On Wednesday, amid growing concern over the spread of Coronavirus Disease 2019 (“COVID-19” or “coronavirus”), the Italian government announced that all sporting events in Italy will resume. The catch? They will all take place behind closed doors—no spectators will be allowed to attend for at least the next month.

Italy, as the epicenter of Europe’s coronavirus outbreak, previously undertook drastic measures to slow the virus’ spread—closing all schools in the country, cancelling sporting events, and instituting bans on other public gatherings across the country.

While the epidemic has not yet reached similar proportions in the US, the virus’ spread has also not shown any sign of slowing down. Could similar measures be taken in the US? If so, what does this mean for event organizers and brand sponsors?

Brands pay big bucks—in some cases hundreds of millions of dollars—to sponsor high profile sporting, entertainment, and cultural events. What are the repercussions if event organizers are forced to cancel sponsored events because of...
the coronavirus outbreak? Does the analysis change if the events go on as scheduled, but spectators are banned from attending?

**Force Majeure**

Some event organizers are asserting that the outbreak constitutes a *force majeure* event or gives rise to another legal basis excusing nonperformance under sponsorship agreements.

- Any assertion of *force majeure* must be analyzed under the terms of the sponsorship agreement, which may or may not contain an explicit clause.
- Where a *force majeure* clause contains enumerated examples, as opposed to a general provision, then a court will typically find that only those events specifically listed are sufficient to excuse performance.
- To the extent the clause also includes a catchall provision, courts will generally limit it to include occurrences of the same nature as those enumerated.
- In light of recent outbreaks of SARS, Zika, and Ebola, it is unclear if *force majeure* clauses will cover coronavirus if “disease,” “epidemic,” or similar language is not listed.

Based on the foregoing, a sponsor may argue that the coronavirus does not fall within the parameters of the *force majeure* clause, performance is not excused, and any nonperformance (event cancellation) by the event organizer constitutes breach.

Even if coronavirus is deemed to fall within the parameters of a *force majeure* clause, the general rules of contract will apply to excuse at least a portion of the sponsor’s contractual obligations. That is, if an event is cancelled, the sponsor should be excused from its duty to pay—at least as to the portion of the payment that was due for the cancelled event.

What if the event is not cancelled and instead—like what is happening in Italy—spectators are banned from attending? If the event goes on as scheduled, there is no reason for the event organizer to invoke the *force majeure* clause to excuse performance.

Yet, from the sponsor’s perspective, the sponsor will not receive the benefit of the bargain because there will be no eyes on the brand marketing. Is this the worst case scenario for brands?

There may be another alternative.

**Frustration of Purpose and Commercial Impracticability**

Frustration of purpose occurs where an unforeseen event, not caused by either party, radically changes the circumstances surrounding the agreement so that performance of the contract is significantly different than the parties initially intended.
Commercial impracticability is where performance of the contract is still possible but due to a change in circumstances, the performance of one party’s obligations has become economically senseless.

- Like *force majeure*, these doctrines are very narrow and usually limited to where a virtually cataclysmic, wholly unforeseeable event makes the contract worthless to a party.

- Like the analysis discussed above for *force majeure*, in light of recent epidemics around the world, it is hard to say that coronavirus is “wholly unforeseeable”

Nevertheless, a brand sponsor may assert that, even though the event continued as scheduled, the contract was virtually worthless. The entire rationale for event sponsorship is to create brand awareness with meaningful real-time interaction—a cause impossible to achieve with no attendance.

**What Parties Can Do Right Now**

During this period of uncertainty, companies should take the time to ensure they have adequate protections in place for the worst case scenario.

Our attorneys are currently actively engaged with our clients to promptly analyze their rights and obligations under various agreements, and applicable law including:

- reviewing key provisions of the sponsorship agreement, such as: representations, warranties, termination rights, insurance provisions, *force majeure* clauses, and make-good rights;

- proactively engaging with co-parties to understand their positions and work with them to develop alternative means to perform contractual obligations; and

- considering second order and third order effects: does cancellation of the event affect the brand’s/organizer’s ability to perform its obligations under other agreements?

**How Parties Can Protect Themselves in the Future**

- Event organizers should make sure that the contract allows them to cancel an event in these situations. Specifically, they should ensure the *force majeure* clause is specific enough to cover disease outbreaks.

- Sponsors should make sure the contract provides for meaningful remedies if the event is cancelled. Further, include a provision obligating the organizer to provide an alternative benefit such as refunding a portion of the fees, or offering replacement sponsorship benefits where the event is not cancelled, but the sponsor chooses not to participate due to a situation like this.

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worst-case-scenario-brand-sponsors