Blaney McMurtry LLP

PUBLICATION

The Legal Implications of COVID-19 on the Tokyo Olympic Games

Date: July 07, 2021
Author: Tyler Matthews

This is not a typical Olympic year. In fact, this is the first time since 1992 that the summer and winter Olympics will be held less than one year apart. In March of 2020, the COVID-19 pandemic stopped international sport in its tracks, resulting in the International Olympic Committee ("**IOC**") announcing that the 2020 Tokyo Games would be postponed to 2021. From this postponement, and the pandemic generally, several unprecedented legal issues arose. Are fans from around the world eligible for ticket refunds? Do athletes who previously qualified to compete in 2020 automatically qualify in 2021? Who is responsible for the inevitable health risks that the athletes will face? This article addresses these most pressing concerns.

Ticket Refunds

International fans have officially been banned from attending the Tokyo Games due to persisting concerns regarding COVID-19 transmission. Customers owning approximately $800 million of worthless tickets around the world are currently demanding reimbursements.

Refund policies vary by jurisdiction. Tickets must be purchased through the official ticket provider of a given jurisdiction or directly from the Tokyo 2020 Organizing Committee ("**TOC**"). The TOC is providing refunds but at an undisclosed date. In Canada, ATPI Sports Events is the official ticket provider for the Tokyo Games. ATPI has implemented an opt-out policy, whereby refunds will automatically be issued by a specified date.

Refunds have not been quite as easy to come by in other jurisdictions. CoSport is the official ticket provider for the US, as well as Sweden, Norway, Greece, Bulgaria, Croatia, Jordan, and Australia. CoSport implemented an opt-in policy, whereby ticket holders were required to submit a refund form with just eight (8) days' notice. Furthermore, CoSport has only offered its customers a 75% refund, which has resulted in the filing of a class action in the US. It has been alleged that CoSport's refund practices are a breach of its Terms and Conditions, as well as New Jersey's *Consumer Fraud Act* and *Truth-in-Consumer Contract, Warranty and Notice Act*.

Athlete Selection & Qualification

Due to the postponement, National Sport Organizations ("**NSOs**") have essentially had three (3) options when it comes to athlete selection: (1) keep the team that qualified in 2020; (2) amend the selection criteria to account for old and new results; or (3) amend the criteria to consider only new qualification events. The decision to choose among the foregoing options is sport-specific.

The decision to implement any of these approaches can have specific legal implications. For example, due to the cancellation of international Olympic qualifiers, the IOC's International Boxing Task Force decided to only consider the 2018 and 2019 World Championships as the women's qualification standard. The issue is that Olympic-hopeful Mandy Bujold was either pregnant or on maternity leave for both events being considered. Several high-profile former athletes have spoken out against the IOC's decision such as Billie Jean King and Lennox Lewis, among others. In an interview with Dave Stern (Sport and Entertainment Law Partner at Blaney McMurtry LLP in Toronto, Canada), Donovan Bailey, 3-time gold medalist and formerly the world's fastest man, found "the process extremely unfair for athletes that previously qualified for the Olympic Games", and further believes that these upcoming Olympic games "will prove to be the greatest psychological battle and mental toughness challenge that athletes have ever had to endure in their professional careers", with regards to the uncertainty of their eligibility and the global fear of COVID-19. An appeal was filed with the Court of Arbitration for Sport ("**CAS**") to make a determination on Bujold's human rights challenge. The CAS ruled in favour of Bujold on June 30, 2021, stating that the IOC must accommodate women who were pregnant or post-partum during the qualification period.

The CAS has yet to publish the Bujold decision, nor any other decision with respect to COVID-19 athlete selection. However, the Sport Dispute Resolution Centre of Canada ("**SDRCC**") has published jurisprudence on related issues. *Rivest v Karate Canada* discusses an athlete who was considered the "top choice" to represent Canada prior to the implementation of amended selection criteria. Even though the amended criteria was novel in comparison to past criteria, it was found to be reasonably implemented, exemplifying a deferential standard towards the NSO's expertise when it comes to decisions made under the pressures of COVID-19.

Similarly, in *Kamara v Boxing Canada,* the athlete who won the internal qualifier for the Olympic Pathway Team decided to forfeit their spot after the IOC postponed the Tokyo Games. The Panel found that it was reasonable to create a new method of qualification instead of automatically selecting the athlete who finished second at the internal qualifier. It was determined, however, that the process of selecting a new qualification method needs to be procedurally fair. Provincial members to Boxing Canada were asked to vote on the new selection method, but it was decided that they were not properly advised of the time sensitivity. As a result, three votes were submitted late and were not considered.

The Risk to Athletes

As the opening ceremonies of the Tokyo Games inch closer, the concern for the health of the athletes continues to increase. Medical Treatment and Repatriation Insurance, which includes coverage for COVID-19 and related illnesses, is mandatory. This insurance is provided for

athletes by the TOC, but only from July 7 to August 11. This wouldn't, however, cover an athlete that is hospitalized for weeks, either before or after this timeframe. It may be wise for competing nations and/or athletes to inquire about further insurance coverage.

Beyond insurance, the IOC has taken steps to protect themselves from COVID-19-related risks. All athletes will be required to sign a waiver that reads: "I agree that I participate in the Games at my own risk and own responsibility, including any impact on my participation to and/or performance in the Games, serious bodily injury or even death raised by the potential exposure to health hazards such the transmission of COVID-19…while attending the Games." While the IOC states that the waiver ensures informed consent among participants, athletes need to fully understand the legal implications of signing such a waiver (especially with the Japanese Government hinting at the reimplementation of the state of emergency in Japan).

The planned measures in place may be cause for concern. A recent study raised three (3) concerns in particular: 1) contact tracing is done via smart phone app, however many athletes do not compete with their phone; 2) athletes will be housed three (3) people to a single room; and 3) athletes must supply face masks for themselves. All that being said, the waiver provides for no cause of action against the IOC.

In summary, with significantly uncertainty looming over the Olympics, even as recently as June 3 2021, the Japanese Government has continued to receive considerable warnings from the media, experts of infectious diseases, as well the as its own citizens. Shigeru Omi, head of a panel of experts advising the Japanese Government on its COVID-19 response, demanded that organizers explain to a skeptical public as to why the Olympics are not being postponed further. Japan's public broadcaster, NHK reported that 1/8th of all volunteers have already quit due to the various health risks involved in working at such an event.

The Tokyo Olympic Games in the wake of COVID-19 and a recent state of emergency has changed the international sports law landscape in unprecedented ways. Athletes and sport organizations continue to adapt as we inch closer to the torch being lit. Just as the world was not prepared for COVID-19, it is nearly impossible for Olympic athletes and organizers to be fully prepared as well. The fallout seems inevitable. Will other ticket providers be sued based on their refund policies? Will athlete selection appeals come down to the wire? Will COVID-19 adversely impact the health and participation of multiple athletes? Only time will tell.

The author would like to acknowledge and thank summer student Tyler Matthews for his contributions to this article.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.