

## White paper

### Cancellation terms in race track contracts, especially regarding the corona pandemic

#### Management Summary:

Since the outbreak of the pandemic, Corona alone does not necessarily constitute a case of force majeure, which is why specific special arrangements should be agreed upon between race track operators and tenants.

In the event that one of the contractual partners has to withdraw from the contract - even at short notice - due to a Corona situation, mutual and fair compensation should be agreed.

If an event is cancelled by the race track operator due to a major event, the lessee must include compensation for this.

In order to distribute the risks of cancellation fairly, the track rental should only be prepaid with 30-50 % of the track rental at the time of booking and secured by a deposit guarantee, for example.

A basic rent in combination with a graduated rent depending on the number of vehicles represents a fair solution for racetrack operators and renters, enabling both parties to reduce their entrepreneurial risks during the Corona pandemic equally.

The current corona pandemic presents us all with completely new challenges. That's why it's now important that racetrack operators and tenants act more together and at eye level than has often been the case in recent years. In our view, a pure customer-supplier relationship in the Corona situation will make it even more difficult for organizers, especially of end-customer events such as track days and driving experiences, to conduct their events with calculable commercial risk. As a result, there will be a lack of rental income for race track operators, which could lead to financial difficulties. At the same time, the lack of rental income leads racetrack operators to carry out their customers' types of events (track days, test days, etc.) independently and often at low fixed costs. Such "self-organized" events, in turn, are in direct competition with events organized by race track renters and further aggravate their current situation.

With this whitepaper we, HTA Circuit Booking GmbH, Speer Racing GmbH Sportveranstaltungen and Bongartz Els & Kollegen Rechtsanwaltsgesellschaft mbH, take a look at the current cancellation and rescission regulations for the rental of a racetrack and give recommendations for action regarding the design of the same, taking into account the mutual interests in the current corona situation.

## I. Corona as "force majeure"

- Provisions on force majeure can be found in many race track contracts throughout the EU. The respective wording and especially the definitions of force majeure are always different. Often "epidemics" (as well as corona) are mentioned as examples of force majeure, but without being further specified. However, the mere existence of Corona in the country of the race track cannot be sufficient to justify a case of force majeure. Therefore, additional circumstances have to be added in each case, which make it impossible or unreasonable for one of the parties to the contract to offer the contractually owed service (e.g. an official prohibition for the race track operator to conduct any events on the race track) or to use the contractually owed service (e.g. a prohibition for the customer to enter the country of the race track, because the customer comes from a risk area).
- In any case, Corona may in principle establish a case of force majeure together with a further measure, in particular by a state authority. However, this does not apply to all contracts that were or will be concluded after the outbreak of Corona in Europe (approx. March 2020), because in these contracts, a typical prerequisite for the occurrence of force majeure, the unpredictability of the case of force majeure at the time the contract is concluded, is generally not given.
- When concluding future racetrack contracts, a force majeure clause can therefore generally not help any contractual partner, unless one explicitly includes certain Corona situations in the respective clause and makes it clear that predictability is not important in this respect. If you generally want to implement force majeure in racetrack contracts, we recommend the so-called "long ICC clause" ([https://www.iccgermany.de/fileadmin/user\\_upload/Content/Handelsrecht-\\_und\\_praxis/ICC\\_ForceMajeure\\_Hardship\\_Clauses\\_March2020\\_GER.pdf](https://www.iccgermany.de/fileadmin/user_upload/Content/Handelsrecht-_und_praxis/ICC_ForceMajeure_Hardship_Clauses_March2020_GER.pdf)) or a reference to it and, if necessary, the individual adaptation of the same regarding corona situations or to the needs of the respective party of a racetrack contract]. In our opinion, however, it is better to agree on concrete special provisions regarding certain situations, which in particular enable the customer to withdraw from the contract free of charge, see para. II.

## II. Rights of withdrawal from the contract for customers due to a Corona situation

- Typical racetrack contracts are not particularly customer-friendly when it comes to the options that entitle a customer to withdraw from the contract or, put simply, to cancel an order. In some cases, a customer can only rely on a general force majeure clause in the context of considerations as to whether to cancel or not, which often places very high demands on the existence of force majeure (see point I.). Often, however, there are also regulations which allow the customer to cancel without giving reasons, but which provide for high, usually staggered "cancellation fees" (e.g. 50% for cancellations up to 61 days before the day of the respective event, 80% for cancellations up to 31 days and 100% within the last 30 days).
- In the current time period, situations arise where an event cannot be held for reasons related to the Corona Pandemic (hereinafter "Corona Situation"), e.g. because (i) the authorities responsible for the race track prohibit events on the race track, (ii) the participants of the event come from a country that has issued a travel warning for the race track country or (iii) because the race track country the participants are denied entry, typically at very short notice, so that in the event of cancellation the customer is usually required to pay 100% of the agreed payment.

- Against this background, it is obvious that customers are very reluctant to make any kind of race track bookings where the standard rules of the race track should apply. Therefore, it is essential that race tracks grant customers more flexible solutions from the contract in corona situations. On the other hand, race tracks cannot bear the risk of a corona situation occurring on their own, especially if the corona situation has nothing to do with the race track country (e.g. because all participants come from a country that prohibits its citizens from leaving the race track country).
- Furthermore, the type of event on the race track must be taken into account in this context, as it is often the case that authorities in a corona situation prohibit events of a tourist nature (e.g. track days), but allow events of a professional nature (e.g. motorsport tests).
- Against this background, race track operators are urgently advised to extend their contracts for race track bookings to include regulations for corona situations and, depending on the type of event, to offer the customer other possible solutions from the contract.
- However, there is no "patent solution" in this respect. Every race track operator has to adapt Corona special regulations to his needs and the needs of the customers individually. Our suggestion in this context, however, is to grant the customer a right of withdrawal in all conceivable corona situations if possible and to keep the requirements for proof of the corona situation low. In return, if the customer cancels the contract due to a corona situation, the race track operator should receive appropriate compensation that takes the interests of both parties into account, e.g. payment of approx. 30-50 % of the agreed compensation, regardless of the time of the declaration of withdrawal due to a corona situation. In our opinion, it would be fair and correct if the same would apply the other way round in case of a cancellation by the race track operator (e.g. because an authority prohibits all events on the race track), i.e. payment of the same amount that the customer would have had to pay if he had cancelled on his own, from the race track operator to the customer. The above-mentioned regulations could be further optimized by the fact that the legal consequence "compensation payment" does not occur automatically, but the parties have the possibility to reach a mutual agreement within a certain period of time (e.g. postponement).
- As an alternative to a cancellation by the customer, a staggering of the price could also be appropriate, especially in corona situations where only a certain number of participants are unable to attend the event, e.g. due to an entry ban. In this respect, the agreement of a basic rent, e.g. in the above mentioned range of 30-50 % of the usual price for renting the race track, could be considered. In addition, a relay rent would then have to be paid, ideally depending on the number of vehicles that drive on the track in the respective booked period. This would reduce the customer's risk on the one hand and, on the other hand, give the racetrack operator the opportunity to cover at least the costs with only a few vehicles and earn more than expected with many vehicles. The model of a graduated rent, which increases depending on the number of vehicles, has been standard practice for many years, especially in the Spanish racetrack market. Even though it was developed under different conditions than the current Corona situation, it clearly shows that there are a lot of race track operators who are willing to link their commercial success to the commercial success of the customer.

### **III. Rights of withdrawal from the contract without compensation for race track operators**

- Almost all race track operators reserve the right in their contracts to cancel a booked event if it becomes apparent after conclusion of the contract that a national or international race event will take place on the race track on the booked event day. In these cases, the race tracks make it clear in the small print that cancellation without compensation is possible at any time. Some race track contracts go even further. In one case even a cancellation for any reason should be possible and in case of such a cancellation the customer should pay 30% of the agreed price.
- On the other hand, the racetrack contracts provide that in case of cancellation by the customer, high cancellation fees are to be paid, see above.
- In our opinion, customers cannot accept such clauses, in particular if they have concluded contracts with participants, e.g. in the case of track days, because in this respect a cancellation by the race track operator may not only trigger a payment obligation to the race track operator, but may also make the customer liable for damages to the participants.
- But even if customers have signed a contract as described above, their chances of invoking the invalidity of the relevant provision in the race track contract are usually not bad, because such provisions, which in the legal sense are almost always to be qualified as General Terms and Conditions, may often disadvantage the customer inappropriately contrary to the requirements of good faith (see § 307 para. 1 sentence 1 BGB) and thus usually be invalid. Accordingly, customers may be able to demand full compensation from the race track operator or, if necessary, even enforce the booked event in court (e.g. by means of an interim injunction).
- But not all race track operators have very one-sided regulations regarding the cancellation of a major event. A race track operator promises the customer in such a case - also in small print - compensation for all damages suffered by the customer due to the cancellation, up to a maximum of twice the agreed rental price. In our opinion, this is a very good approach, as it meets the interests of both parties. Although the racetrack has to "pay" for the cancellation, on the other hand it earns very well from the big event, due to which the booked event has to be cancelled. Therefore, we recommend that customers discuss the legal consequences of a cancellation by the organizer with the organizer before signing the contract and strive for a fair solution such as the one described above.

### **IV. Time of payment of the race track rental**

- The typical current race track contracts stipulate that the customer has to pay the entire race track rental in advance. There is often a very long period of time between payment and the day of the event. The customer therefore has to pay the entire amount in advance without any security e.g. for the worst case, the insolvency of the racetrack operator. But not only in this case, but also if an event is postponed or even postponed several times by mutual agreement due to a corona situation, it is not appropriate for the racetrack operator to receive the entire rental fee in advance and the customer thus has to "pre-finance" the event over a very long period of time.
- In addition, there have recently been cases in which the race track operator was unable to refund the payment to the customer after the event was cancelled because he himself had already made corresponding payments to the owner of the race track and was not reimbursed.

- In order to avoid such risks or problems from the customer's point of view, a departure from the principle of a complete prepayment of the racetrack rental should be made. In our opinion, a good solution would be for the customer to pay a partial amount in advance, e.g. in the range of 30-50% mentioned above, and then pay the rest immediately before or after the event. This solution can be implemented particularly well with a staggered track rental, see point II above.
- In order to also secure the customer's down payment, e.g. in case of insolvency of the race track operator, the lessee has the possibility to secure his down payment by means of a down payment guarantee from a credit insurer, so that the customer is also secured if the race track operator, for whatever reason, cannot repay the down payment although he is obliged to do so (e.g. in case of a cancellation by the race track operator in a corona situation, see section II. above).

### **About HTA Circuit Booking GmbH**

Race track booking by mouse click. Simple, transparent, digital. With this claim, HTA Circuit Booking GmbH was founded in 2011 by the motor sports experts Sebastian Herke (former Head of Formula BMW), Dr. Carsten Tilke (Tilke Architects & Engineers) and Dirk Adorf (former works driver for BMW Motorsport). What has been standard for **hotel** rooms or flights for more than a decade, circuit-booking.com has since transferred to the worldwide marketing of race tracks. Thanks to the world's largest database in this area, 480 tracks in Europe, Asia or the USA can now be booked under the circuit-booking.com domain - including coveted tracks such as the Nürburgring, Indianapolis Motorsport Speedway, Laguna Seca, Yas Marina Circuit in Abu Dhabi or the Shanghai International Circuit. Circuit Booking supports the customer side, such as car manufacturers, automobile clubs and event organizers, in all phases of the booking process for tracks that are required for vehicle tests, track days, incentives or training.

In addition to the procurement of customers, Circuit Booking offers the operators of the race tracks extensive support with the world's only cloud-based track management software and customized white-label solutions - from resource management to event planning, invoicing and accounting to evaluations and statistics.

In order to make all the marketing possibilities of a racetrack easier and thus more attractive for all sides in a changing market, Circuit Booking's digital service portfolio is regularly expanded with innovative content. [www.circuit-booking.com](http://www.circuit-booking.com)

### **About Speer Racing GmbH Sportveranstaltungen**

With over 30 years of experience, over 150 rental days per year throughout Europe and 10,000 bookings per year, Speer Racing is Europe's number one for predominantly private racing events and motorcycle driving safety training - and thus particularly affected by the corona situation. Already a pioneer in "Motorsport for everyone" when it was founded in 1985, the Reutlingen-based company continued to set new standards in terms of quality and safety based on regular evaluation of the market. Speer Racing is the first racing event organizer ever to be certified according to DIN ISO 9001. With its quality management system, the company ensures that all services, from events to customer support and on-site handling to the organization of all processes in the background, are carried out with the highest level of professionalism and can be checked and evaluated at any time.

[www.speer-racing.de](http://www.speer-racing.de)

### **About Bongartz Els & Kollegen Rechtsanwaltsgesellschaft mbH**

We, the Aachen-based law firm Bongartz Els & Kollegen, advise companies in all matters with a focus on commercial law, corporate law and contract law. Especially in these areas we can draw on many years or even decades of professional experience. Since the beginning of the Corona period, we have been involved with a large number of contractual issues triggered by the Corona crisis. In almost all industries, we have found that the typical standard contracts in corona situations do not offer clear and good solutions, and we are therefore working continuously on appropriate improvements to the contracts. [www.bongartz-els.de](http://www.bongartz-els.de)

**NOTE: The contents of this white paper are not legal advice. Accordingly, no liability is assumed for the contents of this whitepaper.**