COVID-19: Obligations of an event organiser in times of the coronavirus crisis

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Recommendations for event organisers at a glance:

- **Review your contracts with regard to "force majeure" clauses**
- **Work with different scenarios to assess your scope of action**
- **Inform your contractual partners early and comprehensively that the event will most likely or definitely not take place**
- **Take all appropriate and necessary measures to mitigate the imminent or already incurred damage as far as possible (cancel reservations in due time)**
- **If possible, obtain the consent of your contractual partners to cancel or postpone your event. Offer them – if possible and desired – a specific adaptation of the contract**

I. Introduction

COVID-19 is keeping the world in suspense. Since the outbreak of the coronavirus in late 2019, governments around the world have imposed severe sanctions to prevent the virus from spreading. Switzerland is no exception.

On 16 March 2020, the Swiss government adopted strict measures to combat and reduce the risk of transmission of COVID-19. Amongst other things, the Swiss government has prohibited the holding of private and public events, including sports events and club activities, at least until 19 April 2020. In addition, it has banned gatherings of more than five persons in public areas.

From the Geneva Motor Show to the IIHF Ice Hockey World Championship – major events in Switzerland are affected by COVID-19 and its consequences. Due to the coronavirus crisis in

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general and the restrictions imposed by the Swiss government on 16 March 2020 in particular, event organisers are forced to cancel or postpone their events in Switzerland.

These cancellations and postponements of events raise numerous legal questions, e.g., which obligations an event organiser has to observe under Swiss law if it is unable to hold the event as planned.

This legal update focuses on this question and deals with the various obligations of an event organiser based on four scenarios. A distinction is made between (i) a cancellation of an event without replacement and (ii) a postponement of an event. These variants then differentiate between (iii) whether the event organiser had to cancel or postpone the event due to an official order or (iv) whether it does so voluntarily based on the emergency situation.

II. Cancellation of an event without replacement

1. Cancellation of an event without replacement due to official order

Case study:

Event organiser X. plans to hold a one-time cross-country skiing event on 11 April 2020. Due to official orders the event has to be cancelled. Given its size and the weather getting warmer, it cannot be postponed.

1.1 Extinction of the primary contractual obligation

If an event organiser cannot conduct an event due to an official order, this is usually a case of force majeure and thus a permanent impossibility according to Swiss law for which the organiser is not responsible.

Unless otherwise contractually agreed, this impossibility of performance shall have the consequence that the organiser shall be released from its contractual obligations to provide the contractual services. Furthermore, the organiser is generally not obliged to compensate for the damage incurred by the contractual partner as a result of the cancellation.

At the same time, however, the organiser’s claims against its contractual partners shall also lapse (e.g., trade fair fees of an exhibitor, fees for event tickets of a visitor, financial contributions of sponsors, or artistic performance of an actor or musician).

1.2 Obligation to provide information at an early stage

Although the subsequent impossibility of performance thus generally results in the extinction of the main contractual obligations, the claim of the organiser not to be liable for damages may be reduced under certain circumstances. In particular, this is the case if the organiser does not comply with the new obligations resulting from the impossibility of performance.

In this respect, the contractual obligation of the organiser to provide information seems to be the most relevant. The organiser's obligation to provide information requires that the organiser

informs its contractual partners immediately upon knowledge of the impossibility that has occurred or is very likely to occur. Thereby, it is irrelevant whether the event can still be held at a later date.

As a rule, the organiser is only exempt from providing such information if it can be expected that its contractual partners already know the reason for the impossibility. In practice, an obligation to inform can be waived in particular if an official order has imposed a ban of assembly or even a general lockdown and it can be assumed that this will also last on the day of the planned event.

The orders issued by the Swiss Federal Council on the 16 March 2020 (in particular the prohibition of events and gatherings of people) apply to the entire Swiss population and must be respected by all organisations, institutions and cantons. The measures taken have been widely reported in the media, so it can therefore be assumed that the majority of the Swiss population is aware of the official order. Therefore, an event organiser is generally not obliged to inform its contractual partners in Switzerland about the current situation and its consequences.

Nevertheless, organisers are well advised to proactively inform their contractual partners not only about the impossibility but also about the cancellation of an event and its consequences. This is particularly important in the case of international events, where the contractual partners cannot be expected to be aware of the concrete consequences of the measures taken by the Swiss authorities or to be able to assess their extent.

1.3 Obligation to mitigate damages

An obligation to proactively inform the contractual partner may then also arise from the organiser's obligation to mitigate damages.

The obligation to mitigate damages obliges the organiser to limit as far as possible the damage that threatens its contractual partners as a result of the cancellation of the event. Under consideration of the concrete circumstances, the organiser is especially obliged to do everything reasonable and appropriate to avoid or reduce the damage. Inevitably, early and comprehensive information of the contracting party qualifies as an effective measure in this respect. This applies all the more so since this precaution can be expected without further ado from the organiser even after the occurrence of the impossibility (i.e. the official order).

2. Voluntary cancellation of an event without replacement

Case study:

The event organiser X. plans to hold a political event in Zurich on 1 May 2020. Various individual and exceptional permissions were issued for the event. Postponement to another date is not possible.

2.1 Non-performance of the contractual service owed in breach of duty

The scenario discussed above, in which an organiser is forced to cancel an event as a result of an official order (because it should have taken place during the period in which the official measures are still in force), must be distinguished from the scenario here, in which an organiser cancels an event even though its performance would – from an objective point of view –still be permissible and possible.

In contrast to the first scenario, voluntary cancellation is not the result of a permanent impossibility in the aforementioned sense. On the contrary, by voluntarily cancelling the event, the organiser violates its contractual obligation to hold the event as agreed. If the organiser does not conduct the event, it will be in default with its performance under certain circumstances. This may result in the organiser being liable for damages to its contractual partners. The event organiser must therefore carefully consider a voluntary cancellation.

2.2 Obligation to act in good faith and to adopt protective measures

Nevertheless, it should be noted that the organiser is regularly subject to not only a primary contractual obligation but also to various secondary obligations (cf. explanations above). On the basis of these secondary obligations, the organiser may be required to cancel its event voluntarily if this is necessary to ensure that the interests of the contractual partner are protected.

In the present context, two secondary obligations come into consideration: firstly, the organiser's duty of loyalty, and secondly, its duties of care and protection.

The former obliges the organiser to be loyal to its contractual partners, to preserve their legal and financial sphere as much as possible and to protect it for the duration of the legal contract. Thereby, the focus of this duty of conduct lies in the consideration of the contractual partner's legally protected interests (e.g., protection of the event visitor against infection with COVID-19).

In addition, the duty of care and protection obliges the organiser to prevent the realisation of a risk (e.g., the danger of infection due to the large gathering of people during an event) by means of appropriate protective measures. This must be specified in two ways. On the one hand, the organiser can only bear foreseeable risks. On the other hand, it is necessary that the cost of the protective measures to be taken by the organiser is in reasonable proportion to the nature of the event.

2.3 Voluntary cancellation falls within the organiser's sphere of risk

However, it should be noted that compliance with the above-mentioned secondary obligations does not mean that the organiser can hold itself harmless against the contractual partner.

Upon conclusion of the contract, the organiser had to be aware that it would assume the usual secondary obligations in addition to the main obligation, namely the execution of the event. The fact that the pandemic now makes it almost impossible for the organiser to act in accordance with the contract must be attributed to its sphere of risk and cannot be passed on to its contractual partners. Therefore, compliance with the secondary obligations only results in the possibility of limiting the potential compensation owed by the organiser for non-performance of the primary obligation.

2.4 Consent of the contracting party as rescue in last resort

In view of the above, it may be concluded that the organiser has only one possibility to hold itself harmless against its contractual partners.

Prior to the cancellation of the event, the organiser must seek to contact its contractual partners in order to obtain their consent to the cancellation of the event. This consent enables the organiser to prevent the occurrence of the delay and the associated negative consequences.

In this context, however, it should be noted that the organiser has no legal claim to such a declaration of consent from its contractual partners and is solely dependent on their goodwill.

III. Postponement of an event

1. Postponement of an event due to official order

Case study:

The event organiser X. plans to hold a concert with a well-known artist on 4 April 2020. Due to an official order, the concert has to be cancelled. The musician is willing to perform on another date.

1.1 No right to unilateral amendment of the contract

If an event has to be cancelled due to an official order, but its performance can be postponed to a later date, a temporary impossibility is generally assumed. A temporary impossibility does not constitute a case of classical impossibility in the aforementioned sense and does not generally result in the extinction of the contractual performance obligations.

According to Swiss law, the postponement of an event generally requires an amendment of the contract, because objectively essential points of the contract have to be modified. For such amendments, Swiss law requires – apart from special cases such as the so-called "clausula rebus sic stantibus" or special contractual agreements (e.g., in general terms and conditions) – the consent of both contracting parties.

If the organiser thus wishes to postpone the event to another date, it is obliged to inform its contractual partner about the desired amendment of the contract (and the event schedule in general) and to send the partner a concrete proposal regarding the amendments to be made. The organiser is also obliged to take such action due to its obligation to mitigate damages.

If the contractual partner accepts the proposed amendments, the contract is considered concluded between the contractual parties with the new modifications. It replaces the contract previously in force between the contracting parties. The acceptance of the amended contract by the contractual partner can be made not only expressly but also implicitly. In practice, such implicit consent exists if the contracting party does not object within a certain period of time to an amendment to the contract submitted by the organiser (so-called opt-out).

If, on the other hand, the contractual partner objects to the proposed amendment, no adjustment of the contract is possible. In such a scenario, the previous contract will remain in force and the provisions of the default will apply (cf. explanations above).

1.2 Full information and communication of the reasons for the postponement

The above explanations show that the organiser is in principle not entitled to unilaterally amend the contract with its contractual partners to the new conditions. The organiser is dependent on the goodwill of its contractual partners.

Nevertheless, there is a good chance, that the organiser may amend the contract successfully since such an amendment serves the interests of the contractual partners in the performance of the event. It is essential that the organiser (i) explains to the contracting parties the reasons for the postponement of the event, (ii) proposes a concrete amendment of the contract, (iii) sets a reasonable deadline within which this amendment can be opposed and (iv) shows the consequences of the absence of an opposition.

2. Voluntary postponement of an event

Case study:

The event organiser X. plans to hold an annual sports competition from 11 – 23 May 2020 in various Swiss sports facilities. A postponement to the next year is possible.

2.1 No right to personal amendment of the contract

If the organiser wishes to postpone the event, although its performance – from an objective point of view – would still be permissible and possible, there is neither a case of permanent nor temporary impossibility.

The contracts are therefore still valid. If the organiser decides unilaterally to postpone the event or if the contractual partner does not agree to an amendment of the contract, the organiser risks being in default with the fulfilment of its contractual obligations (cf. the explanations above).

2.2 Absorptions of damage caused by default as a possible solution

In this case, the organiser can only prevent the occurrence of the default by offering its contractual partners (i) the performance of the event at a later point in time and (ii) the absorption of the associated default interest and default damages.

Besides a valid alternative date for the performance of the event, this offer should also include an explicit declaration that the damage caused by the default will be absorbed. As damage caused by default, the contractual partner may, in practice, claim the travel costs or other expenses and outlays incurred in vain (e.g., costs for hotel accommodation).

From a legal point of view, the abovementioned offer may have a positive side effect for the organiser, who is generally liable for damages: if the contractual partner does not accept the

organiser's offer within the set period, the contractual partner itself will be in default of acceptance and thus relieve the organiser of the negative consequences of the debtor's default.

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No legal or tax advice

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