

Sponsorship Agreements: Key Provisions That COVID-19 Has Now Brought Into Play

04.30.20

The impact of COVID-19 on the sports industry has already been widespread and far-reaching. Professional leagues have seen their schedules abruptly suspended, colleges and universities have ended their spring seasons without crowning new champions, and sports venues of all categories have effectively been left to hibernate through the crisis. In the wake of an unprecedented and seemingly unending series of event cancellations, venue owners and sponsors must now dust off their sponsorship agreements and reexamine certain fundamental provisions. Venue owners will be primarily motivated to mitigate their financial exposure to sponsors, whereas sponsors will be focused on ensuring that they receive the balance of their commercial interests under the original agreement. Although many of these points are often viewed as hypothetical concerns for the attorneys to hash out, they are becoming increasingly relevant (and real). The following highlights some of the key sponsorship provisions that should be assessed as venue owners react and respond to their sponsors amidst the COVID-19 pandemic.

1. **Make Good Requirements.** The basic tradeoff in every sponsorship agreement is the provision of valuable branding opportunities and consumer visibility (for the sponsor) in exchange for lucrative sponsorship fees (for the venue owner). The potential benefits to both parties grow along with the profile and frequency of the underlying events at the applicable venue, and the benefits are further magnified in the context of venue naming right arrangements. To address a scenario where the venue is unable to deliver on its anticipated events, sponsorship agreements often include "make good" provisions to remedy the lost sponsorship opportunities otherwise associated with the fees paid by the sponsor. These "make good" provisions can be quite varied, and their application will hinge on a variety of details such as (i) the applicable triggering events (for example, cancellations of any events or just certain specified "major events," cancellations due to work stoppages within the applicable sports league(s), and cancellations due to external factors such as force majeure), (ii) the contractually negotiated damages model and associated sponsor remedies (fee refunds, additional event access, etc.), (iii) whether additional or alternate inventory is then available with respect to the venue, (iv) whether certain contractual obligations are automatically modified (such as annual guaranteed payments by the sponsor), and (v) the unique dynamics of the relationship between the venue owner and the specific sponsor (length of relationship, magnitude of sponsor fee revenue, etc.). Another unique consideration within the sports industry is the growing possibility of holding competitive events without the presence of spectators, and how such events might still satisfy the sponsor's anticipated sponsorship opportunities.

2. **Maintenance and Capex.** Most sponsorship rights involve some level of initial installation and subsequent maintenance at the applicable venue, particularly when signage or naming rights are involved. Accordingly, venue owners and sponsors should review their sponsorship agreements to determine (i) what maintenance and capital expenditure obligations apply, (ii) what approval requirements may be in effect before these obligations can be carried out, (iii) which party is responsible for implementing and paying for such obligations (may not be the same party), (iv) whether there are any funding limits on the obligations of the party paying these costs and expenses, and (v) whether there are any grounds for excusing performance, such as force majeure (see below). In the context of COVID-19, the parties' original intent may be frustrated (at least temporarily), but they may also find it mutually beneficial to modify their maintenance and capex obligations to a level commensurate with the reduced operations of the applicable venue.

3. **Force Majeure.** The concept of "force majeure" often represents a significantly drafted term within most sponsorship agreements. Although the applicable definition can easily consume half a page of text, the essential meaning of the term (French for "superior force") is an event or effect that can be neither anticipated nor controlled. Regardless of its simplicity or complexity, the occurrence of a force majeure event can have a significant rippling effect on the parties and their respective obligations under the sponsorship agreement. For example, a force majeure event could potentially excuse a venue owner's delay in delivering certain sponsorship rights or a sponsor's delay in satisfying maintenance and/or capex

obligations. However, excused performance due to force majeure may first require certain minimum efforts by the party that is otherwise obligated to perform and it may also expire after a specified period of time. In the context of COVID-19, a threshold question will be whether the COVID-19 pandemic falls within the sponsorship agreement's definition of force majeure (and one should not assume that to be the case). [More detailed discussion of force majeure can be found here.](#)

4. Scope of Sponsorship Rights. Aside from fees and term/renewal, the specific scope of sponsorship rights granted by the venue owner to the sponsor is typically the most heavily negotiated business term within a sponsorship agreement. The sponsor's inventory may include sponsorship rights as to, among other items, (i) tangible elements both within and around the venue, (ii) printed media, (iii) radio and television broadcasts, (iv) internet websites, and (v) various social media platforms. Many sponsorship agreements also address the possibility of new categories of inventory that may be developed during the term of the agreement (often oriented around new technologies or products . . . in-seat video monitors and data analytics come to mind) and, importantly, what rights if any that the sponsor may have to those new items. For example, the sponsor may have a first right to purchase new inventory or the venue owner may retain the right to competitively sell such new inventory to other sponsors. In the context of COVID-19, venue owners are now being forced to consider new avenues for reaching their target audience and for generating new sources of revenue, and we may also start to see a shift from new venue development to existing venue renovation to facilitate new delivery models to the end consumer. As a result, venue owners and sponsors need to carefully review their sponsorship agreements to determine whether there are any limitations on their respective rights to commercialize these new/developing assets.

5. Term and Termination. Although existing sponsorship agreements will hopefully be able to weather the COVID-19 storm, venue owners and sponsors need to consider all potential contract scenarios, including the possibility of termination. These considerations should include an assessment of the parties' respective termination rights, potential grounds for excusing a party's non-performance of the contract (such as force majeure), applicable damages and remedies (including possible recoupment of capex previously funded by the sponsor), and reputational risk. Additionally, related contractual rights such as exclusivity, renewals, and first negotiation rights could be implicated by a termination decision, particularly if the remaining contract term cannot otherwise accommodate make good benefits. Finally, the applicable dispute resolution provisions should be confirmed before any definitive termination decision is made.

Contact:

[Justin Hoover](#) | 817.420.8225 | jhoover@winstead.com

[David Staas](#) | 713.650.2662 | dstaas@winstead.com

Disclaimer: Content contained within this news alert provides information on general legal issues and is not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.