withersworldwide

Coronavirus: Implications for sponsorship agreements

20 APRIL 2020

CATEGORY:
ARTICLE

The world of sports has been rocked by the current crisis, with Formula 1, domestic and European football competitions and the Tokyo 2020 Olympics (amongst others) having been suspended, or indefinitely postponed. We consider below the implications for sponsorship agreements relating to these events, and the teams or players in them – in particular, can sponsors withdraw from these or renegotiate their terms?

Sponsorship as a "partnership"

Sponsor relationships may not be partnerships in the legal sense of the word, but the use of "Official Partner" and similar is not meaningless terminology. Particularly for long-term sponsors and the events, teams or players that they sponsor, the relationship between sponsor and sponsored is often viewed as close and mutually beneficial. Most sponsors will not therefore be looking to withdraw in haste from their sponsorship commitment, knowing that the immediate cash saving for them may cause significant revenue issues for the sponsored event, team or player – and have a detrimental long-term effect on the relationship.

Sponsors may though be looking to agree a delay in payment to help manage their own cash flow. Some may be considering whether to try to reduce sponsorship fees, on the basis that the rights they secured are not going to be worth (at least in the short term) the price that was negotiated for them. To preserve the underlying relationship, the sponsored party may well agree to this, or to offer additional rights (e.g. social media or online visibility in the short-term; new deliverables when the relevant sport re-starts) in order to keep the sponsor on board.

In the short term, a "good faith" negotiation is likely to keep both parties relatively happy. Problems are most likely to arise (a) if the sponsorship agreement is due to terminate, or be renewed, in the near future e.g. end of the current season (as each party has less incentive to compromise); (b) if the relationship was already troubled; or (c) if the sponsor may itself face financial difficulties as a result of the pandemic, and needs therefore to make savings where it can – for example because it knows that its budgets are or soon will be under pressure.

What rights does the sponsor have if it wishes to withdraw or re-negotiate?

Under English law, this will depend on how the contract is drafted. A bespoke and well-crafted sponsorship agreement may tie payment obligations expressly to the achievement of milestones, or the holding of or performance in events, etc and allow the sponsor to withdraw or withhold payment if these are not achieved. Many sponsorship agreements are not however so detailed, so the position will not be so clear-cut.

Will COVID19 constitute a force majeure event?

A sponsorship agreement may contain a (probably fairly generic) 'force majeure' clause. Usually this will provide that if an "act of God" occurs, a party can suspend the agreement or treat its own obligations as suspended. Pandemics may or may not be specifically identified as an "act of God" in the clause. If they are not, unhelpfully there are two opposing schools of thought as to whether a pandemic constitutes an unforeseen event or whether it should have been foreseen by the parties, given epidemics in recent years and repeated warnings of their occurrence. A very narrow interpretation will usually apply to force majeure clauses – a party who wants to rely on them isn't given the benefit of the doubt.

If it does, what is the effect?

The sponsor would need to look at the specific wording of the clause and consider carefully whether they can really rely on the force majeure provision. Depending on the drafting of the overall contract, there may be a logic to the sponsored party claiming that it cannot perform its side of the agreement because an "act of God" has prevented it from holding or participating in tournaments. Does an "act of God" really though prevent the sponsor from performing its obligations (which may principally involve making payment)?

Is the contract frustrated?

If there is no force majeure clause, a party may seek to rely on the doctrine of frustration, a common law remedy. Frustration may apply if there is a significant and unforeseen change in circumstances which makes it physically or commercially impossible to perform the contract, or if doing so would render the performance radically different. The threshold to satisfy the test for frustration is very high, and if performance of the contract is only made more difficult (or more costly), but not impossible, by the pandemic or other frustrating event, the agreement will not be frustrated.

Again, this will depend how the contract is drafted and the specific rights granted. In a sponsorship agreement, it may be that many of the sponsorship rights can continue to be enjoyed notwithstanding lockdown and its effects, because designation as an official sponsor/partner, or having a logo on a website, or making social media postings can still occur. The visibility may be less than it would otherwise have been, but frustration cannot be used to remedy a bad bargain, so the fact that a sponsor has ended up overpaying for its rights will not carry weight here. It will be critical therefore to consider the specific agreement as a whole and assess closely whether it really cannot be performed.

Click here to read more insights on how we can weather the coronavirus outbreak with you.

Authors

Sharon Whitehouse

PARTNER | MILAN

Corporate

+39 02 8821 4233 (Milan) +44 20 7597 6191 (London)

sharon.whitehouse@withersworldwide.com

Isaac Qureshi

ASSOCIATE | LONDON

Private client and tax

+44 20 7597 6150

isaac.qureshi@withersworldwide.com