

## CORPORATE

# COVID 19 & Sporting Events: Impact Analysis



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The global sports market is an estimated \$600 billion industry<sup>1</sup>, comprising of infrastructure, events, training, manufacturing and retail. The scale and revenue-generating opportunities are most visible during marquee international sporting events. Sponsors, organisers, players, broadcasters, advertisers, hospitality providers etc. are all part of this lucrative sports events industry, with huge sums of money invested in the market.

The pandemic caused by the novel coronavirus (also referred to as COVID-19) has had a crushing impact on sporting events, with global events like the Olympics being postponed by almost a year, and other events contemplating a curtailed format, or possibly even cancellation, such as the 2020 Wimbledon championships. Further, globally-watched sporting events like basketball (NBA), football (UEFA, EPL) and cricket (IPL, several bilateral international tournaments) have been thrown into chaos as broadcasters and sport-leagues who had slotted specific periods for their telecast face uncertainty due to the risks of the events being cancelled for fear of spreading the disease.

In this Note, we will attempt to briefly identify key issues that contracts in this industry will face, and the conspectus of legal principles that will inform how companies tide over this crisis.

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1. "Sports Global Market Report Opportunities and Strategies To 2022", May 2019, The Business Research Company

# RELEVANT CONTRACTUAL TERMS

## 1. Contingency clauses in contracts

Contracts may contain clauses that account for various risks and contingencies. Such clauses may take the form of *force majeure*, limitation of liability, change in law, curtailed-event-clauses etc. These clauses could provide answers to how the risks and losses occurring from COVID-19 may be borne between contracting parties.

Such clauses may be used by both parties in a contract in the current scenario, since an epidemic will usually not fall within the sphere of risks undertaken by either contracting party. Different jurisdictions may deal with the issue differently: American and Indian courts tend to interpret such clauses strictly, so much so that *any* alternative mode of performing - if theoretically possible, however more onerous - may prevent the application of a *force majeure* clause. A possibly painful cost-benefit exercise will have to be undertaken, taking into account various factors, including the interests of long-term relationships.

## 2. Legal rule of frustration

In the absence of contingency clauses, the general legal principle of frustration becomes relevant. In English law and under *the Indian Contract Act, 1872*, frustration is available as a general rule to end contracts that have become impossible or impractical to perform - the determination of which is subjective and will depend on the intention and purpose behind the contract.

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In the case of a sporting event being cancelled due to the pandemic, the doctrine of frustration would be different for contracts between organizers and broadcasters than for contracts between teams and merchandizers. While both sets of contracts are obviously impacted, the extent to which root performance can still be maintained will differ.

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### 3. Legal rule of mitigation

The rule of mitigation in contract law is a duty imposed on a party claiming damages for breach of contract (the innocent party), to minimize the losses arising due to the actions of the breaching party.

In a similar vein, courts will usually require parties relying on the concepts of *force majeure* or frustration to establish either that no alternative methods of performance were possible or that the fundamental conditions of the contract had changed to the extent of rendering performance impractical (and not merely more onerous).

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The rule of mitigation will also require the parties to take all reasonable steps to ensure that losses arising due to occurrence of the *force majeure* event are minimized.

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### 4. Renegotiation of obligations

Long term contracts between key stakeholders (e.g. organizing body, team franchises, broadcaster) may contain clauses which obligate the parties to renegotiate the terms of engagement in good faith when there is a material change in facts which substantially alters the parties' performance capabilities. Depending on the specificity of the wording used in such terms, such clauses may be binding and enforceable – thus mandating the parties to renegotiate.

Where contracts themselves do not contain ideal renegotiation clauses, situations like the coronavirus pandemic could call for voluntary renegotiations by parties. Such negotiations, though occurring out of free will (and outside the terms of the original contract), are fueled largely by the potential for future benefits and loss mitigation. These are likely to succeed if both parties feel that the commercial net benefit to the renegotiation is likely to exceed the expected outcomes of litigation/arbitration.



# OPTIONS FOR ORGANISERS

Broadly, the occurrence of a *force majeure* event such as the COVID-19 pandemic leaves organisers with the following options:

## CURTAILMENT/MODIFICATION

Curtailing the event, while maintaining existing schedules, appears to be the least drastic option. This may entail performance of the agreement on renegotiated terms because of changed commercial and business considerations.

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Seasonal sporting leagues are contemplating reduced season with fewer matches. Other sporting bodies such as the FIA (that conducts F1 races) and the Grand National Horse Racing championship have replaced live races with fully virtual simulated races online. While this obviously does not replace live telecast of the actual sport, this caters to fans and enthusiasts and also avoids revenue losses at least to some stakeholders such as betting-license holders. Advertising obligations can be honoured during such alternative programming, thus mitigating against complete loss of air-time and advertisement space. Pushing the boundaries of virtual operations could change the way non-field events, such as chess, take place going forward.

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## POSTPONEMENT

Another option is to delay the performance of the agreement until the *force majeure* event ends, as has recently been done by the International Olympic Association. However, given the time-sensitive nature of such events (thanks to seasonality, viewership trends and conflicts with other marquee events), merely postponing the event may not ensure that the economic equilibrium of the parties is unaffected.

While postponement may appear to be the most attractive, straightforward solution, there are several issues with this option, including the cascading effect of scheduling and broadcasting conflicts.

## CANCELLATION

Cancellation presents the most drastic outcome in terms of wasted expenditure and lost revenues. However, this is a measure a lot of events, especially those that were scheduled to take place prior to the first half of April 2020 - were forced to take, since they did not have adequate time to plan for the massive international shutdown that has taken place.

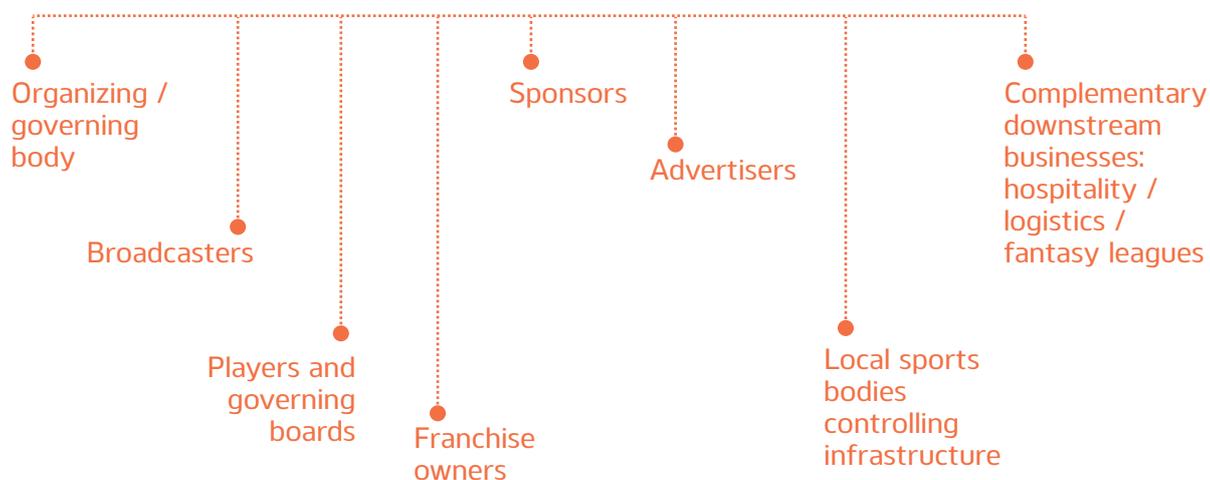
Cancellation is rarely commercially feasible, especially given the long-term commitments of stakeholders such as franchisees, sponsors and broadcasters. (Though high-stakes situations could call for a mixture of strategies).



# CONTRACTUAL IMPACT ON STAKEHOLDERS

Any sporting event – as an example, the Indian Premier League (IPL) - has multiple stakeholders, each of whom will face unique issues. They will usually enter into a web of contracts with each other. The expected revenues under each contract may be directly or indirectly contingent on the happening of the event.

## MAJOR STAKEHOLDERS IN SPORTS



## Contracts entered into by the governing bodies

Of the several contracts that governing bodies will enter into, the most significant will be those with broadcasters and sponsors. Sponsorships (in the form of event / referee / umpire / apparel sponsorships) are significant revenue generating opportunities for such bodies, and advertisement or merchandising opportunities for the sponsors.

Do *force majeure* or other contingency clauses excuse performance by both parties?

• How are such risks and losses split between the parties?

• Do such clauses address wasted expenditure already incurred or provide for any equitable return of money?

How is the current situation different from washouts / cancelled matches?

Are alternative modes of performance possible through curtailment or modification of the event?

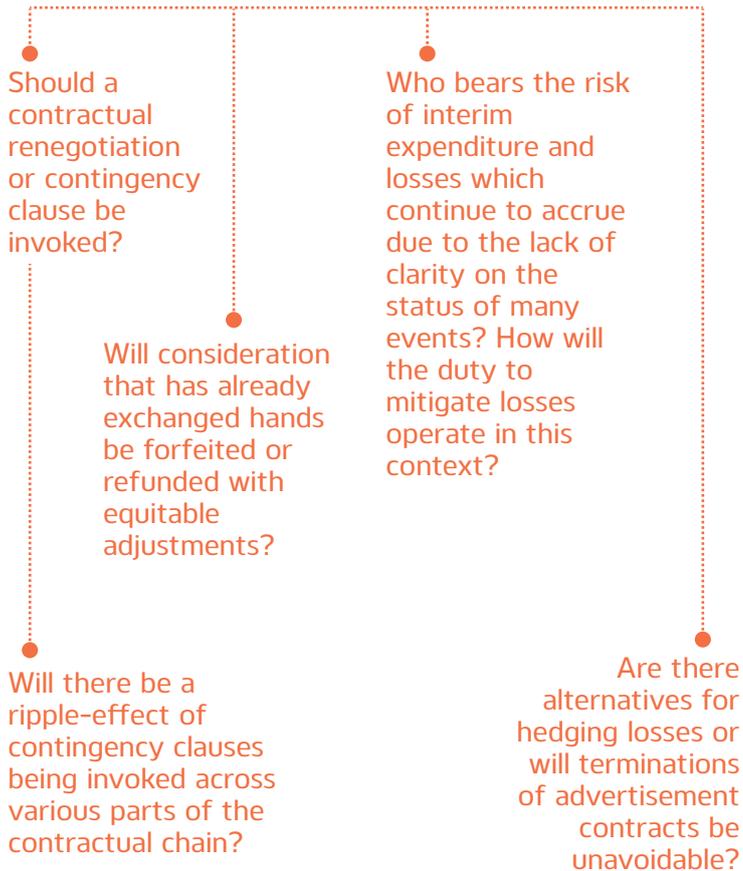
Can refunds be sought from the governing bodies? To this end, can it be said that one contracting party has received absolutely no consideration from the other?

Does the contract contain renegotiation clauses or similar implied duties?

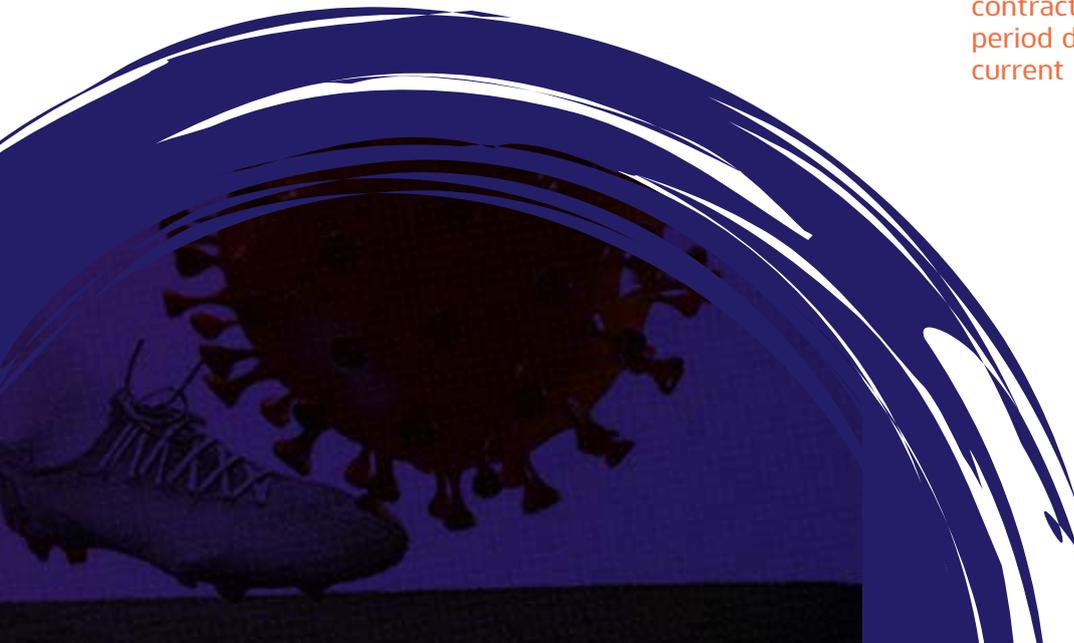
Can a series of *force majeure* or other contingency clauses be triggered across the chain of contracts?

## Downstream contracts entered into by broadcasters and teams

Any situation of postponement/curtailment/cancellation will necessarily impact the capability of a broadcaster to earn estimated revenues. Even if the event is moved from its original schedule on short notice, it is likely that contracts for advertisements have already been concluded and consideration paid.



- In contracts for use of facilities such as stadia, hospitality and logistics services, etc., could it be argued that the facility or service provider has fulfilled her end of the contract by providing the service – even though the purpose for use of the facilities can be no longer fulfilled?
- In upstream and downstream contracts with Team owners in sporting leagues for defined time periods, will the parties be discharged from performance of their obligations and provide for *pro rata* payment / refund of franchise or player fees commensurate with the modified duration of the event?
- Do the contracts allow for a straightforward extension to existing franchise agreements or player contracts, by adding the period delayed due to the current crisis?



# THE LACK OF A ONE-SIZE-FITS ALL APPROACH

With a pandemic of such unprecedented scale, contingency clauses (including *force majeure*) are unlikely to offer complete and satisfactory solutions in most cases. Not all loss suffered by an occurrence such as this may be capable of being recouped using contractual enforcement.

Risk-allocation between the parties in their contracts can certainly provide reasonable solutions. However, as the duties to mitigate losses have already begun to take effect, contracts will have to be keenly studied and analysed, with a tremendous focus on dispute avoidance (rather than dispute resolution) with a suggested approach being that all parties to a contract arrive at equitable results which 'fairly' split the misfortunes amongst them.

What is clear is that this is a major area which will be tremendously litigated if parties do not approach the impending issues pragmatically, with a view of maintaining future business, as opposed to being steadfast on just recouping current lost profits and expenses.

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In sporting contracts, extensions of contract periods could provide a solution, wherein effectively the same revenue-making avenues are made available, despite cancellation of current events. For example, franchisees having paid for licenses to own teams for a period of 5 seasons, will obviously have a huge impact if they ultimately are only able to generate revenue for a lesser number of seasons. One area of focus could thus be to contractually explore maintenance of the original promised revenue stream and duration by suitably extending the contract.

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While such a solution appears simple, intangibles such as players' health and age, the popularity of brands, time-sensitive promotion/advertising (such as for new products) etc. will make a straightforward extension inappropriate in all situations.

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