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Supporter excesses and away tickets: Contractual implications

For some time, the German Bundesliga has increasingly been suffering from supporters who bring fireworks and cause riots in stadiums. The German Football Association ('DFB') usually sanctions those clubs whose supporters are responsible for such prohibited behaviour. The DFB statutes contain a system of strict liability of the clubs, irrespective of whether or not they are substantially responsible for the damage caused. Dr Tim Bagger von Grafenstein of Lentze Stopper and Paul Fischer of Martens Lawyers, provide detailed insight into the contractual situation for supporters purchasing away tickets and a club's ability to claim damages as a result of prohibited behaviour by supporters.

Introduction

At first glance, a judgment of the German Federal Court in 2016¹ generally allows clubs on which sanctions have been imposed for the excesses of their supporters to recover such damages from the individuals responsible. In this context, however, a differentiation in the terms of the contractual situation underlying the purchase of home and away tickets has to be made. The contractual situation of supporters purchasing their tickets from the home club is straightforward: Due to the purchase of the season ticket or a ticket for a specific match the contracting partner is the home club. Through buying the respective ticket - in the online shop or at a pre-sale point - the so-called spectator agreement is concluded². The delivery of the ticket constitutes part of the fulfilment of the spectator agreement. In addition to elements relating to the contract for works and services (i.e. the execution of the event) as well as to the rental agreement elements

(i.e. the provision of a seat or position with a view to the pitch), the spectator agreement also contains several elements of a purchase contract. Due to the duties arising from the spectator agreement the home club is entitled to claim damages from its supporters.

It is also worth taking a broader look at the contractual status of the parties involved in the purchase of away tickets by away supporters and to ask the question: Is there an opportunity to make ticketholders liable regarding any sanctions imposed on the away club because of damages caused by 'its' away supporters?

Away tickets: Procedure in practice

Away supporters basically obtain tickets for the away matches of their team in the same way as tickets for home matches. They either buy a ticket at the local ticket offices of their club, or via the website of their club by concluding the online pre-order process

in the same way as for a home ticket. Depending on the sales channel, the respective supporter receives their ticket directly or has it sent a few days later in the post. As a result of the issuance of the ticket, the fan is granted access to the stadium's away sector. This legal process covers the relationship between the home and away club, between the away club and the away supporter, and between the away supporter and the home club. The respective contracts are interpreted under the objective recipient horizon³. As we will see, based on the aforementioned judgment of the German Federal Court the contractual situation is crucial when it comes to the away club's recovery of damages suffered as a result of supporter excess.

Home club - Away club

The business relationship between the home and away club is usually determined by the statutes of the competent association. For example, in

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Section 3 of the directives for the rules of association of the German Bundesliga⁴ a detailed description of the procedure which binds home and away clubs can be found (ticket quotas, information requirements, ticket orders and deliveries, advance sales, and payment between clubs, etc.). According to this statutory agreement between the clubs of the German Bundesliga, the away club sells the tickets to its supporters on behalf of the home club but in its own name. At first glance, one could classify this scheme as a statutory agreement on a transaction on a commission basis.

In principle, the commissioner is the person purchasing or selling goods or securities on a commercial basis in their own name for the account of another legal person (the principal). However, in the context of the agreed legal relationship between the clubs - in addition to the missing possibility for the away club to deviate from the fixed prices of the tickets - there exists no commission agreement between the parties. It is to be assumed that the clubs consider the statutory regulation as a final and conclusive regulation of their legal relationship. Therefore, there is no room for any supplementary application of the regulations of the commission law.

As a result, the legal relationship between the home and away club is to be classified as a mandate. This ties in with the duty for the away club (the mandatary) to transmit the ticket purchase price to the home club (the mandator). The duty of the away club to provide information on the status of the business relationship is also covered by the typical contractual duties in a mandate.

Such contractual classification as mandate particularly takes the clubs' interests into account. On the one hand, for reasons of identification or other emotional grounds, the away club is interested in allowing its supporters to attend its away matches in order to receive as much fan support as possible. On the other hand, the home club pursues the economic interest of selling as many tickets as possible for its home matches; therefore it also has a significant economic interest in selling away tickets.

For each club, the two mentioned relationships of interest are the result of the usual division of a season into home and away matches: All clubs face each other once in the role of the away club and once in the role of the home club. The sale of tickets by the away club correlates with the clubs' interests in the best possible way: The away club reaches its supporters through the usual sales channels. The away ticket purchase process directly via 'their club' is familiar to supporters; they can use the contacts they are used to and do not have to get in touch with the opposing club. This avoids practical and emotional obstacles (e.g. ticket orders via the website of the 'foreign club' under new registration and data entry, or even visiting such club's supporter shops or club office). Moreover, the away supporter identifies strongly with their club, so the transaction of the ticket sale by the away club also contains a certain emotional component with regard to the away supporter. As a result, the relationship of the ticket sales to the away supporter by the away club has a positive effect both on the home club's economic return on the sale of away tickets and on the actual fan support of the away club.

Thus, the statutory agreement interpreted as a mandate relationship between the home and away club covers the existing interests of both the home and away club as best as possible.

Away supporter - Away club

The away supporter orders the ticket on the website of the away club or purchases it directly in its pre-sales offices. Subsequently, the ticket price is paid to the away club. The ticket purchase is completed at the latest with the ticket's delivery to the away supporter. In terms of fulfilment of the contract, the away supporter has to pay the price, the away club has to hand over and transfer the ticket to the away supporter who is granted permission to visit the away match. Thus, the away club and the away supporter are the contracting parties of the so-called ticket purchase contract, which in the present relationship is - in contrast to the above-described home match relationship⁵ - an independent 'auxiliary business.' With regard to ticket sales, the away club is

facing the away supporter as a so-called indirect representative, since it carries out the legal transaction of the ticket sale in its own name, but in a third party's interest and on a third party's account.

Thus, the rights and obligations arising from the detached purchase contractual element of the spectator's contract only exist in the external relationship between the away club and the away supporter. The agreement of a mandate in the internal relationship is common in terms of indirect representation.

This internal relationship is also followed by the authorisation of the away club to effect the performance of its contractual obligations, i.e. the handover and transfer of the ticket. This classification is justified, as the intervention of an indirect representative is usually motivated by their scope of access to the market participant due to a special position of trust. This also applies here since the above-described special commitment of the away supporter to their club must be considered. The interest of the away supporter is taken into account to the extent that they can refer to their club if the ticket is not delivered or if it has a defect (e.g. a damaged barcode), while the interest of the away club is respected due to the fact that it can include its General Terms and Conditions ('GTC') into the purchase contract and therefore take action against unauthorised resale of tickets by its supporters.

Away supporter - Home club

When presenting the ticket at the stadium entrance of the home club the away supporter is granted access to the stadium. A seat or position is provided in the away sector and the ticketholder has the opportunity to use the stadium infrastructure (sales stands, sanitary facilities, etc.).

The spectator contract is concluded between the away supporter and the home club. This follows from the objectively discernible interests as well as from the actual will of the parties:

- The away supporter primarily wants to experience the match from a seat or position with a view to the field of play. It is also in his/her interest that his/her



In the context of the conclusion of the spectator contract, the away club plays the role of an agent acting as a representative for the home club.

protected legal goods are not affected, which he/she may reasonably expect from his/her contractual partner, in particular including the obligation to provide safety of the premises for persons and vehicles. The away supporter (legitimately) requires his/her contract partner to properly fulfill the programme of duties outlined above. From a legal point of view, this is only possible for the organiser of the event. In the context of a football match, this is the home club.

- It would be extremely difficult for the away club to solve any problems related to the above-mentioned catalogue of duties (e.g. checking the safety in the foreign stadium, ensuring the functionality of the pitch, etc.).
- For the home club it is important that in the case of a breach of the obligation of proper behaviour by the away supporter (e.g. the obligation not to damage the facilities of the stadium, such as seat shells, fences, toilets, etc.) it has a contractual claim against the supporter.

In the context of the conclusion of the spectator contract, the away club plays the role of an agent acting as a representative for the home club. With regards to away tickets, this results in particular from the concrete circumstances of the situation. On the one hand, the interests described above and the actual will of the parties have to be taken into account and confirm this result. On the other hand, the away ticket allows the home club to be recognised as the issuer of the ticket and thus as the organiser of the league match as the ticket is usually provided with the trade marks (club logo), sponsors and stadium names of the home club.

This constellation is problematic for the home club insofar as it has to bring its GTC as well as its stadium regulations to the knowledge of the away supporter during the ticket ordering process. To that end, a concrete reference to the GTC of the away club, as well as a link to the GTC and the stadium regulations of the home club, have to be made when selling the away ticket. Otherwise, for instance,

the home club neither may refer to any liability reliefs agreed per the GTC nor may it claim that the away supporter has agreed by conclusion of the contract to a contractual penalty in the event of misconduct. For example, in the GTC as well as in the stadium regulations of most German Bundesliga clubs there exists a regulation which prohibits spectators from igniting fireworks in the stadium, and a contractual penalty is due in the event of a breach of this prohibition.

Implications of the German Federal Court's judgment on supporter excess

As mentioned, in 2016 the German Federal Court decided that a spectator who infringed their contractual obligation not to jeopardise the procedure of a football match was liable for the damages resulting thereof which also applied to sanctions imposed on the clubs by the DFB⁶. In this respect, it must be highlighted that the underlying facts of the case were based on the relationship of the ticket purchase for a home match by a home supporter. In this constellation, according to the German Federal Court, the home club, based on the infringement of the spectator agreement, may claim compensation from the responsible spectator for damages incurred by the home club as a consequence of the German Football Association's sanctions.

In view of the contractual relationship between away clubs and away supporters this finding may, however, not be directly transferred to their relationship. Indeed, on the one hand in practice away clubs also get sanctioned because of the behaviour of their supporters, on the other hand the spectator agreement is not just concluded between those two protagonists. Due to the lack of an existing spectator agreement between the away supporter and the away club, direct contractual claims do not apply for away clubs towards their away supporters. In addition, under German law liability of the away supporter according to the law of torts is either not given when there is a lack of intended and immoral damage committed by the violator (a prerequisite according to Section 826 of the German Civil Code) or, at least,

it is hard for the away club to prove. Therefore, for the relationship of damages suffered by the away club due to the behaviour of its supporters, the legal figure of so-called contracts with protective effect to the benefit of third parties is significant. From our point of view, the necessary prerequisites are⁷:

- Close contact of the away club to the contractual content/performance (i.e. organisation/realisation of the football match);
- Close contact of the away club to the contractual benefits of the creditor (i.e. the home club), resulting from balancing of the affected interests;
- Recognisability of the aforementioned points by the away supporter; and
- Need for the extension of the contractual protection on the affected away club according to the principles of good faith; in particular there does not exist any identical contractual claims in favour of the away club against the home club or any third party.

Therefore, although the German Federal Court's judgment is not directly applicable to the relationship between the away club and the away supporter, away clubs whose supporters cause sanctions to be imposed by the football association against the club, may recover such sanctions from the relevant supporters.

Conclusion

Pursuant to its statutes the DFB claims payments from clubs by way of strict liability of the clubs for the behaviour of their supporters. In accordance with the latest jurisprudence of the German Federal Court, the clubs, in turn, may recover such damages from the supporters who are responsible for the prohibited actions. However, this only applies for home clubs towards their home supporters. In terms of the relationship between away clubs and away supporters, the contractual situation is rather different:

- Between the home and the away club the settlement of the away ticket sales is based on a mandate. In this respect, the away club acts as the mandatary, the home club as the mandator.

Andrew Forrest to set up new Indo-Pacific Championship in collaboration with the ARU

- By purchasing away tickets the away supporter concludes two contracts: the ticket purchase contract with the away club and the spectator contract with the home club⁸.
- The ticket purchase contract is concluded between the away supporter and the away club. Payment and delivery of the tickets constitute the fulfilment of the contract.
- The spectator contract is concluded between the away supporter and the home club. In this context, the away club acts as an agent representing the home club. Such constellation challenges the home club insofar as it has to bring its GTC as well as its stadium regulations to the knowledge of the away supporter during the ticket ordering process.

Based on these findings, an away club cannot directly rely on the said judgment of the German Federal Court when demanding recovery for damages from the responsible away supporter. The away club, however, benefits from the legal figure of contracts with protective effect to the benefit of third parties and may, referring to this, hold themselves harmless against imposed sanctions as the result of prohibited behaviour by its supporters.

1. German Federal Court, VII ZR 14/16, NJW 2016, p. 3715; also see Hamama/Luft, World Sports Advocate, 3/2017 (15), p. 8 (10).
2. German Federal Court, VII ZR 14/16, NJW 2016, p. 3715.
3. German Federal Court, IX ZR 10/90, NJW 1990, p. 3206.
4. In German: Richtlinien zur Spielordnung des DFL e.V.
5. See Introduction.
6. German Federal Court, VII ZR 14/16, NJW 2016, p. 3715.
7. Also see Bagger/Kober, SpuRt 2015, p. 155 (156 f.).
8. It is not uncommon that one act of will constitutes several legally binding declarations which lead to several contracts. For example, travel agency clients also conclude two contracts, namely the agency contract with the travel agency and the travel contract with the tour operator. The same applies when booking event or adventure tickets via intermediary platforms.

Billionaire Andrew Forrest officially announced on 13 September 2017 his plans to set up a new Indo-Pacific Championship following dismissal of an appeal by Western Force against the Australian Rugby Union's ('ARU') move to axe the team from the Super Rugby competition. Despite the reactionary nature of the proposed new Championship, which will begin on 13 August 2018 and will feature six teams despite interest from 20 countries, Forrest confirmed that "We will be, from here, investing, organising and energising the game of rugby in collaboration with the ARU, in collaboration with Super Rugby and in collaboration with the Wallabies."

"The proposed Indo-Pacific tournament is an interesting development which gives Australian rugby the opportunity to work together to lead the growth of rugby in the region," said Amelia Lynch, Head of the Sport, Leisure & Tourism sector team at Lander & Rogers. "The concept of developing an alternative competition provides an opportunity for the Western Australians, World Rugby and the ARU. Both sides should consider the lessons learned from other new tournaments established in sport in the past - World Series Cricket and Super League rugby were both created in Australia. The way the competitions were established at the time had a costly and divisive effect on those sports. However, they ultimately resulted in the governing body working with the alternate league to expand the sport and its hold on the sport and media landscapes. Rugby has the chance to learn from the lessons of the past and work together to lead the growth of rugby in Australia and the Indo-Pacific region."

The NSW Supreme Court dismissed Perth based rugby union team Western Force's appeal on 5 September 2017 in which they argued that the ARU had no right to axe the team under the terms of an alignment deal. Before the exclusion of Western Force had been finalised, Forrest had offered the ARU AUD 50 million to financially support Western Force if the ARU kept the team within the Super Rugby competition. Initially therefore following the Court's dismissal of the appeal, Forrest's proposal to set up a new Championship seemed to be more of a threat to go into competition with the ARU. However, Forrest's recent announcement has confirmed that discussions are in collaboration with the ARU and specifically relate to the possible replacement of the Australian National Rugby Championship ('NRC'), Australia's third tier rugby competition.

"As a stand-alone rebel tournament, the Indo-Pacific competition would be all but doomed. But with approval and support from the ARU, broadcasters and the private sector, it has significant potential as a pathway competition," adds Allistar Twigg, Lawyer at Snedden Hall & Gallop. "If the competition involved teams from other emerging rugby nations (such as Japan, Singapore, China, Hong Kong, and Sri Lanka) and some more established rugby nations (like Fiji, Samoa, Tonga, and possibly at the New Zealand provincial level), it may attract an international broadcast and/or streaming audience, with commensurate revenues. It would also increase the market for rugby players, meaning more employment and the growth of rugby in those nations."