian, and that almost certainly put significant pressure on Li Ning and the CBA to allow an exception to their agreement.

### **(3) Yili Dairy’s sponsorship of Real Madrid during World Cup**

In 2018, when Mengniu Dairy became the official sponsor of the 2018 World Cup, its major competitor, Yili Dairy, sponsored Real Madrid, the famous Spanish football team. Yili then published numerous advertisements involving football elements during the 2018 World Cup period, but never using World Cup trademarks, elements or images.

This is a very typical case of a brand finding a way to advertise in close association with an event without breaking the law. Obviously the specific content of the ads matters, and Yili could have been punished if any of its ads came too close to implying an affiliation with the World Cup. It was also important for Lili to ensure that it was not restricted from using Real Madrid elements in its ads due to any agreement between Real Madrid and the World Cup.

At a high level, the lack of explicit legislation on ambush marketing and the low number of enforcement

cases creates some flexibility for advertisers in China seeking to unofficially associate with prominent events or brands. However, China is now one of the most ambitious and successful bidders for major events across all sport categories, including traditional athletics, as well as motor sports and e-sports. This, combined with the massive Chinese consumer market, means that exclusive marketing deals for events hosted in China are now a first-line priority for global brands, and we anticipate stepped-up enforcement of ambush marketing restrictions in future, driven by brand and host complaints to relevant national and local authorities.

### **COMMERCIAL CONSIDERATIONS**

See **Regulatory considerations** above.

COLOMBIA

### LEGAL CONSIDERATIONS

In Colombia there is no specific regulation of ambush marketing. However, ambush marketing may be challenged by other available legal means, such as: unfair competition; trademark infringement; copyright infringement; image rights; and consumer protection.

Ambush marketing can be declared illegal if:

- (a) The act affects or may affect the perpetrator's economic interests by unfair means, which will give a cause of action to force the infringing party to remove the noxious effects of its behavior and to compensate for the damages caused.
- (b) The act is in conflict with commercial good faith (such as tarnishing the brand of the competition without any objective statements).
- (c) Within the ambush marketing campaign there is an unauthorized use of a registered trademark or other sign confusingly similar to a trademark of the organizers of the event or an official sponsor.
- (d) The ambush marketing campaign uses designs, colors or images protected under copyright.
- (e) The ambush marketing campaign uses the image of a celebrity usually related to a different trademark or sponsor without the authorization of the individual.
- (f) The ambush marketing campaign causes consumers to be deceived as to the origin of the goods or services or the relation between the provider and the organizers of the event and/or its sponsors.

Where an ambush marketing campaign falls within one or more of the infringements described above, the plaintiff can initiate any or all of the actions available.

Hence, even if there is no specific regulation concerning ambush marketing, Colombia has widespread legal options and tools to prevent and protect the organizer, sponsor or any other party suffering from an illegal ambush marketing campaign.

### REGULATORY CONSIDERATIONS

In addition to the legislation mentioned above, the Colombian Self-Regulatory Code of Advertising ("CONARP") has been in force since October 16, 2013.

This Code aims to provide a regulatory system that will lead and encourage ethical conduct among the stakeholders of the national advertising scene by stipulating principles and behaviors of respect for the veracity of information, decency, honesty and the rights of consumers and competitors.

It mentions, in particular, the respect for privacy and image rights, intellectual property rights, environmental rights and the rights of consumers. This is in line with the applicable legislation in case of ambush marketing in Colombia, despite its not being expressly regulated.

Due to this Code, Colombian companies and consumers seem to obtain complementary protection against ambush marketing even though the Code is not an enforceable law, as advertisers tend to comply with its guidelines.

### COMMERCIAL CONSIDERATIONS

Different judicial decisions concerning ambush marketing have concluded the following:

- The use of a generic expression related to a sporting event in commercial advertising does not affect public or private interests, because advertising is protected by freedom of speech, especially when there is no use of third party's trademarks. For example, FIFA cannot prevent the use of football images (kids playing on a field) merely because the World Cup is about football.
- Anyone can take advantage of a sporting event, unless the marketing strategy affects any right protected under the rules governing the matter.
- Anyone can use common expressions which are in the public domain to refer to an event when they are not used as a trademark.
- The fact that there is sponsorship involved does not prevent other participants in the trade from advertising with generic expressions that allude to a national sentiment as long as they are not labelled as official sponsors without being so.
- It is forbidden to connect a typical commercial (and thus for profit) activity to a registered trademark, given the recognition that it then raises.

Moreover, as suggestions to avoid the use of ambush marketing by competitors, the following might be considered:

- Event organizers might consider using a "name and shame policy". Where such a policy is developed appropriately, ambush marketers will refrain from trying to profit from making a certain association. Nonetheless, some reticence is advisable in order to avoid extra publicity for the ambush marketers.
- A different sponsorship mentality could be considered. An event organizer should contract sponsors because of their values and their image rather than for merely financial opportunities. The contracted sponsors should be more proactive in avoiding ambush marketing through original and enthusiastic ways of marketing their own products or services rather than "piggybacking" on what the event organizer is organizing for them.

 COSTA RICA 

### LEGAL CONSIDERATIONS

There is no specific legislation in Costa Rica related to ambush marketing. There are, however, certain general Laws that may apply. The following are the most common forms of ambush marketing found so far in Costa Rica:

- Using tickets of an event as prizes for sweepstakes or other promotions;
- Sponsoring specific player(s) by a non-event or team sponsor;
- Publishing ads wishing “good luck” or similar messages to a team;
- Giving away promotional items to fans attending an event; and
- Hosting events near official venues or concurrently with official games and events.

Specifically, some of these activities may potentially infringe laws regulating trademarks, copyrights, image rights, unfair competition and consumer protection. Whether they are caught by existing legislation depends on the form in which they are carried out.

Up until now there has not been any known case against an ambush marketeer. However, some related issues have been addressed by courts, such as exhaustion of rights and the fair use of third-party trademarks, the use of a player’s personal image by a team’s sponsor (or by a non-sponsor), sponsoring individual players when a competitor is the official team’s sponsor, amongst others.

Additionally, there have been two relevant cases involving the sales of tickets:

- (a) A preliminary investigation was initiated by the Consumer Protection Agency when, prior to the Football World Cup in Germany 2006, FIFA announced its intention to invalidate tickets given away by non-sponsors in unauthorized sweepstakes (no formal case initiated); and
- (b) Several travel agencies were fined for offering tickets to attend the World Cup in Brazil 2014 despite not being authorized by FIFA, as this was considered to be misleading and unfair advertising (this penalty was later upheld in court).

### REGULATORY CONSIDERATIONS

The following legal principles established by Costa Rican legislation may apply to some forms of ambush marketing:

- (a) Any form of advertising that creates confusion relating to the products or activities of an advertiser or a competitor may be considered a form of unfair competition.
- (b) Third party’s trademarks may be mentioned to describe a product or service, as long as this use is clearly in good faith and does not constitute any form of unfair competition.
- (c) All goods, services or rights offered to consumers are implicitly guaranteed. Hence, advertiser is liable if he offers, eg, a ticket for an event that cannot be validated or used.

There are no provisions in the Self-Regulation Code that deal with ambush marketing.

### COMMERCIAL CONSIDERATIONS

In order to avoid legal problems related to ambush marketing, the following steps can be taken:

- (a) From the event organizer's perspective:
  - Attempt registration and protection of intangibles as widely as the law permits.
  - Make an objective assessment of the scope of the rights owned, to avoid over-promising potential sponsors as to the range of their rights.
  - Exclude, by contract with suppliers and others, some activities that the law does not forbid.
  - Communicate, clearly and widely, all restrictions existing for the sale and purchase of tickets.
  - Make clear communications on the identity of the official sponsors.
  - Make sure (and demand) that ambushers' advertising is clear and conspicuous as to the fact that they are not official sponsors.
  - Enforce strongly all rights, to avoid creating incentives for non-compliance.
  
- (b) From the sponsor's perspective:
  - Make sure that the sponsored party holds sufficient rights to deliver what is being offered.
  - Secure the widest coverage that is reasonable and possible.
  - Ensure that contracts include an obligation from the event's organizer to enforce its IP rights.

CROATIA

### **LEGAL CONSIDERATIONS**

Ambush marketing is not explicitly prohibited under Croatian law. As in other jurisdictions, ambush marketing most frequently appears in connection with large events, both domestic and international. For domestic events, sponsors usually stipulate various restrictions, such as no competitor's advertisements in a specific location, or that only products of the official sponsor may be sold at that location. However, competitors still find their way to associate with the event and the battle against that is not always quick and successful.

For that reason, the parties that are legitimately associated with certain events try to expand the protection of their rights as much as possible, often through the registration of intellectual property rights. One example of this was a case involving the Croatian Football Federation ("CFF"). The CFF obtained a registration from the Croatian Intellectual Property Office of the national football team t-shirt. The CFF tried to challenge the use of the t-shirt in public, particularly in the media. Advertising agencies, their clients, even the national television were approached with requests to stop campaigns and to compensate the CFF for damages incurred by the allegedly unauthorized use of their protected rights in the t-shirts. The public believed, however, that the use of the Croatian football team t-shirt should not be monopolized and that it should be free for use. Thus the CFF's plans to fight ambush marketing, which initially were very ambitious, did not bring the results that they planned.

### **REGULATORY CONSIDERATIONS**

Advertising and marketing in general is not regulated by a single act in Croatia. Instead, provisions concerning advertising are contained in several regulations concerning trade, consumer protection, media etc. The regulatory situation is the same with ambush marketing. For example:

- the Croatian Trade Act, under the provisions concerning unfair trade, bans comparative marketing if it creates confusion in the market;
- the Prohibited Advertising Act bans false advertising that could influence economic behavior of consumers;
- the provisions of the Media Act, which prohibits false advertising,

although all these provisions are very general. Whilst they could be used as the basis for a claim against ambush marketing, the chances of success in the procedure depend on a variety of elements and specific circumstances. In any event, the result is generally not easily and quickly achievable.

### **COMMERCIAL CONSIDERATIONS**

Due to the lack of an efficient regulatory framework concerning ambush marketing, the parties involved should do their best to prevent it, in particular through specific contractual provisions and IP rights registrations. At the same time, however, there is a consensus that a more efficient and direct protection of their rights is necessary, so further legal developments in that respect are expected in the future.

CYPRUS

### LEGAL CONSIDERATIONS

Cyprus does not currently have specific legislation relating directly to ambush marketing. As a result, ambush marketing is not prohibited *per se*. If someone wants to prevent ambush marketing, they must ensure that contractual safeguards are in place or, alternatively, will have to rely on the relevant general laws:

- the Cyprus Trademarks Law applies in cases of trademark infringements;
- the common law tort of passing-off can be invoked to enforce rights in cases of unregistered marks and to protect the goodwill of a brand;
- the Unfair Commercial Practices from Business to Consumers Law which concerns unfair business-to-consumer commercial practices in the internal market;
- the Control of Misleading and Comparative Advertising Law 2000;
- the Right of Intellectual Property Law applies where a “protected work” in the sense of the Copyright Act is reproduced or otherwise exploited or used; and
- the Unfair Commercial Practices from Business to Consumers Law (which implemented EU Directive 2005/29) includes measures against, *inter alia*, any misleading advertising or practise. Notably, not only consumers but also organizations and competitors have the necessary *locus standi* to file a case under Section 16 of this Law.

Furthermore, event organizers and official sponsors/advertisers are able, in cases of ambush marketing, to seek the traditional remedies arising from intellectual property rights protection and from fair market/trade practises.

The best protection against ambush marketing lies in the contractual terms which regulate the rights of event organizers to offer parts or spaces of the event to third parties for their marketing causes. The sophistication of ambush marketing involves a variety of advertising and marketing strategies which can be minimized by precautionary measures which event organizers may take to protect their sponsors.

### REGULATORY CONSIDERATIONS

The Control of Misleading and Comparative Advertising Law of 2000 and the Advertising Code published by the Cyprus Advertising Regulation Organization (“CARO”) set out the main principles that should govern advertising practises:

- to be legal, honest and truthful;
- to be prepared with responsibility towards consumers and to society in general;
- to respect fair competition and not imitate other advertisements; and
- not to exploit the reputation of another company.

Similar provisions to these are also included in the Broadcasting Code; the responsible authority for the enforcement of the Broadcasting Code is the Cyprus Radio Television Authority (“CRTA”).

It has to be said, though, that, as regards the CARO Code, its enforcement power appears to be rather limited, as it is set on a purely contractual basis. Conversely, under the Control of Misleading and Comparative Advertising Law 2000, a prohibition or injunction may be requested when an advertisement is misleading within the terms of the Law.

### **COMMERCIAL CONSIDERATIONS**

It is highly recommended that event organizers and sponsors adhere to the following in order to minimize ambush marketing practices:

- Sponsors should insist that advertising in the vicinity of an event is strictly regulated through a contract and focus on the exclusivity of their sponsorship in order to limit the access to other competitors.
- Moreover, event organizers should consider the imposition of obligations in order to restrict advertising and promotion during broadcasts to that of official sponsors.
- Sponsors should insist on imposing access restrictions upon people who wear clothes bearing the logos/marks of competitors, or who bring items such as banners which advertise competitors.
- Event organizers and sponsors should ensure that their advisors such as lawyers and their advertising agencies comprehend their legal rights and appreciate the need to limit ambush marketing.
- Event organizers should register their IP rights and protect their logos/marks through trademarks before the advertisement or the marketing of the events or the product.

CZECH REPUBLIC

### LEGAL CONSIDERATIONS

Ambush marketing is often used in connection with major commercial events, in particular sports events such as the Olympic Games, Soccer World Cup, European Championships or Ice Hockey World Championships, and is a great opportunity to increase the market share and reach out to potential customers without spending a lot of money.

The term “ambush marketing” is not in any way defined or embodied in Czech law, and there is no special legislative provision aimed at preventing ambush marketing in general. Although ambush marketing may be done entirely legally, it is the case that entities using this kind of offensive marketing technique may commit various infringements.

The most frequent are infringements of provisions of the Civil Code on competition law, in particular, the prohibition on unfair competition. Czech legislation generally considers unfair competition to be conduct that is contrary to good morals and, at the same time, is capable of causing harm to other competitors or customers. A person whose rights have been jeopardized or infringed by unfair competition may bring an action before the competent courts to desist from an infringement and rectify the unlawful situation. Adequate satisfaction, in the form of damages and restitution of unjust enrichment, may also be claimed.

Ambush marketing may, under certain circumstances, lead to misuse of visual, musical or cinematic materials created for a sports event. The Copyright Act provides protection in situations where such materials are deemed to be copyrighted works and are used for marketing purposes without the consent of their owner. In a similar way, a breach of trademark rights may occur. Again, any disputes can be brought before the courts which may decide on the obligation of the infringer to desist from an infringement and rectify the unlawful situation, as well as awarding damages and, if applicable, restitution of unjust enrichment.

The Act on the Protection of Olympic Symbolism is one of the few legislative regulations that specifically focus upon the issue of ambush marketing in the Czech Republic. The Act defines Olympic symbolism as incorporating: the Olympic symbols, the Olympic flag, the Olympic motto, the Olympic flame, the Olympic torch, the Olympic anthem, Olympic emblems, and the terms “Olympic” and “Olympics”, and confirms that Olympic symbolism is registered in accordance with the applicable legislation and international agreements for the protection of industrial and intellectual property by which the Czech Republic is bound. This Act must be followed by anyone wanting to be linked with the Olympic movement or the Olympic Games. Any use of Olympic symbolism, or any designation which forms or contains Olympic symbolism, for commercial, advertising or other similar purposes is possible only on the basis of a prior written authorization granted by the Czech Olympic Committee.

Any disputes concerning the rights and obligations regulated by this Act can be decided by the

competent court, and, in addition to a decision to desist from an infringement, the Czech Olympic Committee or sponsor may also claim damages, compensation for non-material harm caused by unauthorized use of Olympic symbolism, or unjust enrichment. The Czech Olympic Committee regularly publishes the “Methodology for the Use of Olympic Symbolism” which briefly summarizes the Act and describes the current valid rules for the upcoming Olympic Games.

Probably the most famous case of ambush marketing in the Czech Republic is related to Olympic symbolism. In 2006, during the Winter Olympic Games in Torino, national brewery Budějovický Budvar (Budweiser Budvar) launched a television advertising campaign featuring two fans who travelled to Italy for the so-called "Hockey Games" (in Czech the term was “Hokejída”, which may be interpreted as Olympics in hockey). There was also a lighted bundle of hockey sticks in the spot, which clearly referred to the Olympic torch. The Czech Olympic Committee decided to defend itself against this conduct in court. The dispute went all the way to the Supreme Court of the Czech Republic, which confirmed that Budweiser Budvar illegally used Olympic symbolism in its advertising campaign before and during the Olympic Games in Torino, namely the term "Olympic Games" in the term "Hockey Games" and a bundle of lighted hockey sticks as a reference to Olympic torch. Furthermore, due to the fact that the general partner of the Czech Olympic Committee for the Olympic Games in Torino was brewery Plzeňský Prazdroj (Pilsner Urquell), the behaviour of Budweiser Budvar was considered to be unfair competition. The court ordered Budějovický Budvar to pay the amount of CZK 2.25 million (c EUR 87,000) in compensation for unjust enrichment and reasonable satisfaction. The court also ordered an apology to be published in selected national newspapers.

### **REGULATORY CONSIDERATIONS**

The Czech Advertising Standards Council sets out ethical rules in its Code of Advertising Practice. This self-regulatory body may initiate a complaint process if it receives a complaint about a specific advertisement from any natural or legal person or public body, or on its own initiative if it is convinced that a particular advertisement may violate certain provisions of the Code. However, the Council, as a non-state institution, cannot impose financial fines or other sanctions, and its decisions thus take the form of recommendations.

### **COMMERCIAL CONSIDERATIONS**

Although there is no clear strategy to prevent or disable ambush marketing, the event organizers and/or sponsoring companies may limit the risk to some extent through the following steps:

- registration of relevant intellectual property rights (particularly trademarks);
- incorporation of special terms and conditions in sponsorship contracts such as:
  - event organizer’s obligation to protect intellectual property rights and its enforcement in case of infringement;
  - arranging and control of so-called "clean zones" in the area close to the event to ensure

## AMBUSH MARKETING – CZECH REPUBLIC

- that only official sponsors can present themselves in connection with the event;
- strict ban on any advertising at the time and place of the event, except for official sponsors;
- official sponsorship should be noted in/on all relevant advertising;
- secure exclusive television rights and negotiate with broadcasters to avoid sale of advertising space to anyone other than official sponsors;
- inform and secure endorsement with athletes.

DENMARK

### LEGAL CONSIDERATIONS

Currently, there are no specific provisions covering the issue of ambush marketing. The main reason for this is probably that, so far, it has not been a major issue in Denmark.

Instead, an issue of ambush marketing can, and must, be addressed through the general laws regulating intellectual property, competition and marketing, mainly the Danish Marketing Practices Act (“DMPA”) and the Danish Trademark Act (“DTA”).

The few big sports events in Denmark have all been very well branded by their sponsors and organizers. The biggest single sport event—the big cycling event Tour of Denmark—is sponsored by the national postal service, which has managed to brand its name—PostNord—as a part of name of the tour. Few other events, whether these are sports events or not, are big enough to attract any ambush marketers.

### REGULATORY CONSIDERATIONS

The DMPA has provisions (section 3, 5, 6 & 22) covering fair marketing practice, misleading advertising, derogation, misuse of others’ goodwill and the improper use of the characteristics of other businesses. Depending on the case, an action against ambush marketing brought under the DMPA is more likely to be successful than those brought under other Danish Acts. This is because most activity not complying with the DMPA is subject to legal sanctions, such as the issuing of a fine or even, in more serious cases, imprisonment. It is also possible for the court to issue injunctions and award compensation and damages. There is also the option that the Bailiff’s Court quickly can suspend an infringing activity—including ambush marketing.

The DTA (section 4) and other intellectual property laws can also be invoked. Naturally, the Bailiff’s Court can assess any claims of this character as well, although it may be more difficult to prove one’s rights based on these Acts. The DMPA’s requirements for the proprietor of the rights are, in some cases, not as high as those required by the “core” intellectual property laws.

### COMMERCIAL CONSIDERATIONS

- The sponsor of an event should ensure that the organizers of the event will be obliged to follow up on any issue of ambush marketing. In the event of disagreement of whether the activity is an infringement or not the sponsor shall reserve its rights to take action itself. If the sponsor is successful, the event organizers should be contractually bound to cover any costs.
- The event organizers and the sponsors should ensure that the sponsoring of the event is sufficiently branded among the relevant target audience in order to ensure that any ambushing will be recognized as such.

### RECENT ENFORCEMENTS

The Danish Supreme Court has, in the “NOMA case”, issued a very important decision about the use of third parties’ trademarks in advertising. The Court found that the DMPA sections 3 and 22, as well as the DTA section 4(2) had been violated, since NOMA’s well-known brand had been used in advertisements for a competition without the consent of NOMA.

In a similar case the Danish Supreme Court found that a Danish supermarket chain had violated the DMPA section 3 and the Danish Copyright Act section 1(1) by using a ceramist’s products on their product labels and in their flyers on which to display products and had thus commercially exploited the work of the ceramist. The court noted that, as the misuse of the ceramics had been significant, *the de minimis rule* could not be applied in defence of the usage.

Whilst the Supreme Court did not expressly mention ambush marketing in its decisions in the two cases, the same legal considerations would probably apply in an ambush marketing case.

In 2020, The Danish Maritime and Commercial Court ruled that an online betting site had violated the DMPA section 3 by, in connection to the Danish national football team’s participation in the World Cup, showing an advertisement of 2 football players wearing red/white jerseys that resembled the jerseys of the Danish national football team. The Danish Football Union has the exclusive right to exploit the goodwill of the Danish national football team commercially. The court found that the advertisements would create associations with the Danish national football team strong enough to violate the exclusive right of the Danish Football Union, and the ads had therefore freeloading on the goodwill of the Danish national football team.

 DOMINICAN REPUBLIC 

### **LEGAL CONSIDERATIONS**

There is currently no specific legislation in the Dominican Republic which outlaws ambush marketing *per se*.

As in many jurisdictions, trademark and unfair competition regulations can be taken into account to avoid ambush marketing.

### **REGULATORY CONSIDERATIONS**

The Advertising Auto-Regulation Code requires competition to be fair and that promotions should be legal, decent, honest and truthful. However, it is very difficult to stop ambush marketing when there is no infringement to an IP right, or there is no act of clear unfair competition practice.

### **COMMERCIAL CONSIDERATIONS**

In the Dominican Republic, some **non**-sponsors have used baseball games to promote themselves by entering into the stadium with strong promotions without taking into considerations the paying sponsors of the baseball tournament. Practical measures have to be taken, especially by the promoters of the events.



DUTCH CARIBBEAN



### **LEGAL CONSIDERATIONS**

There is no specific law for ambush marketing in Curaçao, St Maarten, Aruba and the Caribbean Netherlands. Ambush marketing can be dealt with, in the main, through trademark law, copyright law and the Civil Code (eg wrongful act, misleading advertising, and contract law).

### **REGULATORY CONSIDERATIONS**

There is no regulator for advertising matters. However, it is strongly advised to consider generally accepted international standards of good advertising practice.

### **COMMERCIAL CONSIDERATIONS**

- Ensure that intellectual property, especially trademarks, are protected in advance;
- Establish and distribute in advance guidelines on the proper use of trademarks and other intellectual property;
- Publicity campaign stating the official sponsors, permitted use of trademarks and other intellectual property and warnings that violators will be prosecuted
- Take measures to ensure, as much as possible, that advertising space on the event premises and in the vicinity is only available to official sponsors;
- Event organisers are advised to negotiate with broadcasting media to limit advertisements during the broadcast of the event solely, or as much as possible, to official sponsors, the latter considering that Curaçao, St Maarten, Aruba and the Caribbean Netherlands are relatively small communities;
- Include in the terms and conditions of the sale of tickets for the event that tickets cannot be used for advertising, sales promotion or other commercial purposes without the organizer's prior written consent.

ECUADOR

### LEGAL CONSIDERATIONS

There is currently no specific law dealing with ambush marketing in Ecuador. However, the following are relevant:

- (a) **the Market Power Control Law** issued in 2011 broadly defines as unfair competition acts all sorts of acts of confusion, deception, imitation, and exploitation of another's reputation. Although ambush marketing is not particularly addressed by the law, it could be included as one of the acts deemed as unfair competition by way of case law, as the law defines said acts in a general manner.
- (b) **the Intellectual Property Law** has remedies for the violation of intellectual property rights, such as trademark and copyright infringement, which could be used as means to attack ambush marketing campaigns.
- (c) **the Consumer's Protection and the Communications laws**, where applicable, which regulate anything related to misleading advertisement or advertisement that does not comply with the specific requirements of law. Also, they prohibit any comparative advertisement based on fraud or indiscriminate declarations.
- (d) In addition, since Ecuador is a member of the Andean Community of Nations, **Decision No 486** is applicable. The Decision deals with all industrial property rights and their protection; in addition, it establishes which acts and conducts constitute unfair competition or unjust exploitation of another's trademark reputation.

All these regulations could be used in certain cases of ambush marketing; however, this conduct is not specifically addressed, which is the reason why acts of ambush marketing are not frequently litigated in Ecuador.

### REGULATORY CONSIDERATIONS

The Market Power Control Law provides the administrative means to protect free trade practices and punish unfair competition acts that could hinder competition, such as ambush marketing practices. The law is enforced by proceedings before the Superintendence for Market Power Control, but, even though this was established at the end of 2013, it has not yet issued any resolutions that could shed light on the ambush marketing issue.

The Intellectual Property Law includes provisions to protect intellectual property rights and competitors against unfair competition. This law states that any form of advertising that creates confusion as to the products or activities of advertisers or a competitor may be considered a form of unfair competition.

Andean Community Decision No 486 is an international regulation applicable in Ecuador; therefore, it

is also a valid means to protect advertisers' rights regarding intellectual property infringements and against acts of unfair competition or unjust exploitation of their trademark reputation.

### COMMERCIAL CONSIDERATIONS

- Effectively protect intellectual property rights: For instance, the protection of trademarks throughout their registration before the campaign is released. As an example, the governing body on football worldwide ("FIFA"), aside from registering the FIFA World Cup trademark and the specific trademarks identifying each world cup (trophy, mascot, logo with country name) has additionally applied for and registered as a trademark the word "mundial" by itself (meaning "of or involving the whole world") in several classes, including class 41 (which covers sporting events).
- Be cautious when drafting sponsorship agreements: These agreements should protect effectively both the sponsor and the organizer of the event.
- Buy the relevant corresponding advertisement: Make sure to make advertisement contracts as broad as possible, so as to include onsite advertisement for the event, as well as all broadcasted and digital advertising of the event.
- Secure endorsements with celebrities such as athletes, actors, musicians, etc.

There have not been any relevant recent enforcements regarding exploitation of another's reputation or trademark's reputations that could be considered as a case of ambush marketing; however, following the creation of the Superintendence for Market Power Control in late 2013, which can act as the competent authority to resolve ambush marketing cases, some activity in this regard can be expected soon.

EL SALVADOR

### LEGAL CONSIDERATIONS

El Salvador does not have a specific regulation regarding ambush marketing. However, regulations established in different pieces of legislation legal bodies can be used to penalize and sanction those who infringe rights and try to link their trademarks with external events without paying for a license or sponsorship.

The Consumer Protection Law prohibits advertising or advertising campaigns that mislead or deceive the consumer, which may be sanctioned based on what is established by the National Council of Publicity and the Consumer Protection Law.

The most common forms of ambush marketing seen in El Salvador are the following:

- ticket raffles of tickets for an event used as a promotional or advertising tool;
- advertising economic packages to attend events and giving away promotional items to the fans attending the event;
- the sponsoring of a player by a non-official sponsor;
- using the colors of the country that is hosting the event as part of a promotion;
- promoting or advertising loans by including in the promotion the fact that the loan could be used to enable people have the economic means to attend a certain event.

Some of the activities mentioned are the ones that are considered ambush marketing; and the laws they may infringe are mainly the Consumer Protection Law and those concerning intellectual property, image rights, copyrights, depending on what the advertising or promotion is being done.

The cases seen in El Salvador have mostly related to IP, copyrights and image rights in connection with a worldwide event such as the Soccer World Cup. There have been no ambush marketing cases *per se* since there is no specific regulation.

### REGULATORY CONSIDERATIONS

In El Salvador there is no specific regulation in that deals with ambush marketing; however, there are regulations which may be applied to infringers under the Trademarks and Other Distinctive Signs Act, the Commercial Code, the Consumer Protection Act and the Advertising Self-regulation Code.

### COMMERCIAL CONSIDERATIONS

Possible ways to avoid the practise of ambush marketing include:

- (a) From the organizer's perspective:
  - to obtain the protection as broad as possible of all intangible rights;
  - to establish all restrictions in regard to the selling and promoting of tickets;
  - to establish all rights granted to the sponsors of the events;
  - to clearly specify and identify the official sponsors; and

- to provide a broad specification to local sponsors and attorneys of what may be published without authorization and what needs authorization from the organizer.
- (b) From the sponsor's perspective:
- to make sure to have all the permissions needed to make use of the rights connected with the event in their advertising; and
  - to include in the contract the possibility to enforce rights in the name of the organizer if infringed by third parties.

In general, we would recommend protecting all IP rights that are being, or will be, used in the event, and keeping a close eye on all advertisement campaigns being released, both prior to, and during the event taking place.

FINLAND

### LEGAL CONSIDERATIONS

In Finland, there are no specific legal provisions to prohibit ambush marketing as such. However, depending on the circumstances in each individual case, ambush marketing may be regarded as unfair business practice.

According to the Unfair Business Practices Act, fair business practice may not be violated nor may practices that are otherwise unfair to other entrepreneurs be used in business. The Government Bill for the Unfair Business Practices Act stated that the ICC International Code of Advertising Practice must be taken into account when interpreting what constitutes fair business practice on marketing communication, even though the ICC Code is not legally binding. Thus, the ICC Code sets the baseline for assessment of ambush marketing. It requires, *inter alia*, that all marketing communication should be legal, decent, honest, and truthful. Furthermore, marketing communication should not make unjustifiable use of the name, initials, logo, and/or trademarks of another firm, company, or institution. Moreover, marketing communication should not in any way take undue advantage of another firm's, individual's, or institution's goodwill in its name, brands, or other intellectual property, or take advantage of the goodwill earned by other marketing campaigns without prior consent.

Unfair business practice may be prohibited by the Finnish Market Court, which is a specialized Court handling, *inter alia*, all civil intellectual property ("IP") infringement and marketing law matters as the Court of first instance. However, ambush marketing is rarely invoked in Finnish legal practice and there is no established case law concerning ambush marketing.

Event organizers and their official sponsors may also, in some cases, seek to protect themselves from ambush marketers through actions for trademark infringement or copyright infringement. In relation to the Trademarks Act, ambush marketing may be considered as trademark infringement if, eg, the entrepreneur in breach exploits a registered trademark in the name of the event itself in its advertising. A reproduction of a logo created to represent the event may lead to copyright infringement by an ambush marketer under the Copyright Act. In practice, claims concerning unfair business practices and trademark and/or copyright infringement may be handled in centralized proceedings in the Market Court.

### REGULATORY CONSIDERATIONS

As established above, the current law in Finland is still undeveloped as to ambush marketing. However, should Finland be hosting any of the larger sports events (such as, eg, the football Euro Cup or the Winter Olympics), it is possible that special legislation addressing the questions around ambush marketing would also be enacted in Finland.

### **COMMERCIAL CONSIDERATIONS**

Practical steps by which to prevent ambush marketing include, eg:

- Effectively protecting, via intellectual property rights, the principal visual identifiers of the event and controlling the disposition of such rights;
- Controlling access to the stadium grounds;
- Fully controlling advertising in the vicinity of the event. The official sponsors may impose contractual obligations on the event organizers to purchase all the advertising space nearby for resale to official sponsors only;
- Obligating the media, through contractual arrangements, to grant advertising time only to the official sponsors during broadcasts and webcasts of the event; and
- Introducing campaigns to raise awareness of the official sponsors among the public.

### **RECENT ENFORCEMENTS**

There is no established case law in Finland concerning ambush marketing.

FRANCE

### LEGAL CONSIDERATIONS

While ambush marketing is generally associated with famous sport events, such as the Olympic Games or the Rugby World Cup, this phenomenon tends to take more and more forms, including in the political domain, as businesses and their ad agencies come up with creative ideas.

There is no specific legislation in France which would outlaw ambush marketing *per se*. Therefore, the traditional tools are used:

- **Intellectual property:** notably copyright infringement or trademark infringement, even if, in certain cases, such ground cannot be used, insofar as trademark infringement implies the use of a trademark by a competing company, and the freedom of speech is protected. Moreover, one notes that registered trademarks are rarely imitated by ambush marketers in France.
- **Unfair competition and the other associated legal notions:** while unfair competition implies a competing relationship between the suffering party and the ambush marketer (which is not always the case), the notion of “parasitism” has been developed by French authors, and then applied by judges to sanction disloyal behaviors towards non-competitors. The parasitism is based on torts, which requires that the suffering party evidences:
  - a fault (disloyal behavior consisting of the intention to promote its own commercial activity by freely, and without risks, benefiting from another party's efforts and investments),
  - a prejudice (to damage somebody's reputation or image, customers' misappropriation, destabilization, appropriation of investments) and
  - a link between them.
- **Misleading advertising/unfair commercial practice**, where applicable.
- **Contract law** (between the owner of the rights on an event and any potential partners/sponsors): the way is to clearly define the scope of the rights granted and the guarantee offered by the grantor.
- **Violation of provisions of the Code du sport** and in particular of section 333-1 that grants to the sports federations and organizers of sports events the ownership of the commercial use of the sporting events and competitions that they organize. This provision was specifically codified in order to protect sports events organizers, since most ambush marketing operations take place in the context of sports events. Further, Article L. 141-5 provides for a special protection regime applicable to the Olympic Games, according to which "the French National Olympic and Sporting Committee is the owner of the national Olympic emblems and depository of the motto, anthem, Olympic symbol and the terms 'Olympic Games' and 'Olympiad'" and they can take advantage of this foundation in order to put an end to all marketing ambush practices that would gravitate around the event of the Olympic Games.

- **Section 9 of the Code civil:** under which individuals have a right to the protection of their image, and may oppose the commercial use of their image.
- **Ad hoc laws:** may be enacted by the State in connection with an event in order to address ambush marketing risks.

### REGULATORY CONSIDERATIONS

The advertising self-regulatory body, Autorité de Régulation Professionnelle de la Publicité (“ARPP”) ensures that the Recommendations it issues are complied with by advertisers, but there is no specific Recommendation on ambush marketing. Rather, the ARPP uses the general principles of good faith, true and honest advertising, etc. However, article 15 of the Advertising and Marketing Communication practice Consolidated ICC Code prohibits the exploitation of the goodwill of a company or an institution, and more specifically “to take advantage of the goodwill earned by other marketing campaigns without prior consent”.

### COMMERCIAL CONSIDERATIONS

The following should be done:

- The legal teams carefully draft the agreements (right granted, exclusivity or not, duration and territory of the grant);
- Monitoring of any ambush marketing event next to the stadium, but also in the stadium;
- Internet monitoring services provided by specialized companies;
- Work with the broadcasters (diffuseurs) to avoid any pirating/hacking: eg, use of specific TV signals that cannot be modified.

Ambush marketing campaigns in France have taken various forms over the years:

- (1) In 2008, Ryanair's ad: "with Ryanair, everyone will be able to attend my wedding" associated with a picture of Nicolas Sarkozy, the French president at the time, and Carla Bruni (who was not yet his wife or even engaged to him), was sanctioned by the tribunal as a violation of Section 9 of the French civil code (the right to the protection of one's image) and Ryanair was ordered to pay €60,000 to Bruni and €1 to Sarkozy. Whilst not categorized as ambush marketing, it clearly was.
- (2) Similarly, in 2004, the Cour d'Appel of Paris ordered SFR, the French telecommunication company, and its advertiser to pay €1 million to Gaumont for parasitical practices as a result of the extensive display in France of an ad (posters, TV) shortly after the release of movie the "Fifth Element", in which not only the leading actress appeared, but a clear and direct reference to the movie was sought. Whilst the court did not qualify this behavior as an ambush marketing operation since the notion was not commonly used at the time, it was nonetheless a clear operation of ambush marketing. The very substantial and unusual amount of damages ordered

against the advertiser and its advertising agency lie in particular with the fact that the ad campaign was very substantial, and that SFR and Publicis did not discontinue it after the decision of first instance.

- (3) In 2013, in order to promote its AXE contest, the winner of which was to go into space, Unilever had individuals dressed up as astronauts attend a France/Germany soccer match in the VIP box, thereby drawing the attention of the TV cameramen. This was a reiteration of the first well-known ambush marketing operation initiated by DIM, the lingerie company, which had female spectators attend the rugby France/Ireland world cup match wearing lingerie in 2007. Neither the AXE nor DIM marketing campaigns gave rise to court actions.
- (4) In 2012, Fiat published an ad in L'Equipe, the French sports newspaper. In this ad, the day after a France/England rugby match, Fiat recalled the score of both teams, congratulated the English team and fixed a rendez-vous on 9 March with the French team for the France/Italy match. The ad was signed "Italie 500" a prediction of the score and a reference to the famous Fiat 500 car. The French Fédération Française de Rugby ("FFR") filed a claim against Fiat on the basis of the violation of Section 333-1 of the French Code du Sport that gives the sports federations and organizers of sports events the ownership of the commercial use of the sports events and competitions that they organize, and on the basis of parasitical practices. The FFR lost on both counts in a very controversial decision of the Cour d'Appel of Paris, confirming the first instance decision, even though most commentators agree that this was a clear violation of the provisions of Section 333-1 of the French Code du Sport and of parasitical practices. This decision of the Cour d'Appel of Paris was confirmed by the Cour de Cassation which ruled in favor of the freedom of the ambusher. It did so on the following terms: "the risk of confusion on the quality of Fiat and its dealers vis-à-vis the FFR was not proven" and therefore it "was not established against them that the promotion of their own commercial activity was carried out by taking advantage of the efforts and investments of the FFR".
- (5) In 2018, the Court of Appeal ordered Franck Provost to pay a rival hairdresser, Jacques Dessange, €120,000 in damages. Although the court held that an official partner of the Cannes Film Festival cannot oppose a competitor's communication about his activities on the occasion of the Festival, and the use of the terms "7th art", "Cannes" or "climbing the stairs", its use of the term "official" and the Festival's symbols (poster, palm tree), as well as suggesting the existence of a VIP access to the backstage area within the framework of a contest entitled "Special Cannes Film Festival" was likely to wrongly attribute to it, in the consumer's mind, the status of official long-term partner of the Festival, to the detriment of the company having invested in, and financed, the event in order to promote its image and profile. Note, however, that this behavior, even though it was a clear operation of ambush marketing, was nonetheless qualified and

condemned as acts of unfair competition and of parasitism.

- (6) The simple retweeting by Snowleader, a brand of outdoor sports equipment, of a tweet posted by Martin Fourcade about his victory at the 2017 biathlon world championships, accompanied by a message of congratulations, was not considered to be at fault. The Tribunal dismissed the claim of infringement of the right to the protection of one's image, as the message did not suggest the existence of a partnership contract and as it fell within the scope of the brand's freedom of expression on a current event. Nor did the Tribunal consider that the behavior of the brand qualified as ambush marketing.

Overall, uncertainty remains regarding courts cases concerning ambush marketing operations where the operation is conducted in the context of an official sporting or cultural event by an advertiser which is not an official sponsor. Communication in the context of such event is possible, but precautions need to be taken in order to avoid a claim for parasitical practices.

GERMANY

### LEGAL CONSIDERATIONS

Germany has no specific legislation against ambush marketing *per se*. Whenever someone wants to prevent a third party from associating itself with a certain event, product or service without really having anything to do with it, they will have to rely on the general laws relevant in the field of ambush marketing:

- the Trademark Act will apply in cases of trademark infringements;
- the Act against Unfair Competition will be the basis for cases against deceptive advertising and misrepresentation, especially when someone creates the impression of being a sponsor of the event or otherwise being related to it;
- the Copyright Act will apply where a “protected work” in the sense of the Copyright Act is reproduced or otherwise exploited or used.

These legal means have proven sufficient to create a good balance between event organizers and its sponsors (brand owners) on one side and other advertisers, mostly smaller commercial entities and merchants, on the other side.

However, as an exception, since 2004 the German Olympic Symbol Protection Act *Olympia-Schutzgesetz* provides protection of the Olympic Rings as well as the Olympic designations “Olympia”, “Olympiade” and “olympisch” alone or in word combinations, including their corresponding words in other languages. Unless permitted by the German National Olympic Committee or the International Olympic Committee, their use in commerce is illegal if it creates danger of confusion as to origin or where the use without due cause takes unfair advantage of, or is detrimental to, the Olympic Games or the Olympic movement. This also applies to similar designations.

Only a merely descriptive use is permissible (eg in relation to the city of Olympia or the ancient Greek Olympic games, or to participants of the Games or equipment actually used during the Games). In general, when using words related to the Olympic Games, care should be taken to ensure that the words are synonymous with great performance or good cost/performance-ratio and can be considered descriptive in the specific context (ie just pointing out the outstanding quality or service or relating to a competitive character in general). Furthermore, words related to Olympia should not be part of the name of a product or service. If there is a factual proximity to the Olympics (eg sports), it is particularly important to avoid symbols that could be associated with the Olympics (for example the Olympic rings) or which are protected under trademark or design law (such as the Olympic mascot). When assessing permissibility, the proximity in time to the Olympic Games will be taken into account. The closer to the Games the advertising takes place, the more likely it could be considered an attempt to exploit the Olympic movement’s reputation.

Over the years, some German appellate courts have considered advertisements with the words “Olympic discount”, “Olympic prizes”, “Olympics 2010” and “In anticipation of Vancouver 2020” as a

violation of the Act. However, current judgments have partly deviated from this assessment, stating that not every word derived from one of the prohibited terms would lead to an association with, or the illegal exploitation of, the reputation of the Olympic Games or deceive about a (non-existent) sponsorship. For example,

- (a) In 2019 the Federal Court of Justice declared admissible the advertising of a textile distributor who used the slogans "Olympiaverdächtig: Mit der richtigen Sportbekleidung die eigenen Rekorde brechen" ("Olympic suspect: Breaking your own records with the right sportswear") and "Die tollen Sport-Shirts und Polos sind einfach olympiareif" ("The great sports shirts and polos are simply ready for the Olympics").
- (b) The advertising of a fitness center with "Olympics Special" as well as "We bring the Olympics into the club" and "Training bei [...] wird olympisch" ("Training at [...] now becomes olympic") was considered permissible by the Higher Regional Court of Frankfurt Main.

While not directly applicable to other large events, such as the soccer World Cup or other world cups, the basic principles of the judgments based on the Olympic Symbol Protection Act will, most likely, also have an influence on the assessment of marketing acts around these events, too.

### **REGULATORY CONSIDERATIONS**

Regulatory bodies do not play a role as far as the enforcement of the laws relating to advertising is concerned. More important are privately-run consumer protection associations or industry associations, as well as competitors that see it as their task to enforce the rules. They send out warning letters with cease-and-desist requests and, in case of non-compliance, also file court actions for cease-and-desist orders.

### **COMMERCIAL CONSIDERATIONS**

Several courses of action can be taken by event organizers and sponsors to protect their interests:

- Registering relevant IP rights before marketing the event or the products/services;
- Contractual means:
  - Buying up advertising space (TV, billboards, newspapers etc);
  - Obliging owners of event locations to hand over "clean sites and the domestic authority";
  - Buying the rights for flying the flag on public and private ground;
  - Binding media organizations to restrict advertising to event organizers, official sponsors and brand owners only;
  - Sponsors should ensure contractually that event organizers will take immediate action against any type of ambush marketing after such activity is brought to their attention;
- Ticketing: restrictions on sale and resale of tickets for advertising and promotional purposes;

## AMBUSH MARKETING - GERMANY

- Action and reaction programs: Eg sponsor protection programs, anti-ambush marketing campaigns; partner recognition programs; ambush action teams.



GHANA

### **LEGAL CONSIDERATIONS**

There is no principal legislation that regulates marketing or advertising in Ghana at this time, and thus there is no specific law that regulates ambush marketing.

Advertising and marketing are regulated by sector-specific legislation which includes the Food and Drugs Act 1992 (PNDCL 3058) as amended, the Public Health Act 2012 (Act 851), and the Protection Against Unfair Competition Act 2000 (Act 589). The common law remedy of passing off is also available in Ghana.

The principal legislation that protects intellectual property and such related rights in Ghana are the Trademarks Act 2004 (Act 664) as amended, the Copyrights Act 2002 (Act 690), the Patents Act 2003 (Act 657), the Industrial Designs Act 2003 (Act 660) and the Protection Against Unfair Competition Act 2000 (Act 589). Act 589 seeks to prevent unfair competition and provides for injunctive remedies against acts of unfair competition with respect to both registered and unregistered marks. Thus, where persons engage in ambush marketing with respect to registered trademarks, protection and redress may be sought both under Act 664 and Act 589.

Ambush marketing usually occurs in Ghana during advertising campaigns relating to sporting events. For instance, football is the national sport of Ghana and a lot of local and international brand sponsors identify with these events through advertising and campaigns. There have been attempts by third parties to take advantage of such events so as to advertise their products despite not being given due authorization to do so.

Organizers and sponsors of events kick against and seek to prohibit ambush marketing. An example of this occurred when the Ghanaian football giants, Asante Kotoko, issued a warning against ambush marketing ahead of the side's Confederation of African Football ("CAF") Cup match against Zesco United of Zambia. Paradise Pac Mineral Water, the sponsor of Asante Kotoko, warned rival companies against the adoption of ambush marketing strategies in their quest to profit from the hugely anticipated clash in Kumasi.

Brand owners can only attempt to seek redress in this area by relying on the above statutes, regulations and the common law.

### **REGULATORY CONSIDERATIONS**

The advertising industry's self regulatory body, the Advertisers Association of Ghana, attempts to regulate the activities of practitioners in the industry.

### COMMERCIAL CONSIDERATIONS

- Where acts of ambush marketing occur in respect of registered trademarks or other intellectual property rights, the owners of such brands may seek financial damages or compensation from the courts against the infringers/offenders. This could serve as a deterrent. Thus, registration of all brands, particularly those connected to sporting or other major events, is important.
- It is also important to work with media houses to ensure that only those who sponsor events air advertisements in relation to those specific events, and such advertisements should contain phrases that prohibit non-sponsors from airing advertisements pertaining to the events during the period when the events are being held.
- The media should also be engaged to sensitize people, and event organizers should clearly spell out and publicize the rules governing events, to guard against ambush marketing.

GREECE

### LEGAL CONSIDERATIONS

Greek legislation does not include any legal provisions prohibiting, or specifically dealing with ambush marketing, with the exception of the special legislation relating to the Olympic Games (Law no 2598/1998 as amended) which protects the following from any unauthorized use: the Olympic symbol (Olympic Rings), the terms “Olympic”, “Olympiad”, “Athens 2004”, “Olympic Games—Athens 2004”, “Olympic Games 2004”, “Olympic Games—Greece” and any relative terms as well as the emblems/trademarks of the Hellenic Olympic Committee.

In other cases of ambush marketing activity, the following legal tools may be invoked:

- The Greek Consumer Protection Law (which implemented EU Directive 2005/29 on unfair commercial practices) includes provisions about misleading advertising/misleading commercial practices which could relate to ambush marketing. For example, a false claim by a trader that a product has been approved or authorized by a public or private body it is deemed to be a misleading practice. Nevertheless, only consumers (ie not the official sponsor) are entitled to sue in case of such false claims.
- The affected official sponsor may bring a claim against an offender relying primarily on provisions of the Greek Law against Unfair Competition and, perhaps, those of the Trademark Law (if there is also a trademark infringement).
- Additionally, any breach of the contractual obligations by the event organizer will lead the official sponsor to raise a claim against him, based on that contractual breach.

### REGULATORY CONSIDERATIONS

At a self regulatory level, the Hellenic Code of Advertising & Communication Practice (which conforms to the ICC Code of Advertising & Marketing Communication Practice) prohibits ambushing of sponsored properties (Chapter B—Sponsorships, article B4).

### COMMERCIAL CONSIDERATIONS

The extent of exclusivity a contract guarantees to an official sponsor determines the extent of its protection against ambush marketing: the stricter the terms of an agreement with regards to the rights of an event organizer to offer areas or spaces within the event venue to third parties for their marketing purposes, the safer for an official sponsor.

More specifically, one can consider some of the following contractual provisions:

- Official sponsors should ensure that they are granted the exclusive use of all advertising spaces connected to the relevant events.
- Official sponsors should oblige the event organizers to contractually ensure that only the official sponsors can advertise or otherwise be related to broadcasts of the events, relevant press

conferences etc.

- On the tickets for the event it should be expressly provided that visitors cannot bring any items bearing logos of competitors into the stadiums.

The most recent and characteristic examples one can point out relate to the Olympic Games of 2004 in Athens. Before entering into the stadiums, spectators were asked to remove the labels from bottles of water they were carrying that were not of the officially sponsored brand of water of the Games. Other visitors, who wore T-shirts or jackets bearing logos or brand names of competitors of the official sponsor, in particular of sportswear, were asked either to remove the clothes or wear them inside out, in order to cover the competitors' brand names.

### **RECENT ENFORCEMENTS**

In view of the fact that Greece has not recently hosted any major sporting/ cultural event, there are no recent court rulings in the field of ambush marketing.

GUATEMALA

### LEGAL CONSIDERATIONS

Currently, Guatemala does not have any specific legislation that regulates ambush marketing *per se*. Nevertheless, Guatemala does have a variety of laws that implicitly regulate ambush marketing through unlawful behaviors in which the scope of ambush marketing activities can be framed, since those laws (i) have as a main purpose the freedom of trade, industry and work; and (ii) allow the penalization of acts of unfair competition that socially harm commerce. The laws are:

- (a) Consumer Protection Law, whose legal end is, generally, to promote, divulge and defend the rights of consumers in commerce. Such rights are inalienable, of social interest and belong in the public order. The Law contains, *inter alia*, a regulation on misleading advertising, which states that such activity is expressly forbidden to be used in commerce. Different kinds of misleading advertising are listed, such as: misleading by comparison, linking, and manipulation. All the concepts are wide and therefore ambush marketing activities can be framed in these forbidden practices even if the concept of “ambush marketing” is not expressly named in the law;
- (b) Commerce Code, which, *inter alia*, regulates as an act of unfair competition the fact that a trader wrongfully uses or imitates any brand name, emblem, sample, advertisement, trademark, patent or any other element of another trader with whom there is no contractual relationship. Additionally, the Commerce Code regards as unfair competition any misleading advertisement to the public or to specific individuals;
- (c) Industrial Property Law, whose purpose, *inter alia*, is to protect trademarks and to establish sanctions for acts of unfair competition related to the wrongful use of other people’s trademarks. Moreover, Guatemala has ratified the Paris Convention, which also regulates unfair competition practises;
- (d) Criminal Code, which stipulates sanctions for those who carry out acts of unfair competition; and
- (e) Civil Code, which, even if it does not regulate unfair competition as the other laws do, does regulate any act breaching a third party right, and provides for this to be compensated through damages.

Where any of the above-mentioned laws is transgressed, the injured party is able to instigate litigation through the proper legal channels. The relief available is for the authority to declare the acts carried out by the transgressor to be illegal and consequentially compel such transgressor to cease the actions and stop or correct any of their noxious effects and to economically compensate the injured party.

In addition, the Constitutional Court (file 2280-2013) has made an explicit reference to ambush marketing as one of the activities that must be subject to regulation, saying that it considered ambush marketing to be contrary to the principles and foundations of the Constitution of Guatemala, specifically in relation to the promotion of the economic activity of the country because it risks the investment of capital in the market and it is deemed a matter of unfair competition.

### **REGULATORY CONSIDERATIONS**

At a regulatory level there are no legal provisions that cover the matter of how ambush marketing should be addressed. However, some guidelines can be found in the Guatemalan Advertising Code of Ethics. This is a self-regulatory code and soft law that many associations of independent publicists and publicity agents have developed to guarantee good and responsible behavior in advertising activities. It contains a series of principles that the publicists and agencies should observe. One of those principles is a prohibition on inducing people to have false expectations through advertisement. Likewise, the Code stipulates that advertisements must abstain from misleading the public with regard to, among other matters, official recognition, distinctions and prices, and from the wrongful use of the intellectual property rights of a third party.

Other laws that should cover ambush marketing at more specific level, due to their subject matter, are the Guatemalan Sport Events Law and the Public Entertainment Law. However, neither laws have been updated and have subsisted for more than a decade without any reform of their terms. Both focus mainly on matters of security and ticketing of the event itself.

However, a general provision of advertising states that any publicity of events should not be misleading to the public. In that order, a broad interpretation of the law and a combined application of the laws cited under Legal Considerations above should result in the prohibition of ambush marketing practices if any enforcement is taken in the courts.

### **COMMERCIAL CONSIDERATIONS**

As suggestions to avoid the practice of ambush marketing, we advise the following:

- Transparency in industrial and commercial activities, through the establishment of conditions of equality for market development, which require obligatory commercial policies to be settled in competitive campaigns where all participants must fulfil the principle of respect and commercial honesty.
- Carefully consider if an advertising campaign that is about to be released is taking advantage or not of someone else's effort and prestige.
- Have proper control over all advertising campaigns in the vicinity of the events as well as in television, radio, social media, etc.
- Protect all IP rights through the adequate channels.

HONDURAS

### **LEGAL CONSIDERATIONS**

Honduras does not have specific legislation that regulates ambush marketing. However, although there is no specific legislation on this subject, the Honduran Commerce Code and the Industrial Property Law contain specific provisions allowing the penalization of acts that may harm commerce socially; this could be interpreted as effectively prohibiting ambush marketing, since this practice is found to be an act of unfair competition.

As for advertising, the Consumer's Protection Law expressly prohibits any advertising that may be wholly or partially false or misleading, or in any way be able to mislead, or to confuse, consumers, under pain of a penalty by the correspondent authority.

Litigation of acts of ambush marketing is not common in Honduras.

### **REGULATORY CONSIDERATIONS**

The Commerce Code provides that all activities contrary to good business practices shall be deemed to be acts of unfair competition. Specifically, Article 425 provides a brief description of acts that will be considered as such.

The Industrial Property Law promotes intellectual activity that has application in the industrial and commercial fields; it also provides that the law against unfair competition protects all intellectual property rights by establishing sanctions for those who infringe this law.

### **COMMERCIAL CONSIDERATIONS**

In order to avoid ambush marketing practices, it is essential to protect all Intellectual Property rights. It would be very difficult to eradicate ambush marketing without the enactment of specific legal mechanisms that prohibit such practice.

### **RECENT ENFORCEMENTS**

There are no recent enforcements in Honduras regarding Ambush Marketing.

HONG KONG

### LEGAL CONSIDERATIONS

“Ambush Marketing” is the marketing of the activity of an entity that is not an organizer or an official sponsor of an event in an active attempt simply to use or to create an erroneous and false impression of association with the event or to take a free rider advantage of the reputation and outreach of the event without either the permission of the event owner/organizer or incurring any or little of the substantial sponsorship cost involved with official sponsorship of the particular event. In effect, the ambush marketer, although peripheral to the event, is enabled in the public eye, without any or much significant outlay or expense, to induce in the public a perceived belief in his association with the event receiving attention and publicity by cashing in on the reputation, goodwill and popularity of the event, while at the same time often being a direct competitor of the actual organizers/sponsors of the event who have invested huge amounts of money in their actual getting up or sponsorship of the event and whose legitimate participation would accordingly be diluted and be unreasonably prejudiced by the ambush marketing activity.

There is no current specific Hong Kong ambush marketing legislation to protect Hong Kong-centred events or Hong Kong sponsorship expenditure.

Ad hoc ambush marketing legislation has been enacted in the past such as to control marketing activity of important national events in China, such as the Beijing 2008 Olympic Games, but this is normally effective for a time-specific designated limited period and, as in this case, cease to be in effect once the event has passed.

Common law provides right infringement remedies in certain circumstances, such as passing off, trademark or copyright violation or misrepresentation, or registering fake similar domain names, but the rights to take these actions are, of course, personal to the sponsor and, in the absence of specific contractual entitlement, are not automatically and generally available across the board either to restrain or to entitle market participators as the case may be.

### REGULATORY CONSIDERATIONS

**Television broadcasting and radio broadcasting** must be licensed by the Communications Authority which has published Codes of Practice, and it is incumbent upon licensees to ensure that the material broadcast on their media complies with these Codes.

**(a) Generic Code of Practice on Television Advertising Standards**

- Requirements to identify sponsors and control quality of sponsored programmes.

**(b) Generic Code of Practice on Television Programme Standards**

- Advertisements must not contravene the law and must be handled in a responsible manner and not be indecent, obscene or of bad taste or denigrate or insult on ethnic, race, gender, religion or physical or mental disability.

## AMBUSH MARKETING – HONG KONG, SAR OF CHINA

- Crime not to be portrayed in a favourable light.
- Provisions for protection of children.
- Fairness in featuring individuals or organizations.
- Respect the primary rights of an individual.
- Controls on indirect advertising in that it must be clearly identified as such as separate finance programme.

### (c) Radio Code of Practice on Advertising Standards

- Licensees to draw up guidelines consistent with compliance with the Code.
- All advertising must be legal, direct, honest and truthful and distinguishable as such.
- Station facilities to be referred if licensee has good reason to doubt the integrity of the advertiser or the truth of advertising representations.

Apart from broadcast licensee regulations the **business of advertising** in Hong Kong is self-regulated. The Association of Accredited Advertising Agencies of Hong Kong (“HK4As”) has a membership structure of Full Members, Affiliated Members, Individual and NGO Members and Student Members. The 28 current members are the major advertising agencies in Hong Kong which joined the HK4As to participate in and be bound by the setting and maintaining of standards of business ethics, enforcing an advertising standards code, acting as a means of arbitration between agencies, and providing a forum of the exchange of views between advertising agencies and others engaged in the advertising industry. Membership of the 4As requires that a member company, individual or partnership must acknowledge acceptance of the 4As Code of Practice either under its common seal or personal signature. Any member found to have contravened or failed to comply with the provisions of the 4As Code will be penalized in accordance with the Rules of the 4As.

### (d) 4As Code

- An advertising agency must not discredit or disparage a competitor agency.
- Advertisement must always be truthful and compliant with Hong Kong law.
- Comparative advertising must be made clear and claims substantiated by evidence.
- Comparative advertising as between one product or service and another must not be disparaging in any way that is misleading, derogatory, or false in implication or fact.

## COMMERCIAL CONSIDERATIONS

Hong Kong has major events attracting significant sponsorship such as the Hong Kong All Open Tennis Championships, the Hong Kong Arts Festival, the Hong Kong Rugby Sevens and the Standard Chartered Bank annual Hong Kong Marathon and the annual Dragon Boat Races. However, there is no specific Hong Kong legislation prohibiting ambush marketing in respect of any of these events. These hugely

## AMBUSH MARKETING – HONG KONG, SAR OF CHINA

popular events attract and provide a captive audience participation which is both a popular provision for the specific market and also creates a captive focus for advertising targeting.

For example, in the case of the Hong Kong Rugby Sevens, the organizer is the Hong Kong Rugby Union which appoints Cathay Pacific Airways and HSBC as Tournament Sponsors, with a group of specific sub-sponsors such as Carlsberg (beer), Marriott Bonvoy (hotels) and Kukri (merchandise). Additionally, the exclusive appointed rights even extend to an officially appointed charity.

What is the justifiable importance or monetary value of an event sufficient to merit consideration of prevention or limitation of ambush marketing activity?

- Event organizers should be bound by sponsors to sell only sponsor advertising space exclusively both in the vicinity, through social media and in or on other media travelling to the vicinity of the event and also for the event organizer to be persuaded/obliged to be aware of and take steps to identify and prevent ambush marketing as a clear further incentive for any potential sponsor to invest a significant amount in its sponsorship in the particular event.
- Sponsors could require event organizers to restrict attendees at or participation in a sponsored event with regard to what they wear, eat or drink or music they play at the event in question.
- It is always advantageous for the public to be informed, even to the extent of saturation advertising in any media, both as to (i) who are the real organizers of the event and (ii) who are the official contracted sponsors, so that all third party business activity promotion functions and their advisers and the targeted public clearly know and understand what are the legal rights in place for the organizers and officially appointed sponsors, knowing, therefore, why ambush marketing will be contrary to these rights and potentially actionable.
- Organizers, of their own volition and also at the instance of contracted sponsors, should agree to have a responsibility to control, restrict or even prohibit the ability of non-sponsor businesses of competitive products and services (think hamburgers, cold drinks, ice-creams, sun shades, sun screen etc) and to take action in respect of any such third party unauthorized promotion, participation in or advertising of their involvement with the event.
- Organizers of an event should be required to prevent any unauthorized promotion or advertising competitive with a sponsor within the forum of the event and to brief relevant staff to be aware of, look for and to be properly instructed as to how to deal with and report any contravening ambush marketing in the forum.
- Organizers of an event should be ready and should be required by sponsors to impose restriction through all media on advertisement of the event and to ensure that broadcast/webcast promotion is available to and restricted to officially appointed sponsors only.

## AMBUSH MARKETING – HONG KONG, SAR OF CHINA

- The venue of each event will have third-party internal or immediately neighbouring billboard and advertising space. Event organizers would find it to their advantage, and therefore should be prepared to buy up all this space in order to offer this opportunity to officially contracted sponsors only. Correspondingly, official sponsors should require the contracted event organizers to do this.
- In the event that an organizer of an event may have control over and become aware of ambush marketing activity in direct and public competition to the product or service of an officially appointed sponsor then it would be in the interest of the sponsor to require in the sponsorship agreement that the organizer makes itself aware of any such ambush marketing activity and is obliged to inform the sponsor and itself to take cessation action against the ambush marketers.

 HUNGARY 

### LEGAL CONSIDERATIONS

There is currently no specific legislation regulating ambush marketing *per se* in Hungary. However, the relevant provisions of competition and trademark law and consumer protection rules provide guidelines in this respect.

According to the Competition Act it is prohibited to engage in economic activities unfairly, in particular in a way that infringes or endangers the legitimate interests of business partners or competitors. Furthermore, under the Competition Act it is prohibited to infringe upon or jeopardize the good reputation or credibility of any competitor by communicating or disseminating untrue facts, or by misrepresenting true facts with any false implication, as well as by any other practices. Comparative advertising is also prohibited if it could lead to an unfair advantage due to the reputation of a competitor or its name, goods, trademarks or where it may lead market operators to confuse the undertaking with a competitor or the name, trademark or other marks of the competitor. It is also prohibited to mislead business partners in economic competition. It could be argued that certain cases of ambush marketing could indeed violate the above provisions, the practice would be infringing competition law.

Under the Unfair Commercial Practices Act the misleading of consumers is prohibited. A commercial practice is regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, misleads or is likely to mislead the average consumer, in relation to, *inter alia*, any statement or symbol regarding sponsorship, resulting in, or capable of resulting in, the consumer taking a transactional decision that he would not have taken otherwise.

Furthermore, the Trademark Act will also apply in cases of trademark infringements. For example, the holder of the trademark is entitled to prevent any unlicensed person from using, in the course of trade for goods or services, any sign where there exists a likelihood of confusion on the part of the public, including the likelihood of association between the used sign and the trademark of the trademark holder.

### REGULATORY CONSIDERATIONS

The Hungarian Competition Authority may initiate proceedings if it recognizes the misleading or unfair practice of a market operator. Competitors may also submit complaints against the entity engaged in ambush marketing. The maximum fine that the Hungarian Competition Authority may impose is 10 percent of the entity's net turnover in the business year preceding the date of the decision.

### COMMERCIAL CONSIDERATIONS

In practice, there are some courses of action that may be taken by event organizers and sponsors to protect their interests:

- organizers should obtain trademark protection for marks to be used for a specific event well before the event in order to secure IP protection which can then be used as an effective tool for battling such conduct;
- preparation and implementation of a detailed and well-regulated contractual system regarding sponsorships, lawful usage of logos, trademarks and reference to being a sponsor;
- organizers should prepare detailed guidelines regarding use of trademarks and signs and assisting advertisers and sponsors in a consistent communication regarding the event;
- close monitoring of the market regarding unlawful use of any sign or reference of the event;
- quick enforcement of rights in cases of infringement (eg sending letters of notice, initiating litigation requesting interim injunction, etc); and
- raising awareness regarding the possibility of ambush marketing and providing information to the public (eg online on the official website) if such conduct is happening.

INDIA

### LEGAL CONSIDERATIONS

In India there is no specific legislation dealing with Ambush Marketing *per se*. However, there are specific acts, such as the Trademarks Act, Copyright Act, Emblems and Names (Prevention of Improper Use) Act, Contract Act, Consumer Protection Act, Competition Act, etc that deal with some forms of marketing that can effectively be termed as ambush marketing. Remedies can also be sought under common law, such as tort of passing off.

In the Indian context, one campaign that instantly comes to mind is that of PepsiCo, during the 1996 International Cricket Council (“ICC”) World Cup. PepsiCo with its cheeky catchphrase: “Pepsi – nothing official about it” stole limelight from the official sponsor Coca-Cola.

There have been many other instances of ambush marketing in India, especially during the Indian Premier League (“IPL”) in cricket. In one such instance during IPL 2013, PepsiCo had won the title sponsor bid, costing them Rs 400-crore for a five-year deal. To ambush the same, rival Coca-Cola had started talks to buy pouring rights for the nine IPL teams. In another instance, in IPL 2012, Parle Agro launched an IFL (Indian Food League) for their popular snacks brand Hippo. This campaign (IFL— Indian Food League) was conceptualized and designed on the basis of the IPL (Indian Premier League). Parle Agro had utilized event buzz very smartly, utilizing IPL association with their campaign to create awareness about their brand in the community. IPL 2017 saw Reliance Jio taking on main sponsor Vodafone in Wankhede stadium. In a match between Mumbai Indians and Sunrisers Hyderabad, the brand created a “Jio wave”; Jio fans, in a Jio formation, did a Mexican wave, which caught everyone’s attention.

Ambush marketing has also been prevalent in Cricket World Cup events. The ICC demands strict adherence for Indian players to their ambush marketing clause, which states “Any squad member that knowingly or unknowingly breaches the squad terms may face sanctions ranging from financial penalties through to being excluded from continued participation in the event”. ICC’s rules clearly state that players have to stop promoting companies and products not related to the World Cup before the event begins. In view of this, Indian cricketer, MS Dhoni, reportedly came under the scrutiny of the ICC for breaching its ambush marketing clause for the cricket World Cup 2011, being asked by the ICC to stop promoting and endorsing Sony and Aircel, which were the rivals of ICC’s sponsors associated with the World Cup then.

In another memorable instance, in the e-commerce domain, on Flipkart’s Big Billion Day Sale in October, 2014, Snapdeal’s ad “For others, it’s a big day. For us, today is no different. Best savings guaranteed, every day. Check Snapdeal.com before you buy” was placed beside the Flipkart’s ad in the leading newspaper, Times of India.

Another good example of ambush marketing in the telecom sector is Reliance Jio’s tweet while Idea-

Vodafone were celebrating their merger on Twitter. Incidentally, Jio was the real reason behind merger. Vodafone had tweeted “Yeah @Idea. It’s time we made it official”. Jio in turn tweeted “Bringing people together since 2016 #WithLoveFromJio”.

Ambush marketing occurs mainly at two levels, (a) on site and (b) through media. In the case of on site ambush marketing, this can be controlled by the organizer of the event, but in the case of ambush marketing through media, the organizer can take action only when there is use of a mark/logo of the event or it is misleading as to being an official sponsor of the event.

Even after occurrence of specific instances of ambush marketing in recent times, as described above, there has been no specific legislation introduced to deal with the particular menace of ambush marketing. The only relief the affected parties may seek would be in the form of Intellectual Property law if they can prove that there has been violation of some statutory provision. The following reliefs may be sought against ambush marketers:

- (a) **Passing Off:** This common law tort, which prevents one person from misrepresenting his goods or services as being those of another, could be sought as a relief against ambush marketers in case of unregistered trademarks. In order to claim such relief, the event organizer needs to prove: (i) his reputation or goodwill in reference to the event in question; (ii) the third party has made a misrepresentation by its marketing, leading the public to believe that there is a connection between the party and event organizer; and (iii) the affected party has suffered or is likely to suffer damage as a result of this confusion.
- (b) **Trademark Infringement:** The infringement proceedings could be commenced against the ambush marketers in cases where the event organizers have a registered trademark and a similar mark is being used by an unauthorized sponsor.
- (c) **Copyright Infringement:** The remedy could be sought in the case of unauthorized replication by a third party of a specific logo created in connection with a specific event.
- (d) **Registered Design Right Infringement:** This remedy could be sought in the case of unauthorized replication or unauthorized “dealing” in articles of a particular registered emblem or logo as design, leading to infringement of such registered design.

There have been few judgements dealing with ambush marketing in India. In one such decision the Delhi High Court in *ICC Development (International) Ltd. v. Arvee Enterprises and Anr*, found the term ‘world cup’ to be a generic term and refused the passing off action against the Philips Company. The court observed that offering tickets as prizes to the event without using the mark/logo of the event is not unlawful and, further, there cannot be a trademark on a generic word and fair use of the word is allowed under the Indian Trademarks Act. By contrast, in another case, *ICC Development vs EGGS*, an injunction was granted against the defendant for misuse of the world cup logo on the basis that there had been copyright infringement, as the logo was held to be an artistic work under the Indian Copyright

Act. In another case, the Delhi High Court in 2010 granted an ex parte interim injunction restraining the defendants from using the website [www.commonwealthgamesdelhi2010.org](http://www.commonwealthgamesdelhi2010.org) as well as from using the Commonwealth Games logo and the mark or any other mark deceptively similar thereto amounting to passing off their goods or services. These cases have set out to be a positive example of relief being granted against ambush marketers under Indian Laws despite the absence of a specific legislation.

In India, in view of the increasing instances of breach by ambush marketers, there is a strong need for a specific legislation with a view to provide effective enforcement to counter Ambush Marketing.

### **REGULATORY CONSIDERATIONS**

The Advertising Standards Council of India, in its Code for Self-Regulation has specified that advertisements should be legal, decent, honest and truthful and not hazardous or harmful while observing fairness in competition.

### **COMMERCIAL CONSIDERATIONS**

Reasons for preventing/limiting ambush marketing are as follows:

- Decrease in commercial value of the event
- Unhealthy competitive environment
- Withdrawal of sponsors from the event

In the absence of specific legislation concerning ambush marketing, it is advisable for event organizers to curtail the practise of ambush marketing by drawing up private contracts with sponsors and media organizations.

IRELAND

### **LEGAL CONSIDERATIONS**

There is no legislation in Ireland dealing specifically with ambush marketing. Where a sponsor or event organizer feels that they have been the victims of an “ambush”, a trade mark infringement action or a passing off action can be used against the ambush marketer. The prospects of success in each case will hinge on the facts presented to the Court. Back in 2006, the Gaelic Athletic Association (“GAA”), the governing council for the Irish sports of Gaelic football and hurling, asked the Irish Government to consider the introduction of specific legislation; however, no progress has been made in the intervening years.

The Consumer Protection Act 2007 contains a number of protections for consumers against advertisements which mislead, and requires a Court to consider any industry codes when considering complaints under the Act. This is discussed further below.

### **REGULATORY CONSIDERATIONS**

The Advertising Standards Authority of Ireland (“ASAI”) publishes a Code of Standards for Advertising and Marketing Communications which states that all marketing communications should be legal, decent, honest and truthful. It also states that marketing communications should not mislead or deceive consumers, nor should they exploit the goodwill of another marketing campaign. The Broadcasting Authority of Ireland General Communications Code contains similar clauses.

Provided the event organizer or sponsor proves that the ambush marketing was in breach of the Codes, they can direct a complaint to either body or, alternatively, take legal action before the public courts under the Consumer Protection Act 2007 against the ambush marketer and ask the judge to have regard to the industry codes.

The GAA has adopted its own position and has amended its rule book so that sponsorship is no longer allowed on items of clothing, boots and accessories, or even on the players’ bodies following a number of high-profile incidents involving individual player sponsorship.

### **COMMERCIAL CONSIDERATIONS**

The best steps a sponsor or event organizer can take are to try and minimise any risk. They are to:

- Ensure they have effective licensing contracts in place for intellectual property and ancillary rights.
- Register trademarks of the logo, name, year and any other images that will be used for the event.
- Consider taking steps to restrict advertising in the vicinity of the event or consider what advertising space can be sold to which companies during the event.
- If a sporting organization, follow the GAA’s lead and amend their rule book to prevent members of the organization being approached by ambush marketers.

### RECENT ENFORCEMENTS

As there are no specific rules targeting ambush marketing, complaints tend to focus on other aspects of such campaigns often used to maximise the publicity and published decisions are infrequent due to the nature of these campaigns.

Irish betting company Paddy Power has become synonymous in the UK and Ireland with ambush marketing campaigns.

#### **(1) 2015 – World Cup Qualifier Billboard**

In June 2015, a billboard featuring an unauthorised image of the face of footballer, Roy Keane, on a mock up from the film Braveheart was placed on the side of a 40ft truck and driven around Dublin the weekend of Ireland's international soccer match against Scotland. The billboard also contained an adapted version of a line from the film: *"You may take our points, but at least we have our freedom. (Ya wee Pussies)"* in an apparent reference to the failed Scottish independence referendum the previous year.

No agreement was in place between the Football Association of Ireland and Paddy Power concerning marketing outside the football stadium and no permission had been granted by the footballer Roy Keane concerning the use of his image (a civil lawsuit taken by Roy Keane was settled privately).

#### **(2) 2014 – Oscar Time**

A 2014 advertisement by Paddy Power, released at the same time as the Oscar ceremony in the US was to take place, and which offered odds and special offers linked to the Oscar Pistorius murder trial in South Africa, was the subject of widespread complaint. The ad included an image of an Oscar statuette featuring the face of Oscar Pistorius. It was investigated by the ASAI in Ireland and withdrawn in the UK and Ireland after generating much publicity.

ISRAEL

## LEGAL CONSIDERATIONS

There is no Israeli legislation which specifically outlaws ambush marketing. Moreover, the term “ambush marketing” is not mentioned in any Israeli law.

However, it is possible to prevent ambush marketing on the basis of Intellectual Property and Intellectual Property-related laws. The relevant laws are:

- (a) **The Trademark Ordinance:** The Trademark Ordinance is the dominant law relating to trademarks in Israel. This Ordinance may be very useful in ambush marketing cases, as it prohibits use of an identical or confusingly similar trademark to a registered mark, which is often the case in ambush marketing events.

Moreover, the Israel Supreme court has held that the Trademark Ordinance prohibits parties from using their competitor’s mark in a negative manner, despite a lack of confusion between the trademarks and their sources (Civil Appeal 8483/02, McDonalds v Burger King). This ruling is extremely relevant to ambush marketing, which often involves cases whereby there is no likelihood of trademark confusion, but one party clearly uses a competitor’s trademark.

- (b) **Passing Off:** Passing off may be a useful tool for preventing ambush marketing. However, passing off is more difficult to prove than trademark infringement, as the plaintiff must establish:
  - (i) that he/she has acquired good will and reputation behind the trademark, and
  - (ii) consumers are associating the defendant’s goods/services with the plaintiff’s.

- (c) **Unfair Interference:** Unfair Interference, which is part of the Commercial Tort Law, may also form a basis for an ambush marketing case. According to the Commercial Tort Law, “a business shall not unfairly prevent or burden the access of customers, employees or agents to the business, goods or services of another business”. One may argue that ambush marketing acts “unfairly burden” the access of customers to the goods and services of another business. However, as in passing off, unfair interference can be difficult to prove.

- (d) **The Consumer Protection Law:** The Consumer Protection Law is often overlooked by Israeli IP and commercial law litigators. This is quite unfortunate since this law extensively outlaws the misleading of consumers and may also be relied upon in ambush marketing cases. Hence, the Consumer Protection Law may be a useful tool for the prevention of ambush marketing which involves an element of confusion between the brands.

- (e) **The Unjust Enrichment Law:** Occasionally, plaintiffs will base their legal actions on the Unjust Enrichment Law. This law is designed to prevent parties from profiting from wrongful acts, which often cannot be defined as Intellectual Property infringement. In other words, it will be useful on those occasions where judges are confronted with situations where the defendant has very cleverly committed acts which do not infringe “classic” IP rights, but it is clear, nevertheless,

that the defendant is taking advantage of the plaintiff's rights.

On the one hand, the Unjust Enrichment Law is the perfect law against “ambush marketers”, who often remain beyond the realm of IP, yet obviously enjoy the plaintiff's goodwill/brands/ideas/ investment, etc. On the other hand, plaintiffs should be aware that obtaining a favourable judgement under the Unjust Enrichment Law is not an easy task. At present, many judgments are not clear and contradict one another. It seems the courts have yet to set clear criteria for the establishment of “unjust enrichment” actions.

### **REGULATORY CONSIDERATIONS**

In Israel, there is no single regulatory body generally in charge of advertising. However, advertising on television is strictly regulated. The Second Television and Radio Authority Rules (Television Advertising Ethics) 1994 and the Communication Rules (Bezek and Broadcasting) (Advertisements, Services and Sponsorship Broadcasting on designated Channels) 2004, set specific rules and guidelines relating to advertisements broadcasted on television. These laws prohibit devaluing your competitors and misleading consumers, which are often the case in ambush marketing.

### **COMMERCIAL CONSIDERATIONS**

- In order to obtain trademark protection, which holds many advantages relating to other legal forms of protection, organizers and sponsors should consider registering the relevant trademarks prior to the sporting event. A trademark application, which has not matured to registration prior to the event, holds few or no advantages.
- Official sponsorship should be noted in all relevant ads.
- Purchase as much advertising space as possible in the vicinity of the event, its approaches, relevant bus and train stations, airports and on means of transportation leading to it.
- Contractually bind organizers of the event to protect official sponsors by taking action against ambush marketers and prevent ambush marketing.



### LEGAL CONSIDERATIONS

The ambush marketing phenomenon has been regulated in Italy for the first time under Law Decree No 16 of March 11, 2020, converted into law by Law No 31 of May 8, 2020, setting forth “Urgent provisions for the organization and holding of the Olympic and Paralympic Winter Games Milan Cortina 2026 and of the ATP Turin 2021–2025 finals, as well as on the prohibition of parasitic advertising activities” (“Ambush Marketing Law”). The Ambush Marketing Law marks a new and general approach towards parasitic advertising activities, by defining the characteristics of ambush marketing forbidden practices and the relevant applicable sanctions. Before the adoption of such law, temporary provisions had been issued on a case-by-case basis to regulate sporting events and exhibitions, such as the 2006 Winter Olympics in Turin (Law No 167 of August 17, 2005) and Milan Expo that took place in 2015 (Law Decree No 43 of April 26, 2013). Consistently with these former laws, the Ambush Marketing Law, in addition to the general provisions already mentioned, also includes provisions targeting specific sporting events, ie the Olympic and Paralympic Winter Games Milan Cortina 2026 and the ATP Turin 2021–2025 finals.

The Ambush Marketing Law prohibits parasitic, fraudulent, misleading or deceptive advertising and marketing activities carried out in connection with the organization of sporting events or exhibitions of national or international importance, where the activities concerned are not authorized by the organizing entities and are aimed at gaining an economic or competitive advantage. The Law identifies four conducts which are considered parasitic advertising and marketing activities and which, therefore, are prohibited:

- (a) the creation of a connection, even indirect, between a trademark or other distinctive sign and the sporting event or exhibition, which is likely to mislead the public on the identity of the official sponsors;
- (b) the false representation or declaration about the sponsorship of the sporting event or exhibition in the advertising;
- (c) the promotion of a trademark or other distinctive sign by any action, not authorized by the organizer, in relation to the sporting event or exhibition which is likely to: (i) attract the attention of the public, and (ii) create the erroneous impression in the public that the perpetrator of the conduct is a sponsor of such event or exhibition; and
- (d) the sale and advertising of products or services by using, even partially, the logo of a sporting event or exhibition or other distinctive signs likely to mislead the public and to generate the erroneous perception of any connection with the event, its organizer or the authorized subjects.

Nevertheless, the activities carried out in connection with the performance of sponsorship agreements entered into by single authorized participants in the sporting events or exhibitions (eg athletes, teams, artists, etc) do not fall within the ban.

The ban operates from the date of registration of the logos, brands or official trademarks of the sporting events or exhibitions until the 180th day following the official date of the end of such events.

The Italian Competition Authority (“AGCM”) may impose sanctions from EUR 100.000 to EUR 2,5 million, unless the conduct constitutes a criminal offence or a more serious administrative offence.

In addition, the Ambush Marketing Law amends the Industrial Property Code (Legislative Decree No 30 of February 10, 2005) by including images reproducing trophies in the list of signs that, if well-known, can be registered or used as a trademark only by the legitimate owner or with its consent.

Before the adoption of the Ambush Marketing Law (and besides the temporary provisions for ad hoc sporting events and exhibitions mentioned above) some other provisions of Italian law (mainly general provisions on advertising and unfair practices) were deemed to be relevant to counter ambush marketing. In particular, the main provisions of law concerned regarded:

- (a) **Unfair competition:** the Italian Civil Code sanctions whoever takes advantage of the merits of a competitor’s products or business, or uses, directly or indirectly, any other means against the principles of professional fairness likely to prejudice the other company;
- (b) **Unfair commercial practices:** the Italian Consumer Code (Legislative Decree No 206 of September 6, 2005) sanctions unfair commercial practices towards the consumer, such as, *inter alia*, the practices which mislead or are likely to mislead the average consumer with regard to the following elements: (i) the use of statements/symbols relating to sponsorship or to direct or indirect approval of the professional or of its products; and (ii) the provision of information relating to the trader’s rights, affiliation or connections;
- (c) **Misleading advertising:** the provisions of Legislative Decree No 145 of August 2, 2007, aim at protecting professionals from misleading advertising and its unfair consequences (as well as at establishing the conditions for the lawfulness of comparative advertising);
- (d) **Intellectual property:** the Italian Industrial Property Code sanctions the unauthorized use of third-party intellectual property rights.

These provisions may be still relevant in the context of the ambush marketing legal framework, given that the Ambush Marketing Law expressly states that its provisions do not prejudice the application of other law provisions aimed at protecting the subjects affected by such unlawful practices.

As regards the Ambush Marketing Law, there is still no enforcement as it is very recent. However, some Courts had developed pre-Ambush Marketing Law case law on the concept of ambush marketing.

For example, a decision issued by the Milan Court on July 30, 2010 is considered to be a leading case in connection with ambush marketing, as it focused on it and regarded it as an act of unfair competition under the Italian Civil Code. In that case, the company Panini SpA, which was the exclusive official licensee of the merchandising of the events related to the 2010 Football World Cup, brought action against another company which had launched on the market a collection of playing cards and a game bearing a series of references to the Football World Cup. The Court stated that such conduct constituted ambush marketing and, as such, was

unlawful based on the undue connection to the notoriety of the event.

Moreover, a recent order issued by the Milan Court on December 15, 2017 at the end of an urgency proceeding, defined ambush marketing as a multi-offensive conduct, given that those prejudiced are the event organizer, the sponsor, and the public. Furthermore, the Court, based also on a well-established commentators' interpretation, listed several types of activities which could be regarded as practices of ambush marketing, eg (i) using brands and signs relating to an event in indirect association with the own brand, even without expressly recalling the event ("predatory ambushing"), (ii) launching surprise marketing initiatives during or in proximity of the event ("ambush by intrusion") and (iii) intensifying marketing activities at and around the event ("saturation ambushing"). This order, and the decision issued by the Milan Court on April 23, 2020 in the subsequent ordinary proceedings, were innovative as they considered ambush marketing practices occurring in the movie industry as unfair competition. Thus, Telecom Italia SpA ("TIM") (along with another company), successfully challenged a competitor for having put in place an ambush marketing practice consisting of the unauthorized exploitation of a character of the Star Wars movie, of which TIM had obtained exclusive rights of use for advertising purposes.

In spite of the adoption of the Ambush Marketing Law, which defines the perimeter of the ambush marketing practices to be regarded as unlawful, this case law may still be relevant.

### **REGULATORY CONSIDERATIONS**

The Self-Regulatory Code on Commercial Communications ("Code") issued by the Italian Advertising Self-Regulatory Body ("IAP") provides the following rules which may be enforced in case of ambush marketing:

- (a) Article 1 stating that "Marketing communication must be honest, truthful and correct. It must avoid anything likely to discredit it";
- (b) Article 2 stating that "Marketing communication must avoid statements or representations that could mislead consumers ...";
- (c) Article 13.2 stating that "... any exploitation of the name, trademark, notoriety and corporate image of other marketers should be avoided, if it is intended to generate an undue advantage".

Although the enforcement of such provisions to sanction ambush marketing practices before the relevant judging body ("Giurì") has not been extensive, a leading case in 2014 stated that Article 13.2 in particular can be used as a tool for regulatory repression of the phenomenon of ambush marketing (Giurì Decision No 52/14). Here, the challenged advertising campaign used by Pepsico Food AIE for the launch of Lay's potato chips brand was aired at the same time of the Football World Cup in Brazil and had as main testimonial a famous Italian football player who had been a member of the Italian national team in the past (Fabio Cannavaro). The official sponsor of the Italian national team (the potato chips company, San Carlo Gruppo Alimentare SpA, along with some other companies), started proceedings against Pepsico Food AIE before the Giurì claiming that some specific elements of the advertising (eg the presence of Cannavaro, the light blue shirt he was wearing, the typical Brazilian atmosphere, etc) could erroneously lead the public to connect

Lay's brand to the Italian national team. Whilst the Giurì ruled that Lay's brand advertising did not constitute an ambush marketing practice since, *inter alia*, the connection between Cannavaro and the Italian national team was too faint to entail a breach of the Code's provisions (Cannavaro had the right to exploit his own notoriety, provided that there was no real connection with the Italian national team), it nevertheless implicitly recognized the possibility of sanctioning ambush marketing on the basis of Article 13.2 of the Code.

### **COMMERCIAL CONSIDERATIONS**

From a merely practical standpoint, event organizers and sponsors may limit the risk of ambush marketing by, eg:

- registering the logos, brands or official trademarks of the sporting event or exhibition, since the Ambush Marketing Law grants protection on such basis;
- including, in the sponsorship agreement with the official sponsor, a clause providing that, in case of ambush marketing, the sponsor and the organizer will liaise to take action against the infringer;
- including, in the terms and conditions of the event's or exhibition's tickets, specific restrictions on the use of the tickets for any advertising purpose; and
- allocating advertising spaces near the event/exhibition locations only to official sponsors.

JAPAN

## LEGAL CONSIDERATIONS

There is no specific legislation in Japan directly relating to ambush marketing. The tactics used in ambush marketing, however, are generally already prohibited in Japan by the Trademark Act, the Unfair Competition Prevention Act and the Copyright Act.

In anticipation of the Tokyo Olympics and Paralympics 2020 (postponed to 2021), the Japanese Olympic Committee, the Japanese Paralympic Committee and the Tokyo Organizing Committee of the Olympic and Paralympic Games (Tokyo 2020) have been increasingly active in protecting the Olympic symbol (the five rings), the Paralympic symbol (agitos), emblems, mascots, pictograms, Games' titles, images, sounds and other Olympics-related intellectual property.

### (1) Trademark Infringement

If the techniques used in an ambush marketing campaign infringe on any trademarks, the owner of the trademark rights may request an injunction and claim damages under the Trademark Act of 1959.

### (2) Competition Law

Separately from the Trademark Act, the Unfair Competition Prevention Act ("UCPA") applies to ambush marketing much more generally, in the ways described below:

- (a) If an indication of goods or business (meaning a name, trade name, trademark, mark, container or packaging for goods which is connected with a person's operations, or any other indication of a person's goods or business used in relation to goods or services) is "identical" or "confusingly similar" to the indication of a good or service that is "well-known", thereby causing "confusion" with the existing product or service, then it is prohibited as unfair competition under the UCPA.

In deciding whether certain marketing activities are prohibited under these provisions, each of the requirements below will be considered:

- *Is the existing indication "well-known"?* For the target indication to be recognized as "well-known" (and protected as such), it must have gained broad recognition in the Japanese market.
- *Is the ambush marketing indication "identical" or "confusingly similar"?* To answer this question, courts look to whether consumers and/or traders, under the particular set of circumstances of trade, would be likely to recognize two indications to be similar, as judged holistically, through impression, experience or psychological association and the like, based on their appearances, appellations or concepts.
- Finally, *Is the indication used in the ambush marketing campaign likely to cause "confusion"?* To answer this question, courts look not only at whether consumers and/or traders are likely to confuse the two entities (ie the event organizer and the ambush trader) as one and the same, but also whether or not consumers and/or traders might, while being aware that the two business entities are different, be given cause to believe

that the two entities may have some relationship, whether the relationship is a transaction-based relationship, economic, financial or organizational (which requires a far higher degree of recognition among consumers and/or traders than a “well-known” insignia).

- (b) In addition, a separate remedy applies if the indication used in an ambush marketing campaign is "identical" or "confusingly similar" to a “famous” or “popular” indication used by another person or entity in relation to goods/services, then civil remedies are available against such activities regardless of whether the ambush marketing campaign indication is likely to cause "confusion". The test for whether the existing mark is a “famous” or “popular” mark is a much higher hurdle than that for being a "well-known" mark, but marks used in relation to an established global sporting event such as the Olympics might typically be a prime example.

### **(3) Copyright Infringement**

If an ambush marketing campaign infringes any copyright (eg, unauthorized use of mascots and/or music), the author, copyright owner, owner of print rights, performer, or owner of neighboring rights, may request an injunction and claim damages under the Copyright Act of 1970. In addition, the author, copyright owner, owner of print rights, performer, or owner of neighboring rights may demand the destruction of objects used for the infringement, objects made through the infringement, or machines or tools used solely for the infringement, or demand any other measures necessary to effect the prevention of infringement.

## **REGULATORY CONSIDERATIONS**

The issue of ambush marketing has been broadly recognized in Japan; and many companies are careful of such activities. Advertising agencies are rather cautious of ambush marketing, and there is little ambush activity on major media (such as TV, newspaper, billboard).

## **COMMERCIAL CONSIDERATIONS**

Where an event organizer believes that particular ambush marketing activities violate the UCPA, the organizer will generally send a cease-and-desist letter. However, as the ambush marketer is unlikely to cease the activities simply upon receiving such letter, the organizer will also consider seeking injunctive remedies and/or damages.

In practice, however, proving that a violation has occurred under the UCPA (ie meeting the requirements described above) is not a simple matter, and so it is advisable that event organizers properly file applications for trademark registration and design right (if any) registration, well in advance, with respect to all relevant marks and indications relating to the event.

Since any combination of characters, figures, signs, 3D shapes or combination thereof with colors, sound, motion pictures, holograms or position may be registered as a trademark if used in connection

with either the goods of a person who produces, certifies or assigns such goods as a business, or the services of a person who provides or certifies the services as a business under the Trademark Act, trademark registration could be helpful for prevention of ambush marketing.

 KENYA 

### LEGAL CONSIDERATIONS

Ambush marketing is a marketing technique which involves riding on the coattails of a major event or campaign without actually paying for or participating in the sponsorship or the event. In Kenya, there is no specific legal regime that deals with ambush marketing. However, there are various other laws that indirectly protect against ambush marketing.

#### **(1) Consumer Protection Act**

The Consumer Protection Act prohibits a person from engaging in unfair practices, which includes a person making a false, misleading or deceptive representation that goods or service have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have. In addition, a false, misleading or deceptive representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have, also amounts to unfair practice.

Any agreement, whether written, oral or implied, entered into by a consumer as a result of a person's engagement in unfair practices may be rescinded by the consumer, and the consumer is entitled to any remedy that is available in law, including damages. Furthermore, if a person is found to be engaging in unfair practices, the Consumer Protection Act imposes a general fine of KES 1,000,000 (approx US \$9,220), or imprisonment for a term not exceeding 3 years or both.

#### **(2) Competition Act**

The Competition Act also provides indirect protection against ambush marketing. A person commits an offence when, in connection with the supply or possible supply of goods and services, or in connection with the promotion by any means of the supply or use of goods or services, the person falsely represents that:

- (a) the goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have; or
- (b) the product has a sponsorship, approval or affiliation it does not have.

Where a person breaches these provisions, they commit an offence and are liable on conviction to imprisonment for a term not exceeding 5 years or to a fine not exceeding KES 10,000,000 (approx US \$92,200) or both.

#### **(3) The Code of Advertising Practice and Direct Marketing**

The Code of Advertising Practice and Direct Marketing 2003 (the "Code") applies to commercial, non-commercial, political and advocacy advertising in Kenya.

With respect to commercial advertising, the Code applies to advertisement for the supply of goods and services, the provision of facilities by way of trade. The Code stipulates the advertisements must not contain anything that is in breach of existing laws of Kenya or anything that the respective laws require.

Moreover, advertisements must not mislead the public or target market by inaccuracy, ambiguity, exaggeration, omission or otherwise.

The Code goes on to state that advertisements must not contain any statement or visual presentation which, directly or by implication, omission, ambiguity or exaggerated claim, is likely to mislead consumers about the product being advertised, the advertiser or about any other product or advertiser, with regard to, *inter alia*:

- (a) characteristics such as commercial and geographical origin;
- (b) copyright and intellectual property rights; or
- (c) official or other recognition or approval, award or medal, whether in Kenya or in any other region of an East African country or, indeed, any other region.

#### **(4) Trade Marks and Passing Off**

In Kenya, protection is accorded to registered trademarks and, well-known trademarks. At the same time, the Trade Marks Act recognizes common law rights of the proprietors of unregistered marks.

A mark that is inherently distinctive may be registered as a trademark under the Trade Marks Act. Upon registration, the registered proprietor acquires the exclusive right to use the trademark in trade in relation to the relevant goods or services. In addition, the Trade Marks Act provides for the protection of well-known trademarks which are entitled to protection under the Paris Convention or the World Trade Organisation Agreement. As such, where the logos and trademarks of major international events and campaigns, such as the Olympics, are registered as trademarks in Kenya, or have been declared to be well-known marks in Kenya, they will be entitled to protection under the Trade Marks Act.

Accordingly, where a third party makes unauthorised use of a registered trademark or a well-known trademark by way of ambush marketing, the proprietor of the trademark may institute trademark infringement proceedings before the High Court. If it is successfully established that the trademark was infringed upon, then the High Court may grant such remedies as an injunction to prevent further infringement, damages, order the ambusher to account for profits, or any other remedy the court deems fit and proper to grant.

In addition, common law rights in unregistered trademarks are recognised under Kenyan law and may be enforced through an action of passing off. In a passing-off action, the proprietor of the unregistered mark must demonstrate that:

- its trademark has acquired sufficient goodwill or reputation through use;
- there has been a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead to the public to believe that goods or services offered by him are the goods or services of the proprietor of the mark; and

- he has suffered, or is likely to suffer, damage by reason of the erroneous belief engendered by the misrepresentation.

To that end, where an unregistered mark that has gained sufficient reputation through use is used in a major event or campaign, and is used by third party without the requisite authorization, then the ambush marketing may give rise to the right to institute an action of passing off.

### **REGULATORY CONSIDERATIONS**

#### **(1) The Competition Authority**

If a person engages in ambush marketing in Kenya, the Competition Authority established under the Competition Act, may on its own initiative or upon receipt of a complaint from any person, institute investigations into the alleged breach of consumer welfare. Upon the Competition Authority concluding the investigations, the person engaged in ambush marketing may be charged with the relevant offenses and fined or imprisoned, as indicated above.

#### **(2) The Advertising Standards Body of Kenya**

The Advertising Standards Body of Kenya (“Advertising Standards Board”) was set up by the Marketing Society of Kenya and the Association of Practitioners in Advertising. Under the Code, any person may lodge a complaint with regard to the content of an advertisement with the Advertising Standards Board, which may impose certain sanctions on the offending advertiser, namely:

- (a) order the withdrawal of the advertisement in its current format;
- (b) subject the advertiser to pre-publication advice in respect of future advertisements for a specified period of time;
- (c) publish adverse publicity about the advertiser; or
- (d) require members of the Advertising Standards Board of Kenya to withhold advertising space from the offending advertiser.

### **COMMERCIAL CONSIDERATIONS**

**Advertisers:** Before engaging in any marketing activity associated with an event it is prudent for advertisers to conduct their due diligence to ensure that they are not making use of trademarks or well-known trademarks belonging to organizers of major events or campaigns, since such use would amount to ambush marketing. This is achievable by conducting desktop Google searches or trademark searches in respect of the slogans, logos and marks intended to be used in the advertisements. If the searches reveal that such slogan, mark or logo has been used in a major campaign or event or has been registered as a trademark by the organizers of such events, then the advertiser should refrain from making use of them.

LUXEMBOURG

### LEGAL CONSIDERATIONS

For the time being, the Grand-Duchy of Luxembourg has not implemented any specific legislation prohibiting ambush marketing behaviour. However, several Luxembourg laws indirectly refer to concepts likely to apply to ambush marketing, namely:

- (a) **Unfair competition and parasitism:** The Luxembourg regime was modified in 2016. Under the old regime, the law of 30 July 2002 on certain commercial practices, unfair competition, and misleading advertising (“BtoB Unfair Practices Law”) prohibited unfair competition. This law was repealed by the law of 23 December 2016 on sales and sidewalk sales and misleading and comparative advertising.

Unfair competition consists of depriving or trying to deprive a competitor of all or some of its clients, or of reducing or trying to reduce the competitive capacity of a competitor through an action which is contrary to fair and honest commercial practices or contrary to a contractual commitment. Since the BtoB Unfair Practices Law was repealed, unfair competition only gives rise to civil liability under Articles 1382 and 1383 of the Luxembourg Civil Code. As a consequence, a claimant needs to establish a fault of the defendant, direct damage, and a link between the fault and the damage. In the context of unfair competition, Luxembourg case law applies the notion of “parasitic competition” (“concurrence parasitaire”), which covers most ambush marketing situations. Parasitic competition occurs when someone, without incurring any costs, follows in a third party’s wake in order to take advantage of its investments and reputation. Under certain circumstances, parasitism may also occur and give rise to liability under the general principles of civil liability even when there is no obvious competition between two entities.

- (b) **Misleading advertising:** This is prohibited both by the law of 23 December 2016 on sales and sidewalk sales and misleading and comparative advertising and by the Consumer Code introduced by the law of 8 April 2011. Misleading advertising means any advertising which in any way, including its presentation, misleads or is likely to mislead the persons to whom it is addressed or whom it reaches and which, because of its misleading nature, is likely to affect their economic behaviour or which, for those reasons, harms or is likely to harm a competitor.
- (c) **Intellectual property infringements:** The Benelux Convention on Intellectual Property, as well as the Luxembourg law of 18 April 2001 on Copyrights, Neighbouring Rights and Database (as modified) grant IP right holders the right to prevent third parties from using their protected rights for commercial gain.
- (d) If there is a **partnership agreement**, contract law, especially its liability principles, may apply if ambush behaviour originates from one of the parties to a partner/sponsor agreement.

**(e) Consumer law:** The Luxembourg Consumer Code was introduced by the law of 8 April 2011 in order to enhance consumer protection by codifying existing legislation. Some specific provisions of this Code can be used to prevent ambush marketing techniques such as:

- practices contrary to the requirements of professional diligence;
- practices that may mislead consumers;
- promoting a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.

Anyone breaching these provisions risks a fine from 251 to 120,000 Euros and any clause contravening them will be null and void.

### REGULATORY CONSIDERATIONS

The Ethical Code of Advertising (the “Ethical Code”) drafted by the Commission Luxembourgeoise pour l’Ethique en Publicité requires the advertising sector to comply with the legal restrictions relating to advertising and unfair competition. Those who have ratified the Ethical Code are also required to meet the terms of the ICC International Code of Advertising and Marketing Communication Practice (“the ICC Code”). According to the ICC Code, any marketing communication should be compliant with the principles of fair competition. A specific provision was added to the ICC Code in August 2011 to target ambush marketing as follows: “no party should seek to give the impression that it is a sponsor of any event or of media coverage of an event, sponsored or not, if it is not an official sponsor of the event or of media coverage”. Even though the ICC Code is not legally binding, it gives a framework and a code of conduct, which should be respected.

### COMMERCIAL CONSIDERATIONS

Here are some tips to prevent ambush marketing:

- (a) Organisers may consider making use of a prevention strategy including, for example:
- Monitoring event advertising;
  - Buying and reselling advertising spaces to official sponsors of an event;
  - Registering any potential intellectual property rights (logos, slogans, etc) before marketing an event or the products/services linked with the event;
  - Requiring participating competitors not to display their own sponsors’ advertising materials during an event;
  - Entering into partnerships with social media players to help them prevent brands from using their social network for ambush marketing attempts; and
  - Establishing Codes of Conduct or special regulations for the duration of an event.

- (b) Organizers and official sponsors may consider:
- Introducing campaigns relating to official sponsors to raise public awareness, and
  - Being proactive by systematically taking legal action against ambush marketers.

MALAYSIA

## LEGAL CONSIDERATIONS

Malaysia has yet to have laws or provisions that specifically regulate ambush advertising. As this advertising strategy sees advertisers associate their brand with prominent events either by using a registered trademark without authorization or by other means, with the intention to create false impression on the public, redress related to ambush advertising may be available under the existing IP Laws and advertising Codes.

Ambush advertising can be divided into two: (a) direct ambush advertising and (b) indirect ambush advertising.

Direct ambush advertising involves the unauthorized use of the trademark of the event organizer by the ambusher. As this approach impinges on the right of the trademark owner, the following may be relevant for event organizer and/or official sponsor:

**Infringement of trademarks registered under the Trade Marks Act 2019:** Marks of well-known sporting events such as “FIFA” mark, the distinctive symbol of the Olympics (five interlocking rings) and the F1 marks, to name a few are registered trademarks in Malaysia. Pursuant to section 54 of the Trade Marks Act 2019 (“TMA”) it is an infringement of a registered trademark if a person, without the consent of the registered proprietor, uses in advertising a sign identical or similar with the trademark in relation to goods or services identical or similar to those for which the trademark is registered, resulting in the likelihood of public confusion. The remedies available include injunction, damages, account of profits or other additional damages as the Court deemed fits.

**Protection of well-known trademarks:** The TMA protects well-known trademarks, regardless of whether the mark is registered in Malaysia or whether the proprietor of the trademark carries on business or has any goodwill, in Malaysia. This protection under the TMA corresponds to Article 6bis of the Paris Convention 1883 and Article 16(3) of the TRIPs Agreement (to which Malaysia is a signatory). As most international sporting events receive broad media coverage, we are of the opinion that marks of sporting organizations are generally protected under the TMA as well-known marks, and may use section 76 to declare invalid use of similar marks, so long as such use by the similar mark would indicate a connection and be likely to damage the interests of the proprietor of the well-known mark.

**Common law of passing off:** Whilst there is no right of action under the TMA in respect of an unregistered trademark, the TMA does not affect the right of action under the common law of passing off goods or services as those of another person, or the remedies in respect of these. In order to initiate a passing off action, the following elements must be satisfied:

- Goodwill owned by the proprietor;
- Misrepresentation by the offender or ambush advertiser; and
- Damage to the goodwill of proprietor.

### REGULATORY CONSIDERATIONS

An indirect ambush advertiser benefits from the event it associates its products or services with without misusing the event's trademark. This makes it much harder for the official sponsors, who have been dishonestly or fraudulently rivalled in trade, to redress their financial loss. However, the Code of Advertising Practice and/or the Communications and Multimedia Content Code may be of use.

Print advertising and digital advertising are covered under two different codes: respectively, the Code of Advertising Practice ("CAP") and the Communications and Multimedia Content Code ("CMCF Code"). Both Codes entail compliance for advertising in every respect with the common and statutory laws including:

- Advertising should not propagate fraudulent trade practices;
- Advertisements should not contain any statement that, either expressly or by implication, disparages any products, services or advertiser in an unfair or misleading way; and
- Advertising should not make unfair use of the goodwill attached to the advertising campaign of any other organization.

If it is evidenced that any print advertisements, such as those on billboards, posters or circulars, do not comply with the CAP, the Advertising Standard Authority may withhold advertising space from the advertiser and withdraw trading privileges from advertiser and/or advertising agencies concerned.

By contrast, if there has been a breach of the CMCF Code, the Malaysia Communications and Multimedia Commission may impose fines not exceeding fifty thousand Ringgit, issue a warning letter and/or remove the content from further advertising. Example of advertisements that come under the CMCF Code are those disseminated through social media platforms, emails, television or via internet medium.

### COMMERCIAL CONSIDERATIONS

Malaysia has had its share of hosting major events like the South East Asian ("SEA") Games, Commonwealth Games, Malaysian Motorcycle Grand Prix ("MotoGP") and the like. Ambush Marketing is very common during such events.

Practical steps for event organizers or sponsors to consider curtailing ambush marketing include:

- (a) Official Sponsors may contractually bind event organizers to only sell advertising space to the sponsors. Also, they may impose restrictions as to what the participants (athletes, spectators) at these events wear and carry(eg the implementation of a spectator ticketing regulation to restrict what can be brought into the event vicinity).
- (b) Obligations should be imposed on the media to only allow advertising and promotional activities done by the official sponsors.
- (c) In order for event organizers to attract future sponsors, they should guarantee that they will take reasonable measures to prevent ambush advertising.

- (d) A penalty should be placed as a deterrent on advertisers who practice unfair marketing strategies, over and above any penalty awarded in damages.
- (e) Increase awareness in the public domain so that the public will know the actual sponsors of the sporting events. For example, placing the special Olympic Rings on Coke cans and bottles sold all over Malaysia to show Coca Cola's sponsorship of the event in the lead up to and during the 2004 Athens Olympics had a huge promotional impact.



MALTA

### **LEGAL CONSIDERATIONS**

In the absence of any large-scale sports event hosted by Malta which are worthy of note, the concept of “ambush marketing” remains an altogether alien concept to Maltese law. There is no event-specific anti-ambush marketing legislation, nor are there any umbrella clauses which cover groups of events.

However, this is not to say that right holders enjoy no protection whatsoever. The provisions of the Competition Act and of the Trademarks Act can potentially be applied to cover cases of ambush marketing. The aim of the Competition Act is “to regulate competition, enable the application of Council Regulation(EC) 1/2003 and provide for fair trading in Malta”, while the Trademarks Act transposes the provisions of the EU Trademarks Directive.

Furthermore, the Consumer Affairs Act, together with the Commercial Code, contain detailed provisions which define and prohibit misleading advertisement and commercial practices. These provisions are largely based on the EU Directive concerning misleading and comparative advertising.

### **REGULATORY CONSIDERATIONS**

The Competition Act confers upon the Director General of the Office for Competition (“DG for Competition”) exclusive competence to apply the provisions of the Act which may be delegated to officers or employees of the same authority. The DG for Competition’s powers include the power to carry out investigations to ensure that the provisions are not being breached. In case of an infringement, the DG for Competition may also order a cease and desist order, a compliance order, as well as hold the offender liable to administrative fines.

The Consumer Affairs Act empowers the Director General (Consumer Affairs) to administer the Act and to carry out any investigations he deems necessary in order to ensure compliance with the same Act.

Most importantly, the Trademarks Act endows trademark holders with various rights and remedies which can be claimed in a court of law. Article 4(1) reads as follows: “A registered trademark is a property right obtained by the registration of the trademark under this Act. The proprietor of a registered trademark has the rights and remedies provided by this Act.” Article 12 goes on to read: “The registration of a trademark shall confer on the proprietor exclusive rights therein”.

### **COMMERCIAL CONSIDERATIONS**

There are various steps which event organizers and sponsors can take to lower the possibility of ambush marketing, including but not limited to:

- Sponsors contractually obliging event organizers to actively endorse the exclusivity with the sponsors and attack ambush marketers;
- Event organizers registering for trademark protection for the most important terms which are to be used for a specific sports event (official name, logo, etc); and

- Organizers and official sponsors imposing obligations on media outlets covering the event to restrict advertisement and promotion to official sponsors only for the duration of the event coverage.

MEXICO

### LEGAL CONSIDERATIONS

Action should be taken against ambush marketing to avoid the misappropriation or the capitalization by non-sponsors on the goodwill or popularity of an event and to repel any intentional confusion or association of the public that might lead them to believe that an ambush marketer is an official sponsor of an event. In Mexico, there are no specific legal provisions against ambush marketing, but it is possible to enforce against it through legal means that are present in the fields of Intellectual Property Law and Consumer Law.

Thus, when a sponsor is affected by an ambush marketing act, he or she can react against it by filing:

- (a) an unfair competition action under the Industrial Property Law, when there is a risk of association of intellectual property rights through ambush marketing. The source of confusion is not required; the risk of association is enough to file an unfair competition action. The plaintiff's chances of success are greater if it has registered its mark and is well-known;
- (b) an unfair competition action in accordance with the Commerce Code, when consumers are confused by the ambusher and associate the products or establishments that they offer with ones of the sponsor;
- (c) a penalty request under the Federal Consumer Protection Law, when the ambush marketing act contains deceptive advertising;
- (d) a civil action against any tortious interference with contract and prospective business advantage;
- (e) a civil action against breach of exclusive agreements; and/or
- (f) a civil action against unfair competition acts included in the new Federal Law for Industrial Property Protection.

Nevertheless, the most effective way to prevent ambush marketing is through contractual limitations.

### REGULATORY CONSIDERATIONS

In Mexico, the Code of Ethics for Advertisement of the National Commission of Self Regulation ("CONAR") requires that the members' advertisements are truthful, not misleading and based on an ethical competition. These principles prove broad enough to reject ambush marketing from an ethical point of view. Despite the limitations of a Code of Ethics conceived by a self-regulatory entity with no legal sanctions, the CONAR has been gaining strength with the relevant authorities, especially with the Federal Consumer Protection Agency ("PROFECO"), where their decisions can be considered as non-binding precedents in administrative resolutions.

## COMMERCIAL CONSIDERATIONS

From a sponsor's perspective the most recommended tips to avoid ambush marketing are:

- Secure exclusive television rights for the event in the sponsor's own business category.
- Secure endorsements with athletes.
- Purchase advertising on billboards outside the venue.
- Address intellectual property rights in the sponsorship agreement (including sponsorship policy), and as the sponsor's obligations to pursue marketing.

The recommended tips to avoid ambush marketing from the organizer's perspective are:

- Seek full protection of IP rights by registration of trademarks and service marks.
- Promote proactive enforcement through cease and desist letters and lawsuits.
- Negotiate with broadcasters to avoid the purchase of subcategory rights by competitors of official sponsors.
- Seek control of venue and distribution of any ambush marketing materials.
- Seek control of advertising in the airspace above the event venue.

THE NETHERLANDS

### LEGAL CONSIDERATIONS

The Netherlands has no specific law that prohibits ambush marketing *per se*. Where such marketing involves the use of distinguishing signs related to the event, redress is generally sought through traditional forms of intellectual property protection: copyright law (Dutch Copyright Act) and trademark law (Benelux Convention on Intellectual Property and Community Trade Mark Regulation). If IP rights are not at disposal in such instances, event organizers and official sponsors may instead rely on general tort law (passing off).

More creative types of ambush marketing, not involving possible IP-infringements, may be combated under unfair commercial practices legislation. For example, an advertisement that falsely suggests that a sponsorship relation exists between a company and an event may be challenged by competitors of the ambusher (such as official sponsors) and/or consumers based on Dutch Civil Code provisions regarding misleading advertising.

Another (preventive) option is the use of contract law in relation to ticket sales. Several forms of ambush marketing may be prevented if the ticket terms and conditions state that tickets cannot be used for commercial purposes without prior written approval. The terms and conditions can also set certain “house rules”, outlawing ambush marketing at the event venue. These types of provisions serve to enable an event organizer to refuse access to the venue to visitors involved in ambush marketing schemes.

### REGULATORY CONSIDERATIONS

The Netherlands has an extensive self-regulatory system relating to advertising. The Dutch Advertising Code contains a body of rules with which all advertising must comply. It is divided into a General Section and a Special Section (the “Special Advertising Codes”) which apply to advertising for specific products and services. The General Section stipulates, among other things, that advertisements may not be misleading or untrue. However, there is no special provision in the Advertising Code stipulating that advertisements must not falsely suggest or imply sponsorship of an event.

Anyone who believes that an advertisement violates the Advertising Code may submit a complaint to the Advertising Code Committee. The Advertising Code Committee may allow or reject a complaint. In the former case the Committee makes a “recommendation”, which means that it recommends the advertiser to discontinue this way of advertising.

Despite its limitations as a self-regulatory system with no legal sanctions, the Dutch Advertising Code and the Advertising Code Committee prove to be quite effective. In 2019, 96% of recommendations by the Advertising Code Committee were complied with.

### COMMERCIAL CONSIDERATIONS

In the Netherlands we have a saying that often holds true in cases of ambush marketing: “sit still when you are being shaved”. Official sponsors and event organizers should consider to avoid devoting attention to cases of one-off ambush marketing (eg one-time marketing stunts at an event venue).

Resorting to legal action may create (even more) unwanted free publicity for the ambusher. Should the ambush marketing be of a more structural nature, counter-measures (legal and PR) should be considered. Save from the usual legal route, for official sponsors a sharp and humoristic marketing counterattack may be worth trying. An unorthodox but sympathetic tactic is likely to enhance positive associations with consumers and fits perfectly in the sportsmanlike spirit.

### RECENT ENFORCEMENTS

The case law on the subject of ambush marketing in the Netherlands is scarce. The Dutch are strongly associated with the concept of ambush marketing due to the “Bavaria Babes” case. During the FIFA World Cup in South-Africa in 2010, several Dutch women were arrested after wearing orange dresses during matches, that were provided to them by Dutch beer brewer Bavaria. Budweiser, official sponsor of the event, was not amused. In terms of marketing value, the Bavaria action was an enormous success.

In 2006 the Court of Appeal of Amsterdam handed down a judgment regarding typical orange shorts featuring the trademark of (again) Bavaria.



## AMBUSH MARKETING – THE NETHERLANDS

These “Leeuwenhosen” were distributed for free to fans in huge numbers around the stadiums where the national football team played an exhibition game. The ambush marketing action was successfully countered by the Dutch football association (“KNVB”). The Court of Appeal considered this form of advertising to be unlawful towards the KNVB, as it negatively affected the value of sponsorship agreements. The Court of Appeal also considered Bavaria’s action to be unlawful towards Heineken (the official sponsor of the event), as Heineken paid an extensive amount of money in order to be (exclusively) authorized to advertise in the stadium.

NEW ZEALAND

### LEGAL CONSIDERATIONS

The Major Events Management Act 2007 (the “Act”) was introduced into New Zealand following confirmation that New Zealand would host the Rugby World Cup in 2011, together with a number of other international sporting events. It was recognized at that point that it was the right time to consider specific legislation to deal with ambush marketing.

Prior to the commencement of the Act, sponsors of marketing events had to rely on a number of separate pieces of legislation and common law rights to protect themselves from ambush marketing. This meant that there were often gaps in the protection afforded to sponsors. Sponsors became reluctant to spend significant amounts of their annual marketing budget on sponsorship, which might be ambushed. The Act, however, has sought to fill those gaps and provide sponsors and event organizers with a certain amount of protection around the investment a sponsor makes in a major event.

The Act does not afford every sponsor or sponsorship arrangement the right to protection from ambush marketing. An event organizer must first apply to have the event declared a “major event”. The relevant body will then consider matters including the number of participants, the number of spectators, the tourism opportunities for New Zealand, New Zealand’s international profile during the event, the level of professional management involved and required, and the level of international media coverage. This makes it clear that the Act will only operate to protect truly “major events” which feature on the international stage. Once declared a “major event”, sponsors of the event will be entitled to the protection afforded by the Act in relation to ambush marketing by “association” and “intrusion”.

Ambush marketing by association occurs where an advertiser (who is not a sponsor of the event) misleads the public into thinking that it is associated with the event. More specifically, unless an exception contained in the Act applies (such as written authorization by the event organiser), no person may, during a major event’s protection period, make any representation in a way likely to suggest to a reasonable person that there is an association between the major event and goods or services, a brand of goods or services, or a person who provides goods or services. The Act establishes a presumption that a representation that includes an emblem or word(s) that have been declared a “major event emblem” or “major event word(s)” suggests such an association. It is noteworthy that both the advertiser and the entity “who receives consideration for the placement or the location of the representation” will be caught by this prohibition.

Ambush marketing by intrusion is when an event is used to provide the ambush marketer’s brand with exposure or publicity to which it is not entitled. In general, this occurs when a non-sponsor marketer gains the attention of an audience who would not have gathered except for the major event. To deal with this type of ambush marketing, the Act allows a declaration to be made for “clean zones” and “clean transport routes” around major events, the aim of which is to prevent unauthorized exploitation

at the expense of event sponsors.

The Act does not affect any other remedies that may be available in other pieces of legislation or at common law. Accordingly, depending on the particular circumstances of the offending conduct, action against ambush marketing activity could also be pursued under New Zealand’s intellectual property laws, such as the Trade Marks Act 2002, the Copyright Act 1994 and the common law tort of passing off, or under consumer legislation such as the Fair Trading Act 1986.

The Act provides for a variety of enforcement measures. These include civil remedies such as accounting for profit, damages and corrective advertising as well as criminal penalties. A breach of the Act can result in fines of up to NZ\$150,000. Enforcement Officers under the Act are also able to enforce various administrative remedies including formal warnings, and seizure or requiring that offending material be covered up.

### **REGULATORY CONSIDERATIONS**

New Zealand’s Advertising Standards Code (“Code”), a self-regulatory code which sets standards in relation to advertising content and placement across all media in New Zealand, includes rules relevant to ambush marketing activity. Under the Code, advertisements must not claim or imply endorsement by any individual, government agency, professional body or independent agency unless there is prior consent and the endorsement is current and verifiable. This is consistent with one of the overarching principles of the Code that all advertisements must be truthful, balanced and not misleading.

### **COMMERCIAL CONSIDERATIONS**

There have been only a small number of enforcement actions that have been reported under the Act to date. These include a company and its director which were involved in the importation of counterfeit Rugby World Cup apparel. The actions resulted in a conviction of both the company and its director for the breach of sections 10 (no representation of associations with major event) and 13a (the importation of goods that breach section 10) of the Act, resulting in a NZ\$20,000 fine each. With a number of forthcoming sporting events to be hosted in New Zealand, including the 36th America’s Cup 2021, which has already been declared a major event under the Act, the Rugby World Cup 2021 and the FIFA Women’s World Cup 2023 (co-hosted with Australia), the Act is likely to be highly relevant when considering the legal compliance of upcoming marketing campaigns in New Zealand.

One of the commercial drivers underlying the introduction of the Act was to ensure that New Zealand is a competitive and desirable location to hold international events. Without the introduction of the Act, sponsors might have found the value of their sponsorship dollar seriously undermined and questioned the worth of sponsorship as a marketing tool. This could still happen if an event organizer fails to take all necessary steps to ensure the event is declared a “major event” and that the scope and extent of any “clean zones” or “clean transport routes” accurately reflect the key locations and specific areas of

## AMBUSH MARKETING – NEW ZEALAND

concern. Sponsorship agreements will therefore continue to be fiercely negotiated and key points for sponsors will not only be the obligation on event organisers to obtain “major event” declarations and secure clean zones but also to make the conditions precedent.

NICARAGUA

### **LEGAL CONSIDERATIONS**

In Nicaragua there is no specific legislation related to ambush marketing. However, some of the common forms of ambush marketing—such using tickets of an event as prizes for sweepstakes or other promotions—may potentially infringe laws regulating trademarks, copyrights, unfair competition and consumer protection. Furthermore, at present there has not been any known case against an ambusher.

In addition to the regulation concerning IP and consumer protection, it is also worth mentioning that the Competition Promotion Act (Law No 601) defines unfair competition as “any actions or conducts carried out by economic agents in the exercise of a commercial activity, which are contrary to honest uses and practices in commercial matters”.

### **REGULATORY CONSIDERATIONS**

There is no self-regulation code currently in place in Nicaragua.

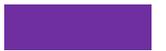
### **COMMERCIAL CONSIDERATIONS**

As recommendations to reduce the ambush marketing practice, we would recommend the following:

- As a general rule, protect all the IP rights;
- Keep an eye over advertising campaigns on newspapers, television and radio, etc;
- Pursue ambush marketers through cease and desist letters, and consider legal actions as well;
- When an ambush marketing campaign has been identified, the event organizer could consider issuing a press release to be shown in the local newspapers, in which the organizer announces its intention to invalidate tickets given away by non-sponsors (for example) and also mentions the name of the only party or parties authorized to run such sweepstakes (ie the sponsor); and
- In Nicaragua, it is a usual practice for parties—interested in running marketing campaigns—to request an approval from the Consumer Protection Agency (“CPA”). Therefore, it is recommended to inform the CPA of the authorized parties that can run a marketing campaign in connection with a particular event.



NIGERIA



### LEGAL CONSIDERATIONS

There is no specific law regulating ambush marketing in Nigeria. This may be due to the fact that there are not many instances of ambush marketing in Nigeria, thus the Law is still developing in that regard. Generally, ambush marketing is experienced during football tournaments in Nigeria. Given that Nigerians are great football fans and most of the population usually attend or tune in to watch football matches, big local companies (and some multinational companies with a presence in Nigeria) tend to seize the opportunity presented by the event to organize advertising campaigns identifying their brands and associating them with the football tournament. Sometimes the advertisements are subtle (eg, encouraging or congratulatory publications to the national team), whilst at other times, the campaigns are full-blown competitions and/or promotions with specified prizes for the winners. No matter the form ambush marketing may take, organizers and sponsors of events do not have many options—other than using the more established principles of trademark infringement/passing off and other intellectual property infringement—for enforcing their exclusive rights and preventing non-partner entities from wrongly profiting from an event which they have not sponsored or acquired licensing rights to.

### REGULATORY CONSIDERATIONS

As stated above, regulation and enforcement is usually achieved through the local intellectual property enforcement systems. For instance, the Trademarks Act (“TMA”) prohibits the unauthorised use of a trademark belonging to another party or entity. The exclusive right to use trademarks related to an event, where secured by the organizers and or sponsors of the event through registration, will therefore be protected under the TMA. This position is also applicable to copyright and other forms of intellectual property associated with an event.

Again, there are some relevant provisions in the Nigerian Code of Advertising Practice (“the Code”) made pursuant to the Advertising Practitioners’ (Registration, etc) Act by the Advertising Practitioners Council of Nigeria (“APCON”) which can be relied on in prohibiting or restricting ambush marketing in Nigeria. In particular, Article 10 of the Code states that advertisements must not contain any item which is in breach of Nigerian and international copyrights laws, or omit anything which the laws on intellectual property require. These provisions are enforceable by APCON and a breach of any of the provisions could result in, *inter alia*, a heavy fine, reduction in the scope of license, suspension or revocation of license.

However, there have been no known cases of enforcement against ambush marketing in Nigeria. This may be due to various reasons, such as the associated costs of litigation, the brief duration of events which result in ambush marketing (and likewise the usually brief duration of the infringement), as well as prompt and proactive steps taken by local legal counsel. In our experience, most ambush marketing cases are settled out of court or not pursued, especially after the event is over. Usually, enforcement is

restricted to making public disclaimers or issuing cease and desist letters and/or notices.

For instance, the Nigeria Football Federation (“NFF”) has published several disclaimers in the papers to the effect that only partners and sponsors of the NFF can use the name of the Super Eagles in advertisements, campaigns, promotions and so on relating to the team’s participation in the Africa Cup of Nations and other similar events, and requesting ambush marketers to desist from doing so. Thereafter, the infringing advertisements were pulled, or ceased to be broadcast without any further information to the public.

In the year 2014 there was an attempt by APCON to enforce a case of ambush marketing against Nigerian Breweries plc (“NB”) who were accused of conducting ambush marketing advertisements during the 20th FIFA World Cup tournament. The NFF had levelled allegations of what it referred to as “ambush marketing” by NB, stating that the company had put up adverts on television and billboards in such manner as to deceive viewers into believing that they were the sole sponsor of the event. The NFF also claimed that NB had initiated communication materials across Nigeria featuring ex-players of the Super Eagles, giving the impression that NB was associated with, or was an official sponsor of, the team. NB had in turn argued that they only taken advantage of an opportunity provided to explore a window that was available without running foul of any law. The outcome is not known—the intervention of APCON in this matter was not reported further.

### **COMMERCIAL CONSIDERATIONS**

Some steps that can be taken by organizers and sponsors having exclusive official rights in an event include:

- Register all related trademarks and logos;
- Publicise the exclusive rights of the official sponsors of the event through massive media campaigns that clearly state that non-sponsors are prohibited from associating themselves with the event or related IPRs;
- Work with the media in prohibiting infringement; and
- Publish the rules and regulations governing the event. For instance FIFA usually publishes the rules and regulations governing its various tournaments, clearly stating the rights of its partners or sponsor organisations.

NORWAY

### **LEGAL CONSIDERATIONS**

In Norway the Marketing Control Act of 2009 (“MCA”) regulates marketing practice among businesses and towards consumers. Under the MCA, ambush marketing will be considered illegal as being in conflict with good business practice among businesses or as being unfair or misleading towards consumers. There are no specific provisions regarding ambush marketing.

The zenith of ambush marketing in Norway was under the Winter Olympic Games in Lillehammer in 1994, though there have been some examples in relation to later sporting events.

To prevent illegal use of sporting events and other cultural events in Norway, the organizers have often registered the event as a trademark. Examples of events that have chosen to protect the event by registering the name and symbols as trademarks are the World Championship in skiing in 2011, The Arctic Race, The Arctic Challenge, and Norseman Extreme Triathlon.

We are not aware of recent enforcements regarding ambush marketing. There have been some examples of traders illegally associating themselves with sporting events or concerts, but to our knowledge these cases has been settled directly between the event organizers and the trader.

### **REGULATORY CONSIDERATIONS**

In addition to the general provisions in the MCA, the Broadcasting Act and Regulations have special provisions regarding advertising and sponsorships. Ambush marketing is, however, not expressly regulated.

As of today we are not familiar with any planned regulatory changes to expressly make ambush marketing illegal. Ambush marketing is covered by the general provisions regarding good business practice among businesses and unfair and misleading business practice towards consumers.

### **COMMERCIAL CONSIDERATIONS**

There are several commercial considerations that event organizers may consider in Norway to prevent ambush marketing. The considerations are as follows:

- Event organizers should consider registering the event name, symbols and logos as trademarks.
- Event organizers should consider imposing obligations on media to restrict advertising and promotion in connection with broadcasts and web casts to official sponsors only.
- Sponsors should ensure that event organizers are contractually bound to take action against ambush marketers within a set period of time after such activity is brought to their attention.
- Event organizers and sponsors may wish to consider increasing official sponsor awareness campaigns so that the public know which sponsors are official.
- The ticket terms and conditions should expressly state that tickets are non-transferable and cannot be used for advertising, sales promotion or any other commercial purpose without the

- prior written approval of the event organizer.
- Event organizers may consider imposing obligations on the athletes that other individual sponsors may not use the athletes in advertising in the event period.

PARAGUAY

### LEGAL CONSIDERATIONS

Ambush Marketing is not specifically regulated as such in Paraguay.

Hence, the norms and regulations addressing general advertising, such as the provisions regarding publicity and advertising contained in the Law on Protection of Consumers and the Self-Regulatory Code of Advertising, as well as the Merchant or Trade Law, are applicable.

Advertising companies and businesses in general should take into consideration the following:

- (a) The Law on Consumer Protection:
  - (i) determines that any publicity/advertising that may be considered misleading is prohibited. The Law also gives a definition of what may be considered misleading, namely that “misleading” advertising is “any sort of information, broadcasting or communication that has advertising features which, wholly or partially, or in any other way, even by omission, may be susceptible of inducing the consumer into error, specially when data with regards to the nature, quantity, origin, etc. of the product/service are concerned. Any data which may give false information, confuse or lead the consumer into error with respect to the real nature, origin or feature of a product or service determined is against the law and prohibited”.
  - (ii) prohibits comparative advertising, which is defined as “advertising that by means of wilful intentions or actions or by declarations that are general and indiscriminate lead the consumer into instituting the superiority of a product/service over another”.
- (b) The provisions of the Law on Trade should also be considered, particularly those that set out the general rules on trade practices and unfair competition:
  - The use of names or distinctive signs that may cause confusion with those legitimately utilized by others;
  - Imitating products of one competitor or perform by any means other acts that may cause confusion with those of a third party (competitor) or the activity of the same;
  - Broadcasting news or considerations with respect to the products or activities of a competitor that may cause the discredit of the same; or
  - Utilizing directly or indirectly any means that are contrary to the professional ethical principals that may cause damage to a competitor.

In order for the Law on Consumer Protection to be complied with by businesses and individuals, claims may be submitted before the National Office of Consumer Protection (a dependency of the Ministry of Industry and Trade) and, also, upon a party’s request, judges may order precautionary measures in order to prevent the breach or violation of the provisions contained in the Law.

### **REGULATORY CONSIDERATIONS**

The self-regulatory Advertising Code determines that all advertising must be carried out with a sense of responsibility and must constitute an instrument of “healthy competition” between products and services coexisting in the market, providing by means of true/accurate, adequate and complete information, the free selection of the consumer.

The Code determines that all advertising must be carried-out with a sense of responsibility and constitute an instrument of “healthy competition” between products and services coexisting in the market, providing by means of true/accurate, adequate and complete information, the free selection of the consumer.

In general terms, the Code compels advertisers to subject themselves to the principles of truthfulness, loyalty, decency, honesty, legality, fair competition and reliability. In this sense, advertisers should refrain themselves from making comparisons based on unfair acts or actions, as well as, facts.

### **COMMERCIAL CONSIDERATIONS**

- Advertisers should ensure that agreements with event organizers relating to a particular event contain certain rules, for example, establishing an exclusive zone within which no unauthorized advertising/marketing may be operated (signs, leaflets, speech) and also, a prohibition on a third party's products or services in any advertising related to the event, particularly in a virtual platform, TV advertisement spots and/or social network.
- Event organizers should ensure that agreements are in place with municipalities for use of public space or with neighboring privately owned space to prevent use by ambush marketers. Such space may then be sold to unauthorized advertisers.
- Event organizers should establish adequate protection of intellectual property related to the event for eventual enforcement against ambush marketers.
- At the moment, the most important aspect of advertising and protection thereof relates to advertising and brand presence virtually and in social networks. That should be strictly overseen by the event organizers in order to only give presence to their actual sponsors and no third parties' brands.



PERU

## **LEGAL CONSIDERATIONS**

Peru does not have a specific legislation for ambush marketing.

Instead, the Unfair Competition Law and Industrial Property Law are used.

## **REGULATORY CONSIDERATIONS**

Any legal action must be sued before the Unfair Competition Commission and/or Trademark Office (both part of the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (“INDECOPI”), which is the regulatory entity for these matters).

Depending on each case, the action brought may be in respect of:

- trademark confusion;
- undue exploitation of the reputation of others;
- undue exploitation of others’ efforts; or
- general acts of unfair competition.

## **COMMERCIAL CONSIDERATIONS**

The following may be considered as infringements; however it is important to keep in mind that many cases may be considered as lawful concurrent damage:

- advertising within the event venue;
- advertising outside the event venue;
- advertising linked to the event;
- running contests linked to the event; and
- sponsoring athletes or teams participating in the event.

 POLAND 

## LEGAL CONSIDERATIONS

To date, Polish legislation provides no specific regulations regarding ambush marketing. However, there are certain legal regulations that should be considered in such cases:

- (a) **Act on Unfair Competition:** This provides a definition of notions such as:
  - (i) unfair competition: “the act of unfair competition shall be an activity contrary to law or good practices, which threatens or infringes the interest of another entrepreneur or customer” eg dissemination of untrue or misleading information about one’s own or another entrepreneur or enterprise in order to benefit from it or to cause damage shall be considered an act of unfair competition; and
  - (ii) unfair advertisement: “advertisement contrary to law or good manners”.

The latter may, of course, encompass ambush marketing. Misleading advertising as well as statements encouraging the purchase of products or services, creating the impression of neutral information, are also forbidden.
- (b) **Industrial Property Law:** This provides protection against the use of identical or similar trademarks for identical or similar goods or services if such use may lead to confusion among consumers in case of similar trademarks. It also provides broader protection of renowned trademarks that is not limited to identical or similar goods or services and does not depend on risk of confusion.
- (c) **Copyright Act:** This penalizes unauthorized use of a sponsor's logo. However, copyrights may not be registered in Poland and therefore formal protection cannot be guaranteed in advance.
- (d) **Act on Combating Unfair Commercial Practices:** This prevents unfair practices in the interest of consumers and penalizes practices contrary to good customs that significantly distort, or may distort, the economic behavior of the average consumer.
- (e) **Act on Competition and Consumer Protection:** This prohibits practices that are harmful to the collective interests of consumers, eg failure to comply with an obligation to provide reliable, correct, and complete information to consumers.

In the course of preparations for Poland to host the 2012 European Football Championship, some measures were proposed in order to prevent ambush marketing during this event, including a draft law regarding protection of rights in relation to sports events. However, work on this was discontinued and there have been no developments since.

## REGULATORY CONSIDERATIONS

The Code of Ethics In Advertising (“CEA”) is a self-regulatory system providing sanctions that can be imposed by regulatory body, Advertising Ethics Committee, only on contractual basis. The CEA

regulates all aspects of advertising communication in relation to various media and requires that adverts are not misleading, unethical or dishonest.

There are also other self-regulatory bodies having codes of conduct regulating advertising activity, including number of industry-specific associations (eg the pharmaceutical and beer industries).

### **COMMERCIAL CONSIDERATIONS**

Official sponsors and organizers of events should:

- Take proper measures in order to protect intellectual property rights (eg trademarks and logos) through their registration before the competent authority prior to release of the campaign;
- Thoroughly research the area where the event is to take place, searching for all existing and possible places of advertisement and reserve for themselves all available space in the vicinity of events;
- Ensure clear confirmation of the brand sponsoring the event, possibly by advertising campaigns prior to the event;
- Ensure that there is no separate brand connected with key players of the event, VIPs or other participants, which could create the impression of a link between the event, the person in question and a specific brand; and bring all necessary actions against unlawful use of, or application for registration of, trademarks;
- Prepare specific rules of conduct for advertisers, preventing ambush marketing activity.

PORTUGAL

### LEGAL CONSIDERATIONS

There is still no specific legislation in Portugal which outlaws ambush marketing *per se*, although some specific rules were brought into force to prevent unauthorised commercial association with (i) the final stage of the European Football Championship of 2004 (Euro 2004) (Decree-Law 86/2004 of April 17) and (ii) the European Under-21 Tournament 2006 (Decree-Law 84-A/2006 of May 19), both decrees establishing fines for non compliance with the limitations imposed. Given the absence of regulation on this matter, where event organizers and their official sponsors have felt aggrieved by the ambushing of events by third parties, they have generally sought redress through more traditional forms of intellectual property protection, such as trade mark infringement, unfair competition, copyright infringement and breach of contract (usually associated with ticket terms and conditions).

### REGULATORY CONSIDERATIONS

The Portuguese Advertising Law requires, among other things, that all adverts are legal, decent, honest (not misleading) and truthful. In particular, it expressly considers comparative advertising, providing (in Article 16 paras D, G) that advertisements must not create confusion in the market place between professionals, between the advertiser and a competitor, or between trademarks, trade names or other distinctive sign of the competitor, and must not take undue advantage of the reputation of a trademark, trade name or other distinctive sign of a competitor. Penalties for violation of this provision range from €1.750,00 up to €3.750,00 in the case of a person and from €3.500,00 up to €45.000,00 in the case of a collective entity. Negligence is punishable. Additional sanctions may be applied, such as seizure of objects used in the advertising; temporary interdiction of the advertising activity up to a maximum of two years; there is also the possibility, in certain cases, of cautionary interim measures of termination or prohibition of advertising, regardless of loss or real damage and independently of intention or negligence.

Unfair competition as prohibited by Article 311 of the Industrial Property Code also prevents any action susceptible of creating confusion with another company's establishment, products or services or non authorized claims made with the purpose of benefiting from the credit or reputation of a competitor's name, establishment or trademark. The penalty for breach of these provisions is a fine ranging from €1.000,00 up to €30.000,00 in the case of a person and from €5.000,00 up to €100.000,00 in case of a collective entity.

### COMMERCIAL CONSIDERATIONS

Practical steps for event organizers/sponsors to consider to prevent/limit ambush marketing include:

- Event organizers should consider imposing obligations on media organizations to restrict advertising and promotion during broadcasts/webcasts to official sponsors only.
- Event organisers may wish to buy up all the billboards and other advertising space in the vicinity

of the event and then resell to official sponsors only. Sponsors may wish to contractually oblige event organizers to do so.

- Sponsors should ensure that event organizers are contractually bound to take action against ambushers within a set period of time after such activity is brought to their attention.
- Event organizers and sponsors may wish to consider mounting official sponsor awareness campaigns so that the public know which sponsors are official.
- The ticket terms and conditions should expressly state that tickets are non-transferable and cannot be used for advertising, sales promotion or any other commercial purposes without the prior written approval of the event organizer.

■ PUERTO RICO ■

### **LEGAL CONSIDERATIONS**

Commercial practices in the Commonwealth of Puerto Rico, although highly regulated by the Federal Trade Commission, do not have a specific statute and/or regulation which deals with ambush marketing practices. Puerto Rico does have a very specific regulation (Reg No 9158-2020) (the “Commercial Practices Regulations”) which regulates, amongst other things, misleading and false advertising. Puerto Rico has also adopted a local Trademark Act which, together with the federal Lanham Act, provides the necessary provisions to protect trademark infringement.

### **REGULATORY CONSIDERATIONS**

The Commercial Practices Regulations regulate and enforce best practices in advertising and marketing within the Commonwealth of Puerto Rico. They require advertising and marketing to be truthful, informative, and not misleading.

### **COMMERCIAL CONSIDERATIONS**

Best practices for event organizers and sponsors when having to prevent ambush marketing efforts are:

- Registering trademarks both locally and within the United States Patent and Trademark Office;
- Enforcing trademark rights and marketing and advertising regulations surrounding the publication of misleading material;
- Naming official sponsors and/or sponsorship categories which would specifically deter ambush marketing from associating with events; and
- Exclusivity in broadcasting and/or marketing agreements to create natural obstacles to ambush marketing efforts.

ROMANIA

### LEGAL CONSIDERATIONS

Ambush marketing is the name given by an event organizer to a marketing campaign which takes place around the event, benefits from the public exposure, but does not involve payment of a sponsorship fee to the event organizers.

For most events of any significance, one brand will pay to become the exclusive and official sponsor of the event in a particular category or categories. This exclusivity creates a problem for one or several other brands. Consequently, in some cases, those other brands find ways to promote themselves in connection with the same event, without paying the sponsorship fee.

Two basic types of ambush activities must be distinguished: "direct" and "indirect" ambush activities.

- (a) The following activities may be included in the first category of direct infringement:
- false claims to official sponsorship by a non-sponsor;
  - intentional unauthorized use of protected intellectual property, such as logos of teams, symbols, etc;
  - attempts by a brand to illegitimately associate itself with an event with the intent to confuse consumers and gain market share from the competing official sponsors, etc.
- (b) In the case of indirect ambush marketing, however, the behavior is more subtle and it does not necessarily represent an unlawful practice or breach of copyright law; it is rather a matter of ethics. Such indirect ambush may consist, eg, in setting up a promotional presence near an event, which, even without making specific reference to the event itself, benefits from the borrowed spotlight. Another example is the use of marginal imagery or terminology not protected by intellectual-property laws to create the illusion of a connection to an event or to a well-known brand.

### REGULATORY CONSIDERATIONS

In the case of direct ambush marketing, legal remedies exist and have been used successfully in the past. In Romania, there are clear regulations that prevent and sanction infringements on intellectual property and anti-competitive behavior.

On the other hand, indirect ambush marketing is more of a grey area to which legal protection is not easily available. For this reason, indirect ambush marketing is analyzed under the broad umbrella of the general ethical principles set out by the advertising law. This law establishes that commercial behavior and announcements have to be decent, fair, and created in the spirit of social responsibility. Therefore, concealed, deceiving, subliminal advertising is prohibited, being considered a minor offence. Also, comparative advertising is prohibited if it creates confusion within the market between the advertiser and a competitor or between their trademarks, trade names or other distinctive marks, or if a benefit is incorrectly derived from the good name of a trademark or from other distinctive marks of a

competitor. All such practices are deemed as minor offences and punished accordingly.

Also, according to the Romanian Code of Advertising Practice, the communication must not violate industrial and intellectual property rights, such as: patents; verbal or combined trademarks; commercial slogans; industrial designs and models; brand names; copyrights; name or communication campaign of another firm; company or institution, etc, or use elements that clearly identify other brands or products.

In addition, communications made by an advertiser with regard to a product, brand or other elements of communication identifiable with a third party are permitted only on the basis of agreement between the parties, which will include the prior consent of the trademark holder.

### **COMMERCIAL CONSIDERATIONS**

In practice, it is difficult to eradicate ambush marketing activities, and this difficulty may hinder the efficiency of the promotional efforts of the official sponsors.

The wide ambit of ambush marketing is most commonly thought of in relation to sports events. According to FIFA's representatives, if the rights of the authorized stakeholders are not protected and the exclusivity is not respected, there is a risk that events will fail to attract the necessary sponsorship.

One way to limit the ambush marketing may be to harden the conditions set out by the event organizers. For example, organizers may establish an area surrounding the event location within which certain commercial restrictions are applicable. In this manner, it would be easier to identify the commercial entities trying to take undeserved advantage of the publicity generated by the event.

Also, the organizers may restrict the access to the location where the events take place for people who, in order to benefit from the exposure, wear clothing or display items such as flags and banners bearing the marks of companies not involved in the events.

It is also up to the organizers to reduce/limit the advertising space during the performance of the event and to make such advertising space available only for the official sponsor.

At the same time, official sponsors should be assured of the organizer's ability to take action against marketing ambushers.

### **RECENT ENFORCEMENTS**

We are not aware of any recent decisions issued by the Romanian courts regarding ambush marketing.

Most infringements are perpetrated by small companies that do not understand or are not aware of the prejudice that ambush marketing may cause. Such cases are usually settled without major difficulty outside court.

RUSSIA

## LEGAL CONSIDERATIONS

Currently, there is no specific legislation outlawing ambush marketing in Russia except for some provisions in laws related to the organization of sports events, namely:

- Federal Law No 310-FZ dated December 1, 2007, which provided for the prohibition of unauthorized commercial association with the 2014 Winter Olympic Games and Paralympic Games in Sochi (“Law on Olympic Games”).
- Federal Law No 108-FZ dated June 07, 2013, was enacted in order to prevent unauthorised commercial association with the 2017 FIFA Confederations Cup or the 2018 FIFA World Cup which were to be held in Russia (“Law on FIFA World Cup”). The Law on FIFA World Cup has recently been amended by specific provisions related to UEFA Euro 2020 that will take place in 2021.

These laws were passed in order to protect official sponsors of the sports events from ambush marketing practices. For example, under the Law on FIFA World Cup, misleading behaviour, in particular creating a false impression that a commodity manufacturer or an advertiser is associated with the 2017 FIFA Confederations Cup, the 2018 FIFA World Cup, or UEFA Euro 2020, including as a sponsor, is deemed inaccurate advertising (thus incurring substantial fines, capped at RUB 500,000 (approx US \$7,000) or unfair competition (entailing the consequences provided for by the anti-monopoly legislation of the Russian Federation, ie substantial fines, the amount of which will depend on the offender’s turnover).

These prohibitions on unauthorized commercial association with sports events are also partly reflected in Federal Law, No 329-FZ of December 4, 2007, on Physical Culture and Sports in the Russian Federation (“Law on Sports”). In particular, the Law on Sports grants protection from unauthorized use (including the use in marketing activities) of symbols of sports events, including the flag, anthem, logo, slogan, official name, or other designation related to the particular sports event.

Moreover, with respect to other, non-sports events, the general ban on unfair and false advertising, as well as a ban on unfair competition may be used when organizers or sponsors feel aggrieved by ambush marketing of third parties.

## REGULATORY CONSIDERATIONS

- (a) **Advertising Law:** Federal Law No 38-FZ of March 13, 2006, on Advertising (“Advertising Law”) prohibits unfair and untruthful adverts and promotions, and generally determines what kind of advertisement is deemed unfair and untruthful. For instance, an incorrect comparison of goods is prohibited. The main criteria of incorrect comparison are:
- (i) lack of specific criterion that is used for comparison of goods and
  - (ii) lack of evidence of its objectivity and accuracy.

However, in practice, not many ambush marketing tools may be recognized by the Advertising Law as being untrue or unfair.

- (b) **Competition Law:** Some aggressive ambush marketing tools may be recognized as unfair competition acts under Federal Law No 135-FZ of July 26, 2006, On Protection of Competition (“Competition Law”). In 2016, the Competition Law was significantly amended and partly harmonized with the EU laws. In particular, it is worth mentioning that imitation is now specified as an act of unfair competition. Based on this prohibition on imitation, such objects as labels, names, color scale, corporate identity as a whole, other individualizing elements, etc can also be protected against unfair use by a competitor. Moreover, in some cases an unauthorized commercial association can be prohibited based on the general prohibition on unfair competition.

The Regulator, the Federal Anti-monopoly Service of the Russian Federation (“FAS”), is entitled to carry out investigations, on its own initiative or following third party complaints, against unfair marketing and can impose fines.

During the period of the Olympic Games and FIFA World Cup in Russia, many cases of ambush marketing were considered as illegal advertising by the FAS. For instance, the dental clinic that used, without authorization, a banner with the text “Official Dental Clinic of the World Cup” was held liable for illegal advertising and was slapped with almost the maximum possible fine in the amount of RUB 424,000 (approx. US \$5,800).

Another interesting example is the case of the beer company “Bavaria”. The company used the designation “FIFA” with regard to its promotional campaign, which consisted of providing the winner of the contest with tickets to World Cup 2018. Both the FAS and courts said that such actions, including the use of trademarks and the creation of unauthorized commercial association with FIFA, violated the interests of FIFA and constituted an act of unfair competition.

However, in some cases, companies manage to prove that the use of particular words related to famous sporting events (such as “Olympic”) does not violate Russian legislation outlawing ambush marketing. Specifically, although the FAS established a violation where a restaurant used the word “Olympic” in slogans “Olympic season is open” and “Special Olympic menu is offered”, the restaurant appealed this decision in court and won. Courts, including the Supreme Court of the Russian Federation, agreed with the restaurant that the mere use of the word “Olympic” with regard to the business of the restaurant does not lead to deception of consumers or constitute an illegal commercial association with Olympic Committee.

To sum up, Russian enforcement practice in the area of ambush marketing mainly consists of the enforcement of special laws such as the Law on Olympic Games and Law on FIFA World Cup. However,

there is potential for further, broader, application of the prohibition on ambush marketing and for more sophisticated enforcement practice on this issue.

### **COMMERCIAL CONSIDERATIONS**

When planning and implementing an advertising campaign it is advisory to undertake the following steps:

- Conduct a preliminary analysis of ambush-marketing opportunities, and have a mechanism to combat these drawn into the contract with the organizer/third parties involved in the project;
- Create an anti-ambush-team (including lawyers) who can track ambush marketing and, if necessary, respond quickly;
- Take care in advance to register all relevant trademarks and domains, and refrain from using unregistered logos;
- All celebrities involved in your adverts (and their families, if possible) should be bound with obligations not to participate in promotions of competitors.

SERBIA

### **LEGAL CONSIDERATIONS**

In Serbia there is no legislation dealing specifically with ambush marketing. Therefore, when trying to protect themselves from ambush marketing practices, event producers, official sponsors, and other rights holders are forced to seek redress in general advertising, intellectual property or unfair competition laws.

The Serbian Advertising Act requires advertising to be based on principles such as the use of permitted means in pursuing advertising goals and other principles of social responsibility. Additionally, provisions of the law prohibiting misleading advertising (ie advertising that in any way deceives or is likely to deceive its audience, and that may affect their economic behaviour, or is detrimental, or likely to be detrimental, to advertiser's competitors) can also be used to address ambush marketing in certain cases.

If the ambush marketing practices entail trademark or copyright infringements, remedy may be available under the Trademarks Act or the Copyright and Related Rights Act. The Trademarks Act explicitly prohibits use of other parties' trademarks in advertising in cases other than permitted comparative advertising.

Since ambush marketing practices are often more subtle and do not necessarily infringe trademarks or copyright, rights holders may, instead, turn to the Trade Act, prohibiting unfair competition. Each of these laws allows for injunctions to be sought, as well as the recovery of damages.

### **REGULATORY CONSIDERATIONS**

Both the Electronic Media Act and the Advertising Act authorize the Regulatory Authority for Electronic Media ("Authority"), the Serbian broadcasting regulator, to create more detailed regulations applicable to advertising on television and radio. The Authority adopted its Rulebook on Advertising and Sponsorship in Electronic Media in 2016. However, the Rulebook contains no specific provisions regulating ambush marketing.

On the other hand, one recent case shows that the Authority is willing to act stringently against advertising practices it considers to be misleading and socially irresponsible. In late April 2020, the Authority in effect banned a television advertisement produced for a local beer brand. The advertisement contained imagery familiar during the COVID-19 pandemic lockdown that was still in place at the time, such as first responders under protective equipment and people applauding from balconies expressing support for medical professionals, with images of people raising beer bottles and celebrating and a voice-over calling for a toast to courage and humanity with a particular beer brand. The Authority found that the advertisement disregarded the principles of social responsibility and contravened the provisions of the Advertising Act prohibiting television advertising for alcoholic beverages to create the impression that the consumption of alcohol contributes towards success.

Whether the “principles of social responsibility” part of the reasoning would apply to other, non-COVID-19 pandemic related, cases remains to be seen.

In 2019, an independent self-regulatory body called the National Association for Ethical Standards in Advertising (“NAESA”) was founded in Serbia, with a mission to promote and support the use of ethical principles in market communications and promote compliance with the Code of Advertising Communication (IAA, Serbian Chapter), as well as with other self-regulatory standards prescribed by International Chamber of Commerce (“ICC”) and European Advertising Standards Alliance. The Code of Advertising Communication itself provides that no party should seek to give the impression that it is a sponsor of any event or of media coverage of an event, whether sponsored or not, if it is not in fact an official sponsor of the event or of media coverage. Additionally, the Code requires the sponsor and event organizer to ensure that any actions taken by them to combat ambush marketing are proportionate and that they do not damage the reputation of the sponsored event nor impact unduly on members of the general public. It is expected that NAESA should become fully operational in 2020.

### **COMMERCIAL CONSIDERATIONS**

The event organizers and the official sponsors should take all reasonable steps to protect themselves against ambush marketing. For event organizers this entails:

- registering the event name and logos as trademarks,
- imposing obligations on official broadcasters to keep the advertising space available to official sponsors and restrict its availability to official sponsors’ competitors,
- trying to purchase all advertising space around and near the venues where the events will take place, and
- imposing restrictions on the sale and resale of tickets for advertising and promotions purposes.

For the official sponsors, this entails ensuring contractually that event organizers are bound to protect them against ambush marketers.

SINGAPORE

### LEGAL CONSIDERATIONS

There is no overarching legislation governing ambush marketing in Singapore. Be that as it may, an aggrieved party may resort to more traditional civil and criminal remedies, including, but not limited to, trademark infringement, copyright infringement, and registered design infringement. In addition, an aggrieved sponsor may also seek remedy under the tort of passing off, as well the remedies provided for in the Consumer Protection (Fair Trading) Act (Chapter 52A).

### REGULATORY CONSIDERATIONS

The advertising sector in Singapore is self-regulating. The Advertising Standards Authority of Singapore (“ASAS”) oversees and regulates advertising activities in Singapore, and relies on a system of guidance and voluntary compliance. The Singapore Code of Advertising Practice (“Code”), which is administered by the ASAS, sets out the basic framework for regulation. The Code applies to advertisements which appear in any form or media. While there is no express stipulation in the Code governing ambush marketing, the following principle needs to be borne in mind: All advertisements should conform to the principles of fair competition generally accepted in business, including non-denigration, non-exploitation of goodwill, and non-imitation.

*Consequences of breach of any of the provisions of the Code:*

Complaints can be made to the ASAS that an advert doesn’t comply with the Code. The ASAS consider complaints and publicise their rulings, meaning the most likely sanctions include:

- a direction to withdraw/amend an offending advert;
- trading sanctions; and
- negative PR arising from an adverse ruling being published.

The ASAS’s rulings are not legally binding but, where the advertiser fails to amend its advertising, the ASAS can contact media/publishers to request that they do not carry those, or similar, advertisements.

### COMMERCIAL CONSIDERATIONS

Singapore has its share in hosting major events, such as the Youth Olympic Games, the Singapore Formula 1 Grand Prix, the World Netball Championships, the International Table Tennis Federation Women’s World Cup, the Men’s Junior Hockey World Cup, the Singapore Open Golf Championship, and the Singapore Marathon. Examples of an ideal marriage of sporting and commercial interests include the Barclays Singapore Open, the HSBC Women’s Championship and the Standard Chartered Singapore Marathon. However, ambush marketing is quite ubiquitous during events of this magnitude.

*Practical approach to be adopted by organizers/sponsors in circumventing ambush marketing:*

- Official sponsors may contractually bind event organizers to only sell advertising space (including, but not limited to, ad space in the stadia and in the vicinity, as well as ad space on

other media) to the sponsors only.

- Event organizers should be made obliged (ie contractually bound) to curb ambush marketing. If not done, it would serve as a disincentive for any potential sponsor to invest a significant amount in sponsoring the events.
- Obligations should be imposed on the media to permit advertising and promotional activities only to be carried out by the official sponsors, while ensuring that these obligations are not tantamount to anti-competitive practices.
- Make sporting governing bodies stakeholders, thereby incentivising them to crackdown on ambush marketers.
- Ensure that the participants agree to be bound (at least morally, if it is not legally permissible), to take deliberate steps to prevent ambush marketing.
- Ensure that adequate protection for IP rights, including, but not limited to, trademark rights, are secured well within the dates of the events.

 SLOVAKIA 

### **LEGAL CONSIDERATIONS**

Slovak legislation does not regulate ambush marketing directly. However, this doesn't mean that such a marketing strategy is always compliant with laws.

In the absence of specific rules (apart from those relating to the use of Olympic and Paralympic symbols under the Slovak Act on Sports), general binding and self-regulatory rules regarding unfair competition, deceptive advertising and intellectual-property infringements apply to ambush marketing. Moreover, the general clause under the Act on Advertising, prohibiting advertising which conflicts with good morals, may be also applicable to ambush marketing.

### **REGULATORY CONSIDERATIONS**

Firstly, ambush marketing advertising could, potentially, be classified as an unfair commercial practise. According to the Slovak Commercial Code, "unfair competition" means conduct in the economic competition which conflicts with the accepted practises of competition and which may be detrimental to other competitors or customers. Misleading advertising and parasitic use of the goodwill of another competitor's enterprise, products or services are explicitly mentioned among the examples of unfair competition practices.

Ambush marketing is sometimes accompanied by copyright and trademark infringements. Advertising agencies hired by non-sponsors often come up with a creative reference to an event or even to an official sponsor of the event in their campaigns. However, if the intellectual property of third parties is used incorrectly, the intellectual property owners can also seek redress under the intellectual property protection laws.

While the above means of protection establish the right of the damaged party to seek redress through a civil action, a breach of the provisions of the Slovak Advertising Act (eg conflict with good morals) or the Slovak Act on Sports (eg illegal use of Olympic symbols) may lead to the imposition of a substantial fine by the relevant public authorities.

In addition to the binding rules, there are those set forth by the Slovak self-regulatory body—the Slovak Advertising Standards Council—in the Code of Ethics. Among other restrictions, the Code of Ethics states that advertising must not be contrary to good morals, competition rules and must not be liable to cause harm to another competitor or consumer.

### **COMMERCIAL CONSIDERATIONS**

In practice, it is difficult to eliminate ambush marketing activities. One of the best options to prevent ambush marketing, along with a well-thought-out marketing strategy and the protection of one's own intellectual property is contractual regulation. Desired protection can be achieved through contractual provisions aiming, eg, to:

## AMBUSH MARKETING - SLOVAKIA

- ensure that non-official sponsors do not get on screens during the TV broadcasts;
- ensure the control of advertising spaces in the stadiums and their surroundings;
- maintain strict control over event tickets (eg by prohibiting the use of tickets as promotional prizes or giveaways); and
- set up some kind of “unwanted dress code” for athletes, VIPs, or even for spectators.

 SOUTH AFRICA 

### LEGAL CONSIDERATIONS

There are two pieces of legislation prohibiting ambush marketing in South Africa.

#### **(a) Section 15A of the Merchandise Marks Act 17 of 1941**

This deals with the abuse of a trademark in relation to a “protected event”. By Section 15A(1) “the Minister may, after investigation and proper consultation and subject to such conditions as may be appropriate in the circumstances, by notice in the Gazette designate an event as a protected event...”.

There are certain requirements for an event to be designated a protected event and the protection is only for a limited period. For the period during which an event is protected, Section 15A(2) holds that: “no person may use a trade mark in relation to such an event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such an event”. This would include any visual or audible use of a trademark which in any way, directly or indirectly is intended to be brought into association with or to allude to any event. This is fairly widely worded and is intended to bring to book those parties who commit ambush marketing “by intrusion”. Contravention of this provision is a criminal offence.

By way of example, the 2010 FIFA Soccer World Cup, which was hosted in South Africa, was designated as a protected event under the Merchandise Marks Act. The effect of section 15A has been confirmed by the High Court in Pretoria. In October 2009, judgment was handed down against Metcash Trading Africa (Pty) Limited, a well-known South African retailer, which had been selling lollipops branded “2010 pops”. The packaging of the product bore images of soccer balls and partial depictions of the South African flag. Although there was no direct reference to the 2010 Soccer World Cup event, the court held that Metcash had intended its lollipops to be associated with the event and had also intended to derive special promotional benefit from the event. The court held that such conduct is unlawful and falls foul of section 15A. Metcash was accordingly restrained from competing unlawfully with FIFA and was also ordered to pay FIFA’s legal costs.

The Minister of Trade & Industry also designated the 2013 Africa Cup of Nations (“AFCON 2013”), which took place in South Africa, as a “protected event” in terms of the Merchandise Marks Act as mentioned above. However, surprisingly, there seem to have been no instances of major ambush marketing and no enforcement of the legislation seems to have been necessary. This could, at least in part, be due to the strict enforcement of the provisions three years prior.

In 2016, the Minister of Trade & Industry declared the 2016 CEO SleepOut a protected event in terms of the Merchandise Marks Act. This event was a fundraiser involving over 200 CEOs, sympathy sleepers and students sleeping on the streets in the middle of winter in an effort to raise funds for various designated charities and trust. This was the first non-sporting event to be granted this status in South Africa. Again, no enforcement of the ambush marketing provisions was necessary.

### **(b) Section 29(b)(iv) of the Consumer Protection Act of 2008**

This states that a producer, importer, distributor, retailer or service provider must not market any goods or services in a fraudulent/misleading/deceptive manner, including with respect to sponsorship of the event. This replaces the previous Section 9 of the Trade Practices Act which was similarly worded, and caters for ambush marketing by association.

### **REGULATORY CONSIDERATIONS**

Previously, the Advertising Standards Authority of South Africa (“ASA”) had a Sponsorship Code dealing with unacceptable sponsorship practices, including various forms of ambush marketing. Unfortunately, when the ASA went into liquidation and the Advertising Regulatory Board (“ARB”) was formed in its place in 2018, the ARB only took over administration of the Code of Advertising Practice and not the Sponsorship Code. As such, only ambush marketing which falls within one of the general provisions of the Code of Advertising Practice (eg, those dealing with misleading advertising and advertising which takes advantage of another’s advertising goodwill) will be able to be the subject of a complaint to the ARB.

If advertising is found to be in contravention of the Code of Advertising Practice, the ARB will order that such advertising be withdrawn within the deadlines set out in the Procedural Guide to the Code.

### **COMMERCIAL CONSIDERATIONS**

As mentioned above, the FIFA World Cup was hosted by South Africa in 2010. Traders and advertisers were cautioned to take into account FIFA’s published guidelines, at [http://www.fifa.com/mm/document/afmarketing/marketing/2010\\_fifa\\_public\\_guidelines\\_11135.pdf](http://www.fifa.com/mm/document/afmarketing/marketing/2010_fifa_public_guidelines_11135.pdf).

These guidelines essentially set out details about FIFA’s official marks and how they should and should not be used by traders and advertisers.

SPAIN

### LEGAL CONSIDERATIONS

Ambush marketing is a relatively new phenomenon in Spain. Spain has no specific provisions regarding ambush marketing. Currently, there is hardly any legislation in relation to this matter.

The fact that ambush marketing has not been contested in Spain could explain why there is no specific legislation on this practice. To the best of our knowledge, there are no plans to enact specific regulation. There is currently a trend, promoted by the organizers of global sporting competitions (ICO, FIFA, among others) to restrict these activities in order to protect the official sponsors (and thus obtain greater income from holding the event). Indeed, such new regulations have been adopted in other countries upon the request of the IOC via their contracts signed with the cities hosting the Olympic games (ie Sidney, London etc).

Nonetheless, the current Spanish legal order provides a body of legislation which could be used against ambush marketing and eventually preventing these types of practices from happening, such as:

- (a) Trademark Act;
- (b) Intellectual Property Act;
- (c) General Advertising Act;
- (d) Unfair Competition Act; and
- (e) Competition Act.

Most ambush marketing campaigns subtly evade infringement of the existing laws, so usually do not violate registered or protected trademarks, copyrights, unfair competition or advertising regulations, since they do not promote false qualities, nor do they make erroneous or untrue promises to the consumer. In such cases, although this is an aggressive marketing practice, described as parasitic, there is no possibility of prohibiting or punishing ambush marketing, as it is not, in principle, prohibited under Spanish law.

### REGULATORY CONSIDERATIONS

Whist there is no specific legislation on the matter, there is, however, a resolution of a self-regulatory private body called "Autocontrol de la Publicidad", issued in 1998, in which charges of ambush marketing were made, although eventually rejected. In this case, the jury had to deal with a complaint filed by the company ISL Marketing AG against Burger King, in the context of the 1998 Football World Cup in France. The complainant claimed that the issuing of vouchers by Burger King as a prize for some customers to attend a match of the World Cup amounted to an unfair way to benefit from a third party's reputation, as Burger King was trying to associate its business with the World Cup without being one of the sponsors. The jury ruled that since no distinguishing sign or registered trademark had been used by Burger King, but just a mere generic reference to the World Cup of France 1998, Burger King had taken no benefit from the World Cup's reputation. In addition, the jury found that there was no exclusive right

over the expression “World Cup of France 1998”. This Resolution shows that, as long as there is no reproduction of a third party’s property sign, logo, expression or trademark, the unfair nature of practices such as those implemented by Burger King is very difficult to prove in court.

More recently, ambush marketing practices were the subject of a contractual dispute during the World Basketball Championship of 2014. The regional government of Madrid entered into an advertising agreement to name one of the stadiums “Barclaycard Center”. The organizer of the event considered this private agreement to be ambush marketing, and as a violation of the rules regulating the use of that stadium during the Championship, because Barclays was not an official sponsor, and the rules prohibited any ambush marketing. However, the Administrative Court of Madrid rejected the claim.

### **COMMERCIAL CONSIDERATIONS**

In our opinion, it is therefore quite difficult to totally prevent ambush marketing in Spain. Possible ways to limit the possibilities of ambush marketing are:

- Reserving advertising spaces in the surroundings, especially at the entries of the event exclusively for the sponsor.
- All documents or publicity material in relation to the event should state the exclusive sponsors.
- Reacting to any ambush marketing campaign by taking legal action or by informing the public.
- Provisions in the Terms & Conditions that apply to tickets sales for the sport event prohibiting ambush marketing activities.

In general, a good configuration of sponsorship contracts will significantly reduce the chances of success of this type of practices. The inclusion of clauses by which the organizers commit themselves to pursue and prevent ambush marketing practices, negotiating which behaviors will be considered as ambush marketing, which subjects will assume the initiative in the pursuit of them, as well as who will be in charge of the litigation costs is paramount.

SWEDEN

### LEGAL CONSIDERATIONS

There is no specific legislation regulating ambush marketing in Sweden as such, and therefore event organizers and their official sponsors feeling aggrieved by ambush marketing conducted by third parties must seek redress via claims of trademark infringement, copyright infringement or claims of unfair marketing practices, such as passing off. Even though such claims offer the possibility of interim relief, none of them is particularly well suited for tackling ambush marketing. As a consequence, it is preferable to try and mitigate risks by contractual and practical means (see further below).

### REGULATORY CONSIDERATIONS

The Swedish Marketing Practices Act ("MPA") requires that marketing is in accordance with good marketing practice and that marketing is also fair towards consumers and traders and is not misleading. Furthermore, advertisers are required to provide all material information surrounding an offer or promotion and there are specific provisions on comparative advertising. The Swedish Consumer Ombudsman, competitors and certain consumer groups can bring enforcement proceedings under the MPA when one of these requirements is violated. In case of trademark and/or copyright infringements, they can bring enforcement proceedings based on the Swedish Trademarks Act ("TA") and Copyright Act ("CA") respectively.

One fairly recent example on the topic of ambush marketing is the trademark infringement case *MalmöKlassikern v En Svensk Klassiker*. In 2014, a local sporting event was established in the city of Malmö. The event was named, and included the sign "MalmöKlassikern". MalmöKlassikern comprised of the separate sporting events MalmöMilen (running), MalmöSimmet (swimming) and Malmö Velo Classic (bicycling). A well-established national sporting event dating back to 1972 named "En Svensk Klassiker", comprising of Vasaloppet, Öppet Spår or Engelbreksloppet (skiing), Vätternrundan (bicycling), Vansbrosimmet (swimming) and Lidingöloppet (cross country running), sued the company behind "MalmöKlassikern" for trademark infringement. The District Court found the likelihood of confusion amongst the relevant classes of persons as scant and ruled in favour of the defendant. Even though both signs included the word "Klassiker", it was likely that a person with an interest in this field would be able to tell the sporting events apart. Further, the figurative components attached to each, and one of the signs, were dissimilar. In 2015, the case was appealed to the Court of Appeal, which confirmed the ruling of the District Court.

One example of an ambush marketing situation where a remedy was not available involved the car manufacturers, Fiat and Volkswagen. Somehow a Fiat employee became aware that Google was out collecting pictures in the area south of Stockholm for use in Google Street View. The employee, driving a red Fiat 500, followed the street view vehicle until it reached the Swedish Headquarters of Volkswagen, and parked right in front of the German car manufacturer's main entrance just in time for the Google vehicle passing by. As a consequence, the red Fiat appeared in front of the Volkswagen HQ

building on Google Map street view results for some time.

### COMMERCIAL CONSIDERATIONS

- Event functionaries should be informed about ambush marketing and be made aware of the official sponsors of the event so that they can identify and act upon ambush marketing attempts.
- The official sponsors should be aware that the price for being an official sponsor may comprise of more than just the fee for becoming an official sponsor. Official sponsors may also need to buy each and every available advertising space in the vicinity in order to diminish the risk of ambush marketing.
- Sponsors should ensure that event organizers are contractually bound to take action against ambush marketers within a set period of time after such activity is brought to their attention. In order for such actions to be of practical value they may need to be coordinated with the relevant authorities. For instance, during the 2006 European Athletics Championship, held in Gothenburg, Sweden, the Office for City Planning cooperated with the Swedish Enforcement Authority in order to create new methods of how to prevent ambush marketing. For example, a special task force was created with the responsibility of removing advertising strips with content constituting ambush marketing.
- Media organizations should be requested not to allow ambush marketing and to restrict advertising in broadcasts to official sponsors only.
- Event organizers should consider imposing obligations on media organizations to restrict advertising and promotion during broadcasts/webcasts to official sponsors only.
- Event organizers may wish to buy up all the billboard and other advertising space in the vicinity of the event and then resell to official sponsors only. An official sponsor should consider contractually binding the event organizers to do so.
- Event organizers and sponsors may wish to consider mounting official sponsor awareness campaigns so that the public know which are the official sponsors of the event.
- The ticket terms and conditions should expressly state that tickets are non-transferable and cannot be used for advertising, sales promotion or any other commercial purposes without the prior written approval of the event organizer.

SWITZERLAND

### LEGAL CONSIDERATIONS

Swiss law does not generally prohibit “ambush marketing”, whereby a company or organization seeks to associate itself or a brand with a sporting (or other) event through marketing activities without entering into a sponsorship or partnership agreement. Event organizers, participants, official sponsors and other contractual partners (collectively the “Rights Holders”) may rely on Swiss copyright, trademark, and unfair competition laws to prevent ambush marketing activities. Rights Holders may further derive rights and remedies from personality rights, or rights resulting from company name or domain name protection, or even from contractual arrangements.

The Swiss Copyright Act protects works that are literary or artistic intellectual creations with an individual character. Hence, based on copyright, the Rights Holders may prohibit the illicit use of logos, mascots, official event songs and film recordings. In addition, public broadcasting of a televised sporting event (so-called “public viewing” or “screening”) generally requires a copyright license under the collective rights management. By contrast, words, pictures, or a combination of words and pictures may be eligible for trademark protection if they meet the criteria of sufficient distinctiveness. A valid trademark confers on the owner the right to prohibit third parties from using identical or similar signs for good and services, where such similar signs create a likelihood of confusion. Competitors, however, can use the trademarks of third parties solely for information purposes unless they have obtained a license. As in other countries, copyright and trademark protection will rarely serve as means to stop all types of ambush marketing. Free riders are aware of the obvious legal traps and therefore often do not directly copy the official logos of the Rights Holders. Even where free riders use the registered word mark of the event or other trademarks or the business names of the Right Holder, they typically do not use the Right Holders' trademarks as a source of identifier for their own products or services. Instead, ambush marketers use other and sometimes very subtle means to create – in the minds of the consumers – an association with the event.

In practise, event organizers rely on the Unfair Competition Act (“UCA”) to combat subtle ambush marketing activities. The UCA does not in itself address ambush marketing or make any reference to sporting events. However, the UCA deems any incorrect, misleading or deceptive advertising statements or promotional campaigns to be unfair. Marketing activities that may create a likelihood of confusion with a competitor, or a competitor's goods or services are also deemed unfair. Furthermore, statements by which the ambush marketer creates the false impression of an existing business relationship (eg sponsorship, partnership or a supply relationship) with the event organizer or the winner of a game are considered unfair competition practise under the UCA.

These statements may also be considered a violation of personality rights under the Swiss Civil Code (“SCC”), which protects a person's privacy, including a person's professional and social reputation. Anything that prunes those rights is considered unlawful under the SCC if not justified by public or

private interest. In this regard, athletes must tolerate a higher degree of invasion on their privacy insofar as, by virtue of their participation in public matters, they are considered public figures (as opposed to private persons). Hence, in each individual case, the relevance of the story (public interest) and the intensity of the invasion of privacy will have to be balanced when investigating an athlete subject to a story or when disclosing an athlete's identity in connection with a story.

Relevant remedies offered by the UCA, in conjunction with the Swiss Civil Procedure Code, are injunctions enjoining ambush marketers from the unfair or deceptive trade practice or removing infringing material. Other available remedies are damages (for loss of profit and unjust enrichment) and criminal sanctions (fines, imprisonment, impoundment and dissolution). However, these other remedies are of little help where fast protection is warranted.

Company name law protects the right of publicity, which is part of the right of personality of individuals. Thus, company name law may also be invoked in the event that the ambush marketer is making use of a registered company name or a name that is similar to the names of the individuals that represent the event. Additionally, domain registration and the registration of the name of the event (including confusingly similar names) on all major social media platforms offer a de facto protection against colliding internet and social media presences of third parties.

### **REGULATORY CONSIDERATIONS**

On an alternative route, the Swiss Commission for Fairness in Advertising ("SCF"), a self-regulatory body, hears complaints from third parties alleging that an advertisement or promotional campaign has infringed the SCF's principles of fairness in commercial communication. However, the SCF issues declaratory decisions only.

### **COMMERCIAL CONSIDERATIONS**

Contractual arrangements tend to be more efficient in restricting ambush marketing. Event organizers may buy up all advertising space in and around the venue, as well as in the media of its partners, or require that lessors of venues and media partners do not accept advertisements or promotions by the official sponsors' competitors. These arrangements, however, only have a direct legal effect on the contractual partners. In addition, event organizers should seek to bind potential ambush marketers contractually. For instance, event organizers may make an offer of event tickets or meet-and-greets with artists or athletes subject to adherence by the ambush marketer to the event organizer's marketing restrictions. Sometimes, ambush marketing activities originate from official partners of an event, eg if a partner is entitled to associate itself with the event as official supplier of beverages, but leverages the event for other products, eg ice cream. Thus, exclusivity clauses in partnership agreements have to be drafted very carefully. Swiss contract law offers the remedy of specific performance. Also, the threat of liquidated damages may effectively secure that partners adhere to the

## AMBUSH MARKETING - SWITZERLAND

limitations on marketing that their respective agreement with the event organizer provides.

TURKEY

### LEGAL CONSIDERATIONS

In Turkey, there is no specific law on ambush marketing, but provisions regarding ambush marketing can be found within several basic codes in Turkey, namely the Turkish Commercial Code and the Consumer Protection Law.

Under these laws, three conditions should be met in order that ambush marketing is deemed illegal:

- a relationship should exist between the parasite marketer and the organization for which he is not a sponsor;
- this relationship should be unfair or work in such a way as to take unfair benefit from the other party's name, product, reputation etc. or misleading; and
- there should be the possibility of damage to the official sponsor.

A parasite marketer will face legal sanctions under the unfair competition rules set out in the Turkish Commercial Code. Turkish advertisement legislations, in this respect, especially the Consumer Protection Law proscribes deceptive and misleading advertisements; consequently, parasite marketers are likely to be exposed to the Consumer Protection Law's sanctions too.

#### **(a) Unfair Competition Regulations**

Whilst parasite marketing always infringes unfair competition rules, ambush marketing is generally a grey area since it can not be deemed illegal in every situation. Parasite marketing usually arises from advertisements and consequently brings about unfair competition, according to the Turkish Commercial Code. Once unfair competition has been determined, a sponsor becomes entitled to require the abrogation of the wrongful acts and compensation for the damages caused.

#### **(b) Advertisement Regulations**

Ambush marketing may be evaluated as misleading the consumer, as it implies a relation with an organization where there is none. As such an act is unlawful under the Turkish Olympic Games Act, it also violates the advertising regulations, as they prescribe that all advertisements must be in conformity with the laws.

In addition to this it may be alleged that acts of ambush marketing infringe the relevant provisions of advertisement regulations in Turkey, namely the Consumer Protection Law and its implementing Regulation on Commercial Advertisement and Unfair Commercial Practices. If a commercial practice does not comply with the requirement of professional care, and significantly damages or is highly likely to damage the economic course of conduct of the ordinary consumer or its target group, it will be deemed to be unfair. The implementing Regulation on Commercial Advertisement and Unfair Commercial Practices lists non-exhaustive examples of unfair commercial practices. Commercial practices that are misleading with regard to a competitor's goods, services, trademarks or other distinctive signs are considered likely to significantly distort the economic behaviour of the average

consumer and are therefore considered as unfair commercial practices. In addition, it is forbidden to take unfair advantage of a person's and/or business entity's name, trade name, intellectual and industrial property rights or reputation acquired from an advertising campaign, as this is considered to be an illegal act aiming to gain unfair benefits from another's commercial reputation.

Thus aggressive and misleading practices will be deemed as unfair commercial practice and will be subject to sanctions as an unfair commercial practice.

### **(c) Intellectual Property Regulations**

Provisions regarding the trademark law may be taken into consideration in order to prevent ambush marketing activities. Where a non-sponsor enterprise uses the sponsor's or sponsored organization's logos, trademarks without any permission it may be evaluated as trademark infringement under the IP Code. However, trademark law protection may not be sufficient in every case, since the sponsor's trademarks are not directly used in ambush marketing strategy, rather, a connection is generally established between the organization and the non-sponsor's trademarks by making reference to them.

With regard to Olympic symbols, however, the Turkish Olympic Games Act requires permission for use of Olympics' name, logo and trademarks in any commercial communication.

## **REGULATORY CONSIDERATIONS**

The Advertisement Board, established under the Turkish Ministry of Customs and Trade, is the main regulatory body to control ads in Turkey. Its duties include determining the rules and policies to which advertisements must adhere and prohibiting and/or imposing a monetary fine on advertisements which are contrary to the law. The Board also takes into consideration globally accepted rules related to advertising. The Board's duties are not restricted to reviewing any form of media, and therefore all forms of advertisements are subject to review. Advertisement Board decisions are legally binding.

The sole self-regulatory body in Turkey is the Advertising Self-Regulatory Board ("ROK"), which was founded by advertisers, advertising agencies and the media members. Decisions or statements of the ROK are not legally binding, and there is no obligation on advertisers to comply with its decisions. However, whilst ROK's decisions are only ethically binding, these decisions are taken into serious consideration. Since they are announced to the public, non-compliance with ROK decisions directly affects the credibility and reputation of the advertiser within the society and the relevant sector.

The ICC International Code of Advertising Practice ("ICC") standards do not have direct enforceability; ROK has adopted them in its Principles of Self-Regulation and these principles were enacted in parallel with the ICC standards. The key principles followed by ROK are decency, honesty, and truthfulness. The ICC standards are considered by ROK in its evaluation of ads when giving advisory opinions. In terms of ambush marketing, Chapter B, Article B4 of the ICC Standards concerning ambushing of sponsored events and the remaining relevant rules on fair business should be respected.

### COMMERCIAL CONSIDERATIONS

**Contractual Provisions:** Sponsorship agreements facilitate sponsors to reach a target audience and support sponsored companies to meet expenses. However, in most cases, ambush marketers not only preclude the sponsor's connection in patches but also in some cases, they are instead perceived as sponsor. Hence contractual provisions seem to be vital in protecting sponsors before any competitor action taken. For instance, the vicinity in which the event is to be held can be bowdlerized from the competitor's advertising campaign.

**License Agreement Provisions:** Intangible rights (ie the rights over the trademarks, names, even slogans of the organization) may be transferred to the sponsor for the fulfilment of the promoting performance arising from the sponsorship agreement through a license agreement. Accordingly, the sponsor, by relying on such license agreement would have the ability to impede ambush marketer against unfair use of such intangible rights arising from the organization.

We can give three outstanding examples observed in Turkey which are advertisements in the way of ambush marketing:

- (a) The photo below shows a very expensive outdoor advertisement area in Istanbul, displaying advertisements for SONY and SAMSUNG. This advertising space is located at a cross-roads where most of the business tower blocks are located, and is a crowded business area. An authorized OPEL dealer has placed its cars, as part of its advertising, right in front of this outdoor advertisement area. This can be considered as an example of ambush marketing, since no other billboards existed in this place.



- (b) In the next image, the billboard next to the branch of Garanti Bank, a major bank in Turkey, is displaying an ad for another leading bank, Yapı Kredi Bank, with the slogan “Automatic Turkish Money”.



- (c) Mavi is a very famous brand for jeans in Turkey and is also well known globally. Its branding has a blue background, as “mavi” means “blue” in Turkish. Next to the Mavi Jeans store, another clothing shop has opened, with the name “bordo”, which means “claret red”. It has not only used a color as its name, but has also used that color as the background for its signage—a clear case of ambush marketing. As “mavi” means “blue”, the other store chose to use a brand which is the name of a color like mavi, and opened its store just next to the Mavi Jeans’s store. The competitor used the claret red background in the signboard just like Mavi Jeans uses blue background in its signboard.



UKRAINE

### LEGAL CONSIDERATIONS

Ukraine does not have an acting law addressing the issue of ambush marketing as a specific concept.

No specific regulation was put in place to protect the official sponsors or to restrict advertising in the cities where the tournament took place before Ukraine was selected as host country for the 2012 UEFA European Football Championship. In 2009, the Law of Ukraine “On organization and staging of finals of the 2012 European Football Championship in Ukraine” was adopted. This law provided protection for UEFA’s intellectual property rights and prohibited unauthorized marketing. However, this law expired in 2012 once the tournament was over.

A similar approach was taken to ensure the protection of UEFA’s intellectual property rights during the final matches of the UEFA Champions League in 2018. The Law of Ukraine “On ensuring the protection of the UEFA intellectual property rights during the holding of the final matches of the UEFA Champions League and the UEFA Champions League among women of the 2017/2018 season” was adopted. The aim of the Law was to ensure the protection of UEFA’s intellectual property rights during the tournament. Moreover, it introduced penalties for the selling by an unauthorized person of tickets for the final matches of the UEFA Champions League. Again, the law expired in 2018 once the tournaments were over.

### REGULATORY CONSIDERATIONS

Ukrainian laws do not contain any specific provisions regarding ambush marketing.

Advertising and promotions in Ukraine are regulated under the Laws of Ukraine “On Advertising” and “On Protection Against Unfair Competition”, which prohibit misleading and false advertisements (including promo campaigns):

- The Law of Ukraine “On Advertising” establishes that all advertising must be impartial, objective and truthful, and avoid any confusion or exaggeration that affects the good faith of consumers.
- The Law of Ukraine “On Protection Against Unfair Competition” establishes that unfair competition is prohibited in Ukraine. Unfair competition is deemed to be any competitive act that contradicts trade and other good-faith customs in business. The Law considers unfair market practices to include (but not be limited to):
  - unauthorized use of a commercial name, trademark, advertisement materials, and other marks that belong to another business entity;
  - attaining unlawful advantages in competition;
  - spreading misleading information, etc.

Such practises will result in liability for business entities who engage in them.

Ukrainian legislation related to combating the unauthorized selling of souvenirs and gift items (so-called “pirate trade”) may also apply against ambushers.

### COMMERCIAL CONSIDERATIONS

Practical steps for event organizers and sponsors to prevent/limit ambush marketing include:

- Perform a preliminary analysis of the ambush-marketing opportunities and engage an anti-ambush-team (including lawyers) who can track the ambush marketing before and during the event;
- Engage anti-ambush lawyers for drafting instructions for personnel as well as drafting templates for documents to be immediately used against ambushers;
- Prevent third parties from using tickets as prizes in competitions run on any media, the Internet and/or as a part of third parties’ promo campaigns;
- Protect their own intellectual property rights (logo, name, year and other images of events) by proper and prior registration of trademarks, as well as respective domain names;
- Consider buying up all advertising space in the venue by the sponsor;
- Secure in advance the exclusive television rights for the event by the sponsor;
- Communicate in advance with the authorities who control the local outdoor advertising about potential unauthorized actions by ambushers;
- Predict potential actions and prepare special equipment against drones with advertising;
- Provide in the sponsorship agreement for an obligation on the event organizer to protect intellectual property rights and enforce them in case of infringement;
- Make provision at the time of entering into agreements for the lease of the venue (halls, arenas, stadiums for exclusive rights on placing advertising and selling branded goods;
- Monitor the entrances to the venue and instruct the security guards to look out for visitors carrying any advertising material and prevent them from taking this into the venue;
- Control the distribution of ambush marketing material within the venue;
- Monitor the exits from the venue as potential places for the distribution of unauthorized advertising materials or as locations for unauthorized points of sale of branded goods; and
- Pursue ambushers through “cease and desist” letters and lawsuits (seeking injunctive relief where applicable).

UNITED ARAB EMIRATES

### LEGAL CONSIDERATIONS

In the UAE, there is currently no specific legislation that addresses “ambush marketing”. Whilst some countries may be able to rely on their trade practices or competition laws, these will not be as helpful in the UAE. There are no “look and feel” rights associated with an event, and no laws that say that a company cannot act in a way that compromises the contractual rights of a third party. Because of that, it is possible that the event organizer and event sponsor may find that, legally, they have few options in law or in a courtroom.

### REGULATORY CONSIDERATIONS

In the absence of specific laws, event organizers and sponsors must consider which laws may be of assistance.

The Chairman of the Board of the National Media Council (“NMC”) passed Resolution No (26) of 2017 on Media Content. Its terms require, *inter alia*, that advertisers “refrain from infringing upon the rights of organizations and individuals directly or indirectly; and respect the intellectual property rights”.

In addition, given the potential for consumer confusion, the Resolution requires companies to:

- comply with codes of conduct and standards of honesty, including compliance with the rules governing business, especially with regard to consumer protection and fair competition controls, prohibition of commercial fraud and illegal monopoly; and
- avoid publishing advertisements that contain false, malicious, and misleading information.

For action to be taken under the Resolution, the NMC must be notified. The NMC has power to penalise the parties concerned as they deem appropriate (usually a fine of up to AED 5,000 (approx US \$1,360) and may also report the matter to other agencies.

Whilst this is not going to be helpful in all cases, certain ambush marketing strategies could be construed as misleading or dishonest to consumers and so may also impinge on the protections afforded to the general public. Article (27) of the Executive Regulation to the Federal Law No 24 of 2006 in respect of Protection of Consumers notes that “no person shall be permitted to advertise in any medium any goods or service in such manner leading to deceiving or confusing consumers”. However, proceeding with a matter under these Regulations would have to be considered carefully, with an analysis undertaken in each case of the extent of the deceit and the scope of damage that was effected on consumers. This will not always be an easy analysis.

### COMMERCIAL CONSIDERATIONS

- Given that the UAE has a civil jurisdiction, any matters contained within a contract will be considered by a court if they are breached by a party.

## AMBUSH MARKETING - UNITED ARAB EMIRATES

- As with any jurisdiction, it is important to plan outcomes and develop action plans to address any contractual breaches well in advance.
- In addition, it may be helpful to implement trademark protection for event branding in order to augment the contractual position, and ensure trademark and copyright notices are placed on all official merchandise and signage.

UNITED KINGDOM

### LEGAL CONSIDERATIONS

There is currently no specific legislation in the United Kingdom which outlaws ambush marketing *per se*, although specific legislation has been brought into force to prevent unauthorised commercial use of Olympic and Paralympic marks and terminology via the Olympic Symbol (Protection) Act 1995. Legislation has also been introduced to prevent ambush marketing for specific events. Most recently, the Birmingham Commonwealth Games Act 2020 has been passed, introducing protections ahead of the 2022 Birmingham Commonwealth Games. This legislation closely mirrors previous anti-ambush marketing laws established for the 2012 London Olympic Games (The London Olympic Games and Paralympic Games Act 2006) and for the Glasgow 2014 Commonwealth Games (The Glasgow Commonwealth Games Act 2008).

Provisions in these special event-specific laws address unauthorized commercial associations with the event and unauthorized advertising in and in the vicinity of venues (regardless of the content of the advert). These laws have strong deterrent effect. The courts had no cases come before them in respect of the London Olympic Association Right created by the 2006 Act, and we are not aware of any cases being brought by the Glasgow 2014 organizing committee in respect of its rights under the 2008 Act. Both the 2006 and 2008 Act have since expired, and to our knowledge no cases have yet been pursued under the 2020 Birmingham Commonwealth Games Act.

Interestingly, the position for the UEFA Euros (due to take place in 2020 across a number of European cities, including in England and Scotland, but postponed to 2021 as a result of the Covid-19 crisis), has resulted in an inconsistent approach in the UK. Scotland has introduced legislation (the UEFA European Championship (Scotland) Act 2020) to prevent unauthorized advertising in the vicinity of Hamden Park in Glasgow (the venue hosting matches), but not an “association” right, as has previously been introduced for the Olympic, Paralympic and Commonwealth Games. On the other hand, England (whose Wembley Stadium is due to host the final of the Euros) has not introduced any special legislation in respect of the event.

Event organizers that do not benefit from bespoke legislation have to, where they feel aggrieved by ambush marketing, seek redress through the more traditional forms of intellectual property protection, such as trademark infringement, passing off or copyright infringement. Although each case will turn on its own particular facts, these are the main ways in which event organizers seek to protect themselves from ambushers in the UK.

### REGULATORY CONSIDERATIONS

The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (“CAP Code”) requires, among other things, that all adverts are legal, decent, honest and truthful. The equivalent Code for broadcast advertising, the BCAP Code, has similar provisions requiring that advertisements are not

misleading.

Despite their limitations as a self-regulatory system with no legal sanctions, the CAP and BCAP Codes are backed up by the Consumer Protection from Unfair Trading Regulations 2008, which can apply to advertisements that mislead. The enforcement body, Trading Standards, can also bring enforcement proceedings where an advertisement is misleading within the terms of these Regulations.

### **COMMERCIAL CONSIDERATIONS**

Practical steps for event organizers/sponsors to consider to prevent/limit ambush marketing include:

- Event organizers should consider imposing obligations on media organizations to restrict advertising and promotion during broadcasts/streamed content (including virtual advertising) to official sponsors only.
- Rules relating to the advertising activities of participants during and in connection with the event should be considered and implemented. However, such rules will need to be balanced against the rights of participants, and their effectiveness will depend on the commercial model adopted for the event. An example of this type of rule is Rule 40 of the Olympic Charter. In 2020, Rule 40 caused significant upset amongst athletes in the UK, despite the IOC relaxing the rule in advance of the Tokyo Games and giving National Olympic Committees the ability to give athletes greater freedom to promote their personal sponsors. British athletes threatened legal action against the British Olympic Association (“BOA”), arguing that its position on the rule was too restrictive. The BOA subsequently made further concessions. These, and the Covid-19 crisis which diverted attention away from Rule 40, seem to have led to any formal legal action being dropped.
- Event organizers may wish to buy up, or seek options over all the billboard and other advertising space in the vicinity of the event and then offer these to official sponsors only. Indeed, sponsors may wish to contractually oblige event organizers to do so.
- Sponsors should ensure that event organizers are contractually bound to liaise with sponsor where there is an ambush in their product category and, where appropriate, to take action against ambush marketers.
- Event organizers and sponsors may wish to consider mounting official sponsor awareness campaigns so that the public know who the official sponsors are. Ensuring businesses and their advisors (lawyers, advertising agencies etc) understand the legal rights in place, and the reason why it is necessary to prevent ambush marketing, is also likely to be important.
- The ticket terms and conditions should expressly state that tickets are non-transferable and cannot be used for advertising, sales promotion or any other commercial purposes without the prior written approval of the event organizer. They should also prevent unauthorized advertising within the stadia, and relevant event staff should be briefed to be alert to, and

trained on how to deal with, in-stadia ambush.

- The organizers should consider the need to control the ability of businesses which supply products and services to the event (but who are not sponsors) to promote their involvement. Contractual restrictions may be appropriate, but should be balanced against the potential negative PR of being seen to “gag” local businesses.

### RECENT ENFORCEMENTS

As mentioned above, no action was taken through the courts in respect of the London 2012 Olympic Games. Several interesting cases gained some press coverage but were resolved without formal legal action:

- Beats by Dre provided free headphones *en masse* to many athletes competing at the Games. There was no obligation on the athletes to use the headphones (they did not have endorsement deals with Beats by Dre) but, inevitably, many were seen worn by athletes at the events. As the headphones were in the colours of national flags, they stood out, giving the brand significant exposure;
- Paddy Power (the betting company) ran an advertisement on billboards and a newspaper in London stating "Official sponsor of the largest athletics event in London this year! There you go, we said it. (Ahem, London France that is)" They had sponsored the inaugural egg and spoon race in a town also called London, but in France.
- Paddy Power also erected a giant sign bearing their name in a field behind the first tee at the 2010 Ryder Cup in Wales. An injunction was successfully sought to have this removed on the basis it was in breach of planning laws.

More recently, few if any ambush marketing activities in the UK have hit the headlines. This may be because major advertisers have become more sophisticated in understanding the scope of the legal controls in place and manage their way around this. There have certainly been major advertising campaigns framed around major tournaments over the past few years, but many have simply been emotive campaigns, often using reference to the sport, featuring athletes from the relevant competition, and/or the names or images of relevant countries or cities. Beats by Dre have, for example, run campaigns featuring prominent players in the run up to recent football and rugby World Cups. However, these campaigns have been executed in a manner that has not, in the absence of a general association right, fallen foul of the law.

UNITED STATES OF AMERICA

### LEGAL AND REGULATORY CONSIDERATIONS

There is no overarching legislation against “ambush marketing” as a whole, but rights holders (leagues, teams, governing bodies, and individual talent) (“Properties”) can use a patchwork of federal and state laws to combat ambush marketing.

First, Properties can bring a trademark infringement claim under the Lanham Trademark Act for the unauthorized use of a Property’s registered trademarks; however, such a claim is unlikely to be available as ambush marketers are often savvy enough not to use the official trademarks or other intellectual property rights of a Property.

Properties can also bring unfair competition claims for false association, false authorization, or false advertising under a different section of the Lanham Trademark Act (all claims under the Lanham Trademark Act involve claims of confusing or misleading the public) and can further bring unfair competition claims or right of publicity claims under similar state laws.

Finally, in the case of unauthorized use of event tickets, Properties can bring a claim against ambush marketers for breach of contract.

The closest legislation the US has to an ambush marketing law is the Ted Stevens Olympic and Amateur Sports Act, which allows the US Olympic and Paralympic Committee (the “USOPC”) to enforce the Act’s protections against uses of certain Olympic trademarks without the need to prove a likelihood of confusion (which separates it from the powers of standard Properties), a critical element of trademark infringement; rather, it just needs to prove that a defendant used those specific Olympic marks for a commercial purpose without its authorization.

Although it is possible for Properties to bring claims (as shown above), there is a reluctance to take legal action against ambush marketers, for a number of reasons. Ambush marketers have increasingly launched more sophisticated campaigns that blur the lines between legal marketing activity and marketing that constitutes trademark infringement or false association. Because ambushers rarely use the actual trademarks of the Property, a pure trademark infringement claim is often unavailable, thus leaving the ambush campaign in a legal gray area. Also, many ambush campaigns last only for a short period of time, which makes the time and cost of litigation to prevent such a campaign prohibitive. Further, ambush marketers can take the simple step of including a disclaimer in their marketing campaigns, and, while not foolproof, there is some judicial support around the use of disclaimers as a valid defense. Because litigation can bring uncertain results, is very costly, and the ambush marketer may welcome the extra publicity that it receives, Properties are hesitant to sue over ambush marketing (although Properties will regularly send out cease and desist letters or otherwise “name and shame” the ambushers in the media).

Finally, recent changes to International Olympic Committee (“IOC”) Bylaw 40.3 (colloquially known as

## AMBUSH MARKETING – UNITED STATES OF AMERICA

“Rule 40”) are worth noting. The IOC relaxed its long-standing prohibition against Olympic participants’ use of their person, name, or picture for marketing purposes during a “blackout period” commencing a short period just before the Games through a short period after the Games (a prohibition that benefitted official Olympics sponsors). Now, Rule 40 reads permissively such that Olympic participants may allow the use of their person, name, and image for advertising purposes during the Games period – but only in accordance with guidance and principles set forth by each territory’s Olympic Committee. In the US, the USOPC will allow “personal sponsor marketing” in two forms:

- (a) generic marketing of the product, service, and brand (ie, no use of Olympic intellectual property or any direct or indirect references to Team USA) that includes one or more Olympic athletes, or
- (b) athlete-focused marketing reflecting a personal sponsor’s support of an athlete’s participation in the Olympic Games.

Although this certainly helps Olympic athletes obtain endorsements from non-Olympic sponsors, the USOPC’s Rule 40 guidance introduced the requirement of having such sponsors sign a “Personal Sponsor Commitment,” which specifically prohibits these athlete-sponsors from “ambush marketing”, and thereby creates a breach of contract action if such prohibition is violated.

### COMMERCIAL CONSIDERATIONS

(a) **Properties:** Because ambush marketing often lies in a legal grey area, there are preventative steps that a Property can take without resorting to litigation, including:

- **The purchase of all advertising space and media time:** In order to control the marketing messages near an event location, the Property can purchase all advertising space around and near the venues where the events will take place. The Property could then offer such advertising space to official sponsors, or at least not offer it to competing sponsors. Additionally, if the Property has control over advertising during the broadcast, it could require that no advertising competitive to that of its official sponsors be shown during the coverage of the event, or require that the broadcaster give a right of first refusal for the purchase of advertising time to the Property’s official sponsors. The Property could even purchase all of the broadcasting advertising space itself and offer it to its official sponsors.
- **Require event host locations to establish “clean zones”:** Properties should work with the governments of event host locations to establish a clean zone near the location of the event leading up to and during the time of the event, which can be enforced through either specific local ordinances establishing such clean zones or a combination of counterfeiting, vending/permit, or trespassing laws.
- **Maintain strict control over event ticketing:** By maintaining strict control over event tickets, Properties can prevent non-sponsors from using tickets as promotional prizes or

## AMBUSH MARKETING – UNITED STATES OF AMERICA

giveaways. Properties can do so by using ticket license language prohibiting such unauthorized uses.

- **Public relations activities:** Properties can create a public education campaign to emphasize the relationship between the sponsorship fees paid to the Property and how such fees benefit the event and the participating athletes.
- **Include a “no ambush” rider in media purchases:** With respect to the broadcast or other distribution platform on which the event is exhibited, the Property can require such platforms to prevent ambushing by requesting approval rights over all third-party advertisements that run during the exhibition, or by having the platforms incorporate specific prohibited terms or images in media purchase agreements for advertising time during the exhibition.

(b) **Sponsors:** In addition to having the Property protect against ambush marketing, the official sponsor itself can protect its exclusive rights from ambush campaigns. Such ways include:

- buying up assets outside of the sponsor's official rights to supplement the association between the sponsor and the Property,
- purchasing product or service category exclusivity from the broadcaster of the event, or
- securing endorsements from athletes related to the Property,

although all of these are expensive propositions.

Perhaps most importantly, sponsors should come up with creative marketing campaigns to out-market the potential ambushers. There may be no airtight way to prevent ambushing; so sponsors should leverage their official assets (such as marketing rights, rights to the Property's trademarks and logos, access to tickets and VIP events, etc) to maintain control of the sponsorship and maximize the value of their investment. With strong marketing activation and creativity, consumers should remember the sponsor's campaign and not that of an ambush marketer.

### RECENT ENFORCEMENTS

Although lawsuits targeting ambush marketing campaigns are risky given the legal gray area, there have nevertheless been a few circumstances where a Property successfully sued an “ambush marketer” over the wrongful taking of the Property's intellectual property or goodwill. Such successful cases have involved unofficial use of the Properties' actual trademarks or Properties' colors and other indicia in addition to similar-looking logos or marks. These include lawsuits brought by the NFL's Oakland Raiders against the Nation's hamburger chain (which, among other things, changed its hamburger logo to one with an eye patch similar to the Raiders' eye patch pirate logo) and by the NFL's Philadelphia Eagles against a radio station (which offered tickets to Eagles' games as part of contest prizes), in 2009

and 2011 respectively.

Additionally, NBA great, Michael Jordan, found success in lawsuits against two Chicago-area grocery stores for placing advertisements in a Sports Illustrated commemorative issue celebrating Jordan's induction into the Basketball Hall of Fame. These advertisements offered congratulations to Jordan, featured his name, his #23 jersey number from his playing career, and images of basketball shoes meant to resemble his branded "Air Jordans", and tied the congratulatory messaging into marketing slogans for the grocery stores. In one of those cases, Jordan was awarded \$8.9 million from a jury in 2015.

Finally, the National Collegiate Athletic Association ("NCAA"), the governing body for college athletics in the US and which operates the popular basketball championship tournament colloquially known as "March Madness", aggressively enforces its trademark rights and, in 2018, won a default judgment against a company that ran online sports-themed promotions and sweepstakes under the marks "April Madness" and "Final 3" (where the Court found the infringement to be willful and awarded attorneys' fees in the amount of \$220,998). The NCAA also regularly challenges trademark applications incorporating "Madness" for sports or contest related goods and services at the US Patent and Trademark Office.

URUGUAY

### **LEGAL AND REGULATORY CONSIDERATIONS**

Although ambush marketing is a sensitive and current subject in the advertising environment, there is no specific law or statute within Uruguay that specifically regulates it. Therefore, it is debatable whether ambush marketing is an illegal practice under Uruguayan law and each case must be analyzed on a case-by-case basis.

As a general principle, whatever is not prohibited is allowed. However, some ambush marketing campaigns could be questioned under principles of unfair enrichment, tort liability, unfair competition and related theories, particularly if the ambush campaign undermines the sponsorship value of the event.

As regards to case law, the only related case to ambush marketing refers to the Appeals Court's decision on the use of an Olympic athlete's name. A congratulatory sign was posted on a highway when Olympic cyclist Milton Wynants was arriving back to his hometown in Paysandú, after winning a silver medal in the Sydney Olympics. The sign congratulated the cyclist, but included the logo of the Bank. The Bank had not agreed with the athlete on the link of the athlete with the Bank. As a consequence, the Court came to the conclusion that there was a use of the athlete's publicity right without his authorization and for promotional purposes, hence, the Bank was obliged to pay a considerable amount of money to the athlete.

VENEZUELA

### LEGAL CONSIDERATIONS

The current legislation in Venezuela does not consider ambush marketing as sanctioned conduct; as a consequence there are no specific laws that regulate and define the limits and sanctions of these advertising activities.

According to Venezuelan legislation, this conduct can be repressed when it involves:

- an infringement to exclusive rights (ie endorsement or sponsorship agreements),
- Intellectual Property Rights infringement,
- unfair competition practice, or
- in specific circumstances, conduct that could deceive consumers or affect the marketplace.

However, it is important to highlight that none of these laws that regulate such matters have been updated in recent years.

An action for Intellectual Property Rights infringement would proceed in the case of the use of a third party's distinctive sign without authorization, which will constitute a trademark infringement under the Industrial Property Law. This situation will also be applicable in case of the unauthorized use of a work protected by copyright, or a product protected by Related Rights.

Another, and possibly more suitable, option, since ambushers are usually very careful in avoiding Intellectual Property infringements, is to attack the activity as an act of unfair competition, regulated by the Law for Promoting and Protecting Free Competition. This Law expressly forbids the development of any kind of commercial policies oriented to eliminate competitors through unfair competition. Specifically, this Law prohibits the promotion of products and services based on false declarations, as well as the product and/or services simulation.

The same considerations would apply in the event that the Consumer Protection Agency considers that the advertising of a non-sponsor of an event is misleading to consumers, to the extent that they are confused as to who are the real sponsor(s) of the activity. However, in this case the affected party must convince the public authorities of the damage to Venezuelan consumers, in order for them to take action in the "public interest", rather than to protect individual rights.

### REGULATORY CONSIDERATIONS

The National Advertisers Association ("ANDA")'s Ethical Code establishes a general prohibition against any advertising constituting an act of unfair competition by means of the attribution of certifications or qualities to products and services that they do not actually have. This Code specifically establishes that all advertising must respect Intellectual Property rights, and that disloyal imitation, that could lead consumers to be confused in respect of products and/or services, has to be avoided in all cases. Unfortunately, this Code and arbitration procedure is only applicable to company members of ANDA.

## COMMERCIAL CONSIDERATIONS

Some considerations for minimizing ambush marketing activities are:

- Carefully draft sponsorship agreements in order to assure the protection both of the sponsor and of the organizers of the event.
- The sponsor should try to cover all types of advertising media, in order to minimize the possibility for ambushers to take advantage of the event.
- Sponsors should work together in major campaigns to make it clear to consumers who the official sponsors are, bearing in mind that all matters related to consumer protection are considered to be of public interest, opening the door for more co-operation.

ZIMBABWE

### **LEGAL CONSIDERATIONS**

There is no specific law regarding the prevention or prohibition of ambush marketing in Zimbabwe. Despite this fact, however, aggrieved persons, such as sponsors and organizers of an event, may seek redress through use of laws related to intellectual property, including but not limited to, the Trademark, Industrial Designs, Copyright and Competition Acts. In addition to statutory law, there are common law remedies, particularly passing off.

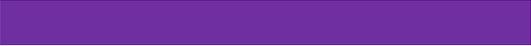
### **REGULATORY CONSIDERATIONS**

There are no specific regulations governing the problem of ambush marketing. However, the Advertising Standards Association of Zimbabwe (“ASAZIM”), a self-regulatory body, has a guiding document, the Code of Standards (“ASA Code”), which broadly requires that advertisements must be legal, decent, honest and truthful, and must conform to ASA Code. Moreover, Zimbabwe is a country of serious soccer and cricket fans, and the organizers of these events are often FIFA and Cricket Associations of Zimbabwe. Such organizations have the ability to promulgate rules through which they would be able to take preventative action and enforcement of rights.

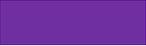
### **COMMERCIAL CONSIDERATIONS**

Since the concept of ambush marketing is somewhat new in Zimbabwe, it would behoove sponsors and event organizers to undertake the necessary steps prior to the event to protect their intellectual property through registration, alert the ASAZIM, and, in particular, work with the relevant sports associations to establish rules and regulations to address the potential problems and issues. Both organizers and sponsors need to consider provisions and clearly define obligations in the sponsorship agreement for protection of intellectual property rights and the steps to be taken in the event of ambush marketing.

At present there have been no cases related to ambush marketing in Zimbabwe.



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