How Contract Provisions and Common Law Principles Will Impact the Sports Business

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It's hard to read the news these days without seeing the dramatic effect of COVID-19 on professional and collegiate sports. Among others, a number of professional athletes have opted out of their respective seasons, Major League Baseball teams postponed games due to emerging positive tests, the NCAA eliminated all fall championships for Divisions II and III and certain Power Five Conferences have postponed their football seasons, plus all their fall semester sports. Sports at all levels play a powerful role in the American experience, providing people with a way to tie culture and entertainment to local, regional, and national pride. Our strong connection to and dependence on sports also serves to generate enormous revenues and profits for the sports industry and its related stakeholders. Sports is not only a source of entertainment to the public, it also is a big business. According to BusinessWire, the sports eco-system generates $600 billion globally. This high-yield investment does not apply only to professional sports. Even the smallest modification to the standard schedule of collegiate games and events has widespread effects on the business of sports—and makes for big news. Media outlets highlighted ESPN's potential loss of over $800 million in advertising deals if college football is cancelled this fall season. Recent news of Under Armour, Inc. attempting to terminate their $280 million 15-year agreement with UCLA has also garnered significant public attention and press coverage.

The cancellation or postponement of events will cause significant ripple effects for colleges beyond the contracts that the powerhouse teams and big-name sponsors are a party to. For example, when the Big Ten Conference cancelled its college football season, as many as 33 non-conference games were cancelled—with 11 football games between the Big Ten Conference and Mid-American Conference (MAC) alone. Normally, these non-conference games result in large guarantee payments for the teams involved. The MAC faces a potential loss of over $10 million in income as a result of the cancellation of these games and this shortfall was one of the factors that lead to the MAC canceling their full season.

Breach of contract and cancellation of college games are not limited to college football and affect all collegiate sports and stakeholders. In many sports, the magnitude of the payments may be smaller since the economies of scale are proportionate but require the same level of attention by college athletic administrators. For example, the NCAA's cancellation of the 2020 Men's and Women's Basketball Championships resulted in a proportionate decrease of payments of 62.5% to all 1100-plus NCAA members. As recently reported, the University of North Colorado, the reigning 2019 Big Sky Women's Volleyball conference winner, could potentially lose tens of thousands of dollars of guarantee payments due to cancellation of their conference games and will need to address these cancellations and loss of payments on a contract by contract basis. In addition to the colleges

directly involved, countless local, regional and national advertisers, sponsors, media companies and vendors will lose substantial revenue for each game and event which no longer will occur.

With serious economic benefits at risk, the contracting parties need to understand the risks and rewards of postponing or cancelling sporting events. Among the measures of that risk/reward analysis is whether the parties have protected themselves in their written agreements by a particularized *force majeure* clause, what its absence connotes, and by understanding the applicability of the "impossibility" and "frustration of performance" doctrines.

How should businesses think about force majeure and the common law doctrines in business decision-making in the sports world? Force majeure, meaning "superior strength," is a concept *that excuses, temporarily or otherwise, a party from performing otherwise applicable obligations*. It is a contractual clause and does not exist in the common law. Force majeure normally is governed by state (not federal) law concepts of contract interpretation and enforcement. This can have significant consequences. Because of differences in the laws of each state, the same types of disputes may be decided differently, depending on which state law controls interpretation of the contract. Some states, for instance, in applying their general principles of contract interpretation, may construe force majeure provisions more narrowly, or broadly, than others.

Many force majeure clauses in sports and entertainment contracts do not cover pandemics—either by specific omission or because the language of the clause is not broad enough. Force majeure clauses often include "acts of God" and "governmental actions." Some clauses include broad "catch-all" phrases at the end of a laundry list of uncontrollable situations, such as "or other circumstances beyond the party's control." In any event, the precise wording is key. For example, force majeure clauses might not be invokable because of the existence of COVID-19, but might become invokable because of the resulting governmental or NCAA action, such as a shutdown, closure of ports of entry, interstate travel ban or limitation, or an executive order prohibiting large gatherings, etc.

Even in the absence of a force majeure clause, contract parties may seek to negotiate their contractual obligations. In unprecedented times like these, parties may try to invoke the common law doctrines of "impossibility" or "frustration of purpose" to excuse themselves from obligations. Also governed by state law, impossibility and frustration of purpose can have different results in different jurisdictions. Here, too, colleges and other decision-makers should consult counsel to understand how their states' laws may apply these doctrines.

But what is impossibility or frustration of purpose? Under these common law doctrines, is it logical or fair to hold a vendor to its obligations when no spectators are allowed in the stadium? Similarly, are colleges without recourse or remedy in recovering guaranteed payments? Are colleges without recourse or remedy for non-guaranteed payments when its counter-party (e.g., sponsor, advertiser, media company) breaches and the college still can provide the product (e.g., the sporting event)?

Put simply, under the "impossibility" doctrine, if an event is cancelled and the cancellation is outside the control of both parties and not contemplated at the time of execution of the contract, then neither party is required to perform under the contract and will not incur liability. For example, if an advertiser had planned to promote a product during a Mid-American Conference football game —whether in-person or through media advertisement—and due to COVID-19 or a governmental or

NCAA directive, the game or event will not occur, the advertiser may be able to avoid payment for such advertising.

In addition, the principle of "frustration of purpose" may be invoked when it might be feasible to perform the contractual obligations, but at the time of performance, the existing conditions undermine the original intent of the parties in entering into the contract. Rather than tens of thousands of fans and customers crowding sporting arenas throughout the country, events are held with a fraction of that number or—as in the case of Major League Baseball—no fans at all. Does the absence of fans create a frustration of purpose? Perhaps for vendor sales at the event and perhaps not for the media or sponsors who may still broadcast the event to viewers. A careful evaluation of each event, including the purposes for the contract, and the applicable state law will assist in determining whether the contract's purpose has been frustrated by COVID-19 and the state's regulations.

Ultimately, it comes down to the fact that each stakeholder must determine how to mitigate these risks. Decision-makers from affected sports programs should review the existing contracts with counsel for the inclusion of a force majeure provision, its effect, the applicable state law, and the common law doctrines of impossibility and frustration of performance. In the end, the goals are to understand and mitigate the risks. Much like many aspects of current events, the immediate future of the sports world is uncertain. The promise of returning to normalcy keeps moving further away. It is important to consider all of the legal and business options available under contractual and common law in order for any business in the sports industry to emerge from this situation in as favorable a position as possible.