

Coronavirus, sports events, frustration and force majeure

As the epicentre of Covid-19 has shifted from China to Europe this has led to government intervention across the continent with a ban on mass gatherings in many European countries. This ban on mass gatherings along with a number of high profile Covid-19 cases in the sporting world has led to the postponement of most major European sporting events with the UK largely following suit with the mainstream media all highlighting the English Premier League, Football League and the Scottish FA suspending football matches for the foreseeable future.

As the world of sport reacts to the new reality many questions are now being asked as to what happens next. For example, what happens when a sports event gets cancelled as a result of Covid-19? What happens to fans who have bought tickets to an event if that event is to take place behind closed doors? What happens to employment contracts or sponsorship agreements which are due to expire shortly, or at the normal end of a sporting season, or before an event takes place? What about broadcasters or sponsors or other stakeholders who have spent significantly on events which may now never take place?

Frustration of Contract v Force Majeure

There are many possible legal disputes which could arise out of the ongoing situation. An important part of these disputes will be whether the ongoing Covid-19 pandemic, and the action taken by governments and governing bodies to cancel sporting events or play them behind closed doors will release a party from its contractual obligations.

"Frustration" of a contract can arise when completely unexpected events intervene and where performance of the contract becomes impossible, illegal or radically different from that contemplated by the parties at the time of the contract.

The doctrine of frustration will release parties from their contractual obligations so the courts will not invoke it lightly. For a contract to be frustrated it is necessary to establish:

- that an event occurs after the contract was formed which was unforeseen by the parties;
- that it makes them incapable of performing the promises they made;
- that that event is the fault of either party; and
- that performance of the contract becomes impossible, illegal or radically different from that contemplated by the parties at the time of the contract.

The common law principle is that if a contract is found to have been frustrated, both parties are released from further performance and neither is entitled to sue the other for breach. A delay in the performance of an obligation such as the postponement of a sporting event is not necessarily a frustrating event, the party claiming frustration must show that the delay would make the ultimate performance of the relevant contractual obligation radically different that which was undertaken by the contract.

Many will have heard the term "force majeure" as a term to describe recent events surrounding Covid-19 and the current postponement of the sporting calendar. Unlike "frustration", "force majeure" is not a legal concept it is one that must be created by a contract, contracting parties can include force majeure terms in their contracts which will provide for specific circumstances in which they are excused from performing their obligations under the contract. If the parties have carefully contemplated the circumstances in which they may be released from performing their obligations in a contract, it will be harder for them to rely on the doctrine of frustration.

Whether or not a Force Majeure clause can be relied upon will depend on the wording of that particular clause and whilst some we have seen arguably cover the current circumstances, others may not be drafted appropriately to cover the current Covid-19 epidemic.

The fallout from Covid-19 will be sure to dominate headlines for the foreseeable future. The exact nature of any disputes arising out of the epidemic is yet unknown and will depend on how the situation develops and will also be impacted by government policy, advice and circumstance. This will dictate whether or not parties involved in potential disputes can rely upon the doctrine of frustration or a force majeure clause.

Given that the circumstances presented by Covid-19 are unprecedented, disputes will be difficult to manage with certainty for sports, stakeholders and all connected with events not taking place.

It is possible that most involved in the difficult circumstances presented by Covid-19 will want to work to avoid the danger of disputes and legal concepts being invoked; many will want to agree postponements and an opportunity to reshape delivery of obligations, by for example, staging events at a later date.

Whether that proves possible as a solution may need to be tested by careful discussion and ultimately the goodwill of the parties.

Get in touch

If you have any particular concerns regarding events during this time, please contact us through the **sportscotland** expert resource legal helpline (0141 227 9333 or sportscotlandinfo@harpermacleod.co.uk).