

Tokyo Olympics Move May Spark Wave Of Contract Litigation

By Christopher Cole, David Ervin and Holly Melton (March 30, 2020, 5:18 PM EDT)

On Tuesday, March 24, the prime minister of Japan and the International Olympic Committee announced that the 2020 Tokyo Summer Games will be postponed for one year. In a statement, IOC officials said the games would be “rescheduled to a date beyond 2020 but not later than summer 2021, to safeguard the health of the athletes, everybody involved in the Olympic Games and the international community.”

The announcement is likely to set off a wave of claims for refund or contract repudiation to and from frustrated advertisers, sponsors, travelers, entertainers, service and technology providers, and other entities that planned to participate in the Olympics. This seismic cancellation could well spark substantial litigation, much like occurred in the aftermath of 9/11.

This article outlines the key legal considerations for advertisers and other companies that had been working to purchase or provide services or events around the 2020 Tokyo Olympics.

Advertisers

A variety of advertiser agreements are impacted by the IOC postponement:

- Official sponsors of the IOC. Top sponsors have the broadest rights for all Olympics games. Considering the \$100 million sponsor fee for a four-year cycle sponsorship, all top sponsors are likely already heavily immersed in responding to these issues.
- Official sponsors with Tokyo Host Committee. The IOC rights flow down, but each host city may set unique, local terms and restrictions. Some of these may be implemented in local laws and regulations. We recommend consulting with Japanese counsel for further advice on these issues.



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- Official sponsors of the U.S. Olympic Committee. There are different levels among the domestic sponsors, who typically pay less than IOC top sponsors. These include:
 - Official sponsors of individual U.S. Olympic teams. These require smaller rights fees, and usually include separate athlete endorsement deals as discussed below.
 - Athlete endorsement agreements. The amateur status issue (governed by the Ted Stevens Act in the U.S.) makes these agreements more complicated, but sponsors help cover the costs and expenses of the athlete's training and receive exposure during the games.

From the sponsors' perspective, and depending on their level of sponsorship, they will lose a slew of benefits as a result of the postponement of the 2020 Tokyo Games:

- Activation during the 2020 Tokyo Games, including in arenas and Olympic Village signage and branding, sponsor hospitality and tickets, experiential events around Tokyo, with athletes and partners that were to have created content and brand exposure.
- Lost opportunities, plus sunk costs and expenses.
- Lost media rights, because there will be no broadcast of the Olympic Games for 2.5 weeks. NBCUniversal Media LLC recently reported that it had obtained roughly \$1.4 billion in television advertising commitments for the Tokyo Olympics, a record advertising haul. The U.S. ratings for the Olympics rival those of the National Football League (for some of the games) with a few events breaking into the top 10 for most-watched programs during the year. Therefore, this is considered premium inventory.
 - Because of the unique nature of the inventory, it makes it hard to provide "make-goods" (i.e., replacement media) during this calendar year. Networks are likely to ask advertisers to roll over their investment to next summer's games; they may offer incentives to advertisers for the year in between.
- Lost athlete activation. Some of the athletes that would have competed in the Tokyo 2020 Games will not compete in 2021 for various reasons. This is a potentially big loss for their sponsors. Also, many athletes are deeply integrated with products; some have their images on packaging. All of this was timed to maximize exposure during July and August, which is now gone. This creates production, supply chain and related issues for sponsors, all of which involve additional costs.
- Beyond these direct investments, corporate advertisers are likely to have spent significant sums in the preparation of advertising in other media. They may have created event-related packaging, out-of-home materials, point-of-sale, social media and other specialized marketing collateral in anticipation of the games, all of which is now likely unusable.

Travel and Hospitality

The postponement creates a new nightmare for the hospitality and travel industry, already hard hit by the virus. Not only will travelers seek to cancel existing bookings for Japan-related travel, but if they attempt to reschedule for next year, they may run into conflicting prior bookings for that time.

Japan's tourism industry will suffer an extensive blow, as many travelers would have moved on after the Olympics to explore other parts of Japan. In addition to guest bookings, hotels also will likely have to address event cancellations, vendor contracts that are no longer needed, and possible staff reductions from anticipated levels.

Related Services

Production of an event as vast as the Olympics requires armies of specialized service providers, from construction and carpentry to food and telecommunications. These providers will likely demand to be paid for services rendered, and potentially also seek the entire value of their contracts in light of irrevocable commitments of manpower and equipment, including lost opportunities, made in reliance on the Olympics moving forward on schedule.

Entertainment

Entertainers who had been booked to appear, either officially or through private arrangements (e.g., for a private corporate event), may seek to be paid for the booking despite nonperformance. They may deny reimbursement of any advance fees already paid.

Entertainers may claim that they had foregone other opportunities, and had also booked various subsidiary service providers (makeup, hair, management, roadies, etc.), all of whom should also be paid in reliance.

Real Estate and Event Space

Numerous brands had made arrangements to obtain space at or near the various Olympic venues in the form of immersive experiences and "pop-ups" and pavilions featuring their products. These short-term leases are also rendered temporarily useless.

What Next?

The analysis of what to do next should follow five basic steps.

First, analyze whether COVID is the direct cause of the disruption or whether it may be due to a third-party response.

Here, government and IOC actions in response to COVID-19 likely might be characterized as rendering

performance of the contract unlawful or impossible. Moreover, cancellation of the Olympics obviates the need for performance of the contract.

There may also be other factors contributing to the nonperformance, such as curtailment of transportation modalities or facilities and shortage of supply and/or raw materials required to perform under the agreement.

Second, analyze the applicability and coverage of any force majeure provisions in the relevant contracts.

The first task is to gather all of the relevant contracts and subcontracts. You may not only have a claim under the primary contract for service, but may owe subcontractors that were engaged to provide components of the service.

Consider, for example, the advertiser that has contracted to put on an Olympics-related event, engaged talent and catering, and obtained real estate rights. The fallout from cancellation will affect all of these ancillary business deals.

Importantly, not all force majeure clauses are the same. The relevant clauses may exclude certain types of situations, like unprofitability. Specific clauses may reference coverage or exclusion of force majeure in situations of pandemic. Indeed, the IOC's own contracts typically insulate it from exactly such events, providing the IOC with broad protection from interruptions beyond its control.

Case law examples of litigation over concert and event cancellations abound. For example, in 2014, a concert promoter sued singer Rod Stewart for refusing to return a \$2 million performance guarantee after the singer canceled a concert due to medical issues.

In another typical case, a hotel operator sued a business for attempting to renege on hotel conference bookings, which were rendered inadvisable due to Sept. 11-related travel restrictions. In yet another example, a sponsor sued a race car team for refund of guarantees it had paid for sponsor-branded cars when the underlying race was canceled due to threats of terrorism.

The key issues in these cases involve interpretation of the force majeure provisions of the governing contracts, as well as analyses of which of the parties had contracted to bear the risk of cancellation due to unusual events that made performance difficult, if not impossible.

Third, determine the governing law.

With respect to the Olympics-related cancellations, there is a possibility that Japanese law may govern in the absence of language to the contrary. Japanese law may differ from U.S. law in the handling of contract interpretation and potential remedies.

We asked our friends at the law firm of Anderson Mori & Tomotsune in Tokyo to provide us a preliminary, high-level list of Japanese legal considerations:

- Termination. In Japan, it can be costly and time-consuming to terminate so-called long-term suppliers. Whether a given relationship involves a long-term supply arrangement is fact-specific. Also, termination triggers relating to bankruptcy, insolvency and the like might not be enforceable.
- Force majeure. In Japanese practice, we sometimes see force majeure clauses that expressly include epidemics. Rarer are clauses that include governmental acts. However, regardless of the wording of the actual provisions at issue, in our experience, parties typically engage in intensive negotiations over whether a force majeure event has occurred.
- Frustration. Japanese law includes the concept of termination for frustration of purpose, but it has a high bar. In general, the relevant performance must have become physically impossible. There is no binding authority on the extent to which a pandemic might so frustrate performance.
- Damages due to breach of contract. Japanese law in general requires that damages be reasonably related to the underlying breach. Japanese law does not recognize punitive damages and excessive liquidated damages. Generally, Japanese courts are conservative in quantification of damages.
- Request for change of contractual terms. This typically arises in the context of real estate lease rents.
- Damages related to failed contract negotiations. In some cases, a dead deal leads to damages compensation.
- Employment. Dismissals are generally difficult, as is cutting salaries.
- Bankruptcy and accounts receivable collection. The area of creditors' rights is a relatively mature area of Japanese law, but cases can take years to be resolved.

Fourth, determine immediate actions to protect your rights.

The contracts may require notice be provided within a specific period. The notice should be carefully crafted to avoid creating an admission that may later restrict rights under relevant contracts and the governing law.

Think strategically about the operational needs and legal risks and possibilities that the business faces. Consider how the arguments you are making in this dispute could impact other corporate disputes,

including those in which the roles may be reversed. Be sure to collect documentation relied upon, and keep correspondence and emails between the parties.

Fifth, determine what rights you have in light of other parties' actions.

Can you stop performance? Would any such cessation put you at risk of litigation for breach of contract by subcontractors? The occurrence of a force majeure event may or may not be, in and of itself, sufficient to excuse nonperformance. Whether or not nonperformance is excused will depend on a careful reading of the clause itself and an analysis of the applicable law.

The postponement of an event as central to advertising and marketing as the Olympics is a rare cataclysm that is certain to spin off significant legal battles.

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