

Coronavirus and Football – what next?

These are unprecedented times but, where possible, the FSA will continue its work and campaigns on behalf of football fans, while following all advice from Public Health England. Fan safety is always our number one priority.

However, the FSA can't focus solely on existing campaign work as Covid-19 has brought new and unforeseen challenges for clubs, including those who are supporter-owned. With that in mind legal and professional services group Gateley have produced this briefing document for FSA members.

As part of their service Gateley can offer a 30-minute free legal advice service to all FSA affiliated supporters' trusts who own or part-own football clubs. Please see our contact details below.

Commercial Issues

In these unprecedented and uncertain times, the spread of Covid-19 is threatening to pose significant issues for families, businesses and other organisations worldwide, but what are the key issues and risks being faced by football clubs, as Sport in the UK and across the world is effectively put on hold? Here we aim to address some of the key things that your club can look out for, in order to help mitigate those risks.

Now that all fixtures have suspended until 3 April (at least) and the FA has advised all grassroots football in England to be postponed, the ramifications are wide-ranging for all clubs, whether that's because of the impact on your players, coaches or support staff, or understanding how the established supply chains that keep the club operating on a day to day basis will be affected. More and more clubs are now inevitably looking closely at their contracts to see how they can manage the impact the crisis will have.

In the first instance, our advice to clubs would be to consider the contracts you have with your hospitality and catering service providers, your partners and sponsors and other service providers, such as security and other ground staff, as well as contractors. What will the Covid-19 pandemic impact these contracts, now that games are postponed?

What should you be looking out for?

Most of your club's commercial contracts will include what are called '**force majeure**' clauses. The force majeure clause is usually found at the end of your contracts and are essentially designed to protect one or both parties, if something happens to prevent them performing the contract that is outside their control.

An effective clause, once triggered, will suspend performance of the affected party's obligations whilst the force majeure event is ongoing, until the contract can be "resurrected" after the event. In some contracts, a suspension may not be workable, and parties may seek to terminate the contract entirely. Your contracts may also provide for the right to terminate after force majeure has been in place for a defined period of time, but each contract will differ and therefore, it is important to seek legal advice if you are unsure.

Under English law there is no implied concept of force majeure and a contract must contain an express provision in order to allow force majeure to be claimed. It is also down to the contract to define the circumstances that constitute force majeure and the precise working of your contracts will be very important in this regard. Since the virus is new, it is unlikely that any clauses in your contracts will explicitly refer to a 'Coronavirus' outbreak. So, it will have to be considered whether your clauses have been drafted widely enough to specifically cover the outbreak as a force majeure event in the contract. Usually, but not always, a force majeure event is defined in the general sense, along the lines of "circumstances outside of the control of the parties" with examples then given of what is considered outside of the parties' control such as fire, flood, terrorist act, act of war or act of government.

Even if it is covered, other requirements may still need to be satisfied to constitute 'force majeure' depending on the wording of the clause. If you have any queries about a particular force majeure clause

and its impact on your contracts, or indeed any other coronavirus related issues, we would advise getting in touch with our legal partner, **Gateley**.

What happens if your contract does not contain a force majeure clause?

In these circumstances, the old English law doctrine of frustration may apply, if the pandemic ultimately makes performance of your contract physically or commercially impossible or transforms the obligation to perform into a radically different obligation than was previously envisaged when the contract was made. If a contract is deemed frustrated, it terminates immediately and all parties are released from their obligations (except those that should have been performed before the frustrating event, which they can remain liable for).

Frustration is unlikely to apply where performance is merely delayed or postponed and there is a very high threshold to demonstrate a “frustrating event” and therefore should only be pursued as a last resort. However, where contracts are tied to a specific date and time and can no longer go ahead, for example, because the government imposes widespread bans on large gatherings, football matches or other events over a certain capacity, they may be said to be ‘frustrated’, depending on the size of the mass gathering. At the time of writing, it is not yet clear what the definition of ‘mass gathering’ is and whether a match played ‘behind closed doors’ would fall under this definition for example. We await further advice from the government and ultimately a decision on what will happen to the remainder of the football season, but in the meantime, do seek legal advice or governing body instructions before taking any significant action.

What should you be doing now?

- Review all key club contracts looking out for any specific terms which talk about termination, cancellation, non-performance or ‘force majeure’.
- Invite communications and early dialogue from contractual partners regarding the impact of the outbreak, to prepare as best you can for potential disruptions and identify a pragmatic way forward for both parties
- Await formal government or governing body instructions before taking any significant action. Whilst the existence of the Coronavirus pandemic may be within scope of a force majeure clause (i.e. where the clause does not provide explanation beyond “causes outside the control of the parties”), it could be dangerous to assume that any additional steps taken by a party to counteract the virus (being within its control) will fall within the scope of such a clause. The key question will be what triggered liability: the pandemic, governmental edict or the steps taken by a party in response?
- If in doubt about whether a force majeure event applies to specific contracts or what other relief may be available, seek legal advice from **Gateley** before acting or sending communications.

Consumer Issues

What about ticket sales and cancellations - do we have to refund our fans?

As a community owned club your supporters will likely be sympathetic to the situation the club faces. Our advice would be to make early contact with season ticket holders and anyone who may have made an advance purchase of tickets or other club matchday packages. Your response to any requests for refunds will depend on the contract you have with your ticketholders, any express rights to cancel in the ticket terms and conditions and ultimately on whether the government/governing bodies decide to complete the season.

Most terms and conditions allow ticket holders to use their tickets for rearranged matches, but if you have any queries about your terms and conditions and fans’ rights to cancel and claim refunds, we would advise getting in touch with **Gateley**.

Terms and conditions aside, it is important to consider the reputational issues that a failure to refund ticket holders in the event of cancellation may have on the club. Of course, refunds may soften the impact of the cancellation, but can obviously lead to incurring substantial costs if insurance is unavailable for these types of business losses.

Employment considerations

The outbreak of coronavirus also raises points of employment law, immigration and health and safety for clubs and their staff, whether that's in respect of your players or support staff. Specific legal advice should be sought where necessary, as the situation is changing daily, but for guidance on what you should be considering now please see below links to further advice.

The FSA is a member of Cooperatives UK and we would advise all supporter-owned clubs to consider [joining the FSA](#) as members of Cooperatives UK. Cooperatives UK have provided some [advice and guidance on HR and governance issues](#) which you may find helpful.

Gateley has also prepared some guidance notes as the pandemic develops, which can be found here:

[Note for employers - Issue 1](#)

[Note for employers - Issue 2](#)

[Note for employers - Issue 3](#)

[Note for employers - Issue 4](#)

[Note for employers - Issue 5](#)

How to get in touch with Gateley

As you may be aware, your club's membership with the FSA entitles your club to 30 minutes of free legal advice from Gateley. In the first instance, please contact either Andy Walsh (andy.walsh@thefsa.org.uk) or Richard Irving (richard.iring@thefsa.org.uk). Once we have received the details of your query, we will put you in touch with an appropriate Gateley contact.

