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COVID-19 presents potential new legal issues for sports world

SPORTS
MARKETING PLAYBOOK

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Novel coronavirus, known as COVID-19, has done what war, boycotts and natural disasters have never been able to accomplish — brought the sports world to an almost complete standstill across the globe.

COVID-19 first appeared in late 2019 in Wuhan, China. By mid-March the World Health Organization (WHO) declared the outbreak a pandemic. In the United States, sports organizations started postponing and canceling games and events to slow the spread of the highly contagious virus. Then leagues began shutting down entirely. Now, the 2020 Tokyo Olympic Games have been postponed until 2021.

The implications of such unprecedented measures go far beyond idled players and disappointed (and bored) sports fans with nothing to watch. The economic impact could be staggering as the fate of lucrative broadcast agreements and sponsorship contracts are left hanging. By some estimates, more than $10 billion in sponsorship commitments will be disrupted in the United States alone – and that's based on a six-month shutdown.

The writing was on the wall for sports in the U.S. when the Centers for Disease Control and Prevention recommended the postponement or cancellation of events that attract more than 50 people for at least eight weeks. By mid-March, leagues and event organizers were making the tough decisions necessary to protect their athletes, employees and fans.

The NBA suspended all games until further notice after a player for the Utah Jazz tested positive. MLB officials cancelled Spring Training games and delayed the start of its season until at least mid-May. The NFL cancelled all public events related to the 2020 draft, while continuing with plans to televise the event. The NHL suspended its season until at least May.

The biggest U.S. sports events of the spring were also affected by the rapidly spreading virus. In golf, the Masters Tournament, scheduled for mid-April was postponed, as was horseracing's Kentucky Derby, which is traditionally run on the first Saturday in May. The NCAA cancelled March Madness. Myriad international sports leagues also moved or cancelled events and tournaments, impacting cycling, esports, motorsports, rugby and soccer.

Then, on March 24, the International Olympic Committee (IOC) announced the postponement of the Tokyo 2020 Summer Olympic Games until 2021. World Wars I and II led to the cancellation of several games, but it's the first time in the 124-year history of the modern games that the event has been postponed, according to the IOC. The 2020 Summer Olympics, scheduled to start on July 24, 2020, will now begin July 23, 2021.

Significantly, the IOC also confirmed that the delayed summer games will still be branded as the 2020 Olympics, which will protect sponsors' rights and agreements with the IOC into 2021.

But postponing the Olympics knocks out a key tent pole for summer broadcast and streaming programming. The Wall Street Journal estimated that delaying the Summer Olympic Games will cost major sponsors, including broadcast and streaming partners, "hundreds of millions of ad dollars" by disrupting related marketing plans and other projects and programming.

So what does this unexpected hiatus mean for the web of advertising, sponsorship and broadcast contracts that power the sports world?

Among other things, it means that these contracts — and in particular their "force majeure" provisions — will be closely scrutinized. Most contracts include a force majeure clause to govern what happens when a party to the contract is unable to fulfill its obligations due to unforeseeable circumstances or circumstances beyond their control — such as acts of God, natural disasters, labor strikes or lockouts, terrorism, war or governmental action, among other scenarios.

But here's where things can quickly get complicated. Force majeure clauses are interpreted depending on the contract, jurisdiction and facts of the situation. Contract clauses are governed by state law, and jurisdictions treat force majeure clauses differently. While courts generally construe the clauses narrowly against the party seeking to invoke them, some jurisdictions – New York, for example – interpret them even more stringently than others.

The language of the specific force majeure provision is key. While these clauses might seem standard or boilerplate, they can have subtle but yet consequential differences that may ultimately determine whether they can be invoked to excuse performance.

For example, does the force majeure language specifically list the outbreak of a disease as a triggering event? If so, does it define or classify disease outbreak specifically, using terms such as "pandemic," which like COVID-19 impacts the world, or "epidemic," which has a regional impact? The use of specific terms like these could determine how the clause is ultimately applied.

Even if the force majeure clause doesn't specifically enumerate the outbreak of disease as a triggering event, it could still apply to excuse performance. For example, if the COVID-19 outbreak does not qualify specifically as a force majeure event, other events related to or resulting from the pandemic — such as government-imposed stay-at-home orders, shutdowns of nonessential business, or prohibitions on gatherings of more than 10 (or 50) people — may trigger the clause.

Some force majeure clauses apply only where a party's performance under the contract is deemed "impossible" – a potential sticking point that could lead to litigation down the road if parties are not in agreement on the facts of the situation. For example, at what point in the timeline of the development of the pandemic would the impossible standard be met? Arguably, the orders that a majority of states and many countries have put in place would make it impossible to hold a sporting event. But does the postponement or cancellation of events – or a league's entire season — as a precautionary measure taken in response to the threatened spread of the virus qualify as well?

Some contracts don't have a force majeure clause. In those instances, parties to advertising, sponsorship and broadcast contracts could rely on common law doctrines such as frustration of purpose, impossibility and impracticability. Unlike force majeure clauses, however, these doctrines may terminate the contract, instead of merely excusing a party's performance.

Going forward, the legal landscape remains unclear due to the still unknown duration of the outbreak and its already unprecedented impact on sports throughout the world. Questions that must first be answered include how long postponed events will be delayed and the delay's financial impact on the parties planning to reschedule events. For canceled sports events, parties may decide to negotiate alternative deals and rights, while taking into consideration the network of third-party relationships and contracts involved.

One aspect is clear: advertising and sponsorships in the sports world are changed forever. Stakeholders — sports organizations, athletes and brands, among others — will need to take a new look at existing and upcoming contracts in light of the outbreak to ensure they cover specific situations and needs. Parties to contracts should also consider the potential domino effect that the cancellation and postponement of sports events may have on third-party vendors and other parties.

For now, responding to the COVID-19 outbreak remains a moving target. As sports organizations eventually emerge from a "wait and see" mode, particularly those that opted to push their events back, additional new legal challenges may present themselves as the virus winds down.