

COVID-19: CARES Act Resources for Associations and Legal Strategies for Association Meetings

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COVID-19: Legal Strategies for Association Meetings

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Agenda

- Focus of webinar is on impact of COVID-19 on association meetings and other events – i.e., meeting contracts and event cancellation insurance
- Difference between contract law provisions and common law principles
- Force majeure contract provisions
- Strategies and options to attempt to cancel without penalty or reduce penalties
- Pros and cons of canceling now or waiting to cancel or postpone
- If you proceed with rescheduling the meeting for several months from now, what steps to take to reduce risk to the event sponsor and risk to attendees
- Event cancellation insurance, commercial general liability insurance, and workers' compensation insurance
- Best practices for negotiating future meeting contracts

Force Majeure Overview

- “Force majeure” means “overpowering or irresistible force.” It is a common law principle and a contract term that can work to relieve the parties from performing their contractual obligations when certain unforeseen circumstances beyond their control arise.
- There is a difference between common law force majeure *principles* and force majeure provisions in *meeting contracts*.
- Sometimes referred to in contracts as “impossibility” or “termination without cause.”
- It can mean acts of God or acts of third parties outside of the control of the parties to the contract. That being said, not all force majeure clauses are equal. The devil is in the details.
- A successful force majeure cancellation will allow you to cancel the event without penalty to the venue. Expect *strong* pushback from the hotels and convention centers when canceling based on a force majeure provision, sometimes even when your position is strong.
- While force majeure provisions have historically been one of the least-negotiated provisions in hotel and convention center contracts, in situations like COVID-19, they have been at the center of and critical to the analysis.
- Contractual force majeure clauses generally only excuse *complete* performance (and not partial performance or underperformance) of contractual obligations.

Force Majeure Overview (cont.)

- If you have an event with multiple hotels and/or a convention center, the force majeure provisions likely will differ for each contract; each needs to be analyzed separately.
- The force majeure analysis needs to focus *both* on the provision's language itself and the facts that exist at the time; those facts may well change day-to-day and significantly affect both the analysis and the timing of decisions to cancel or attempt to postpone events.
- Ideally, the force majeure provision should be tied into the attrition provision(s) so that if there is a force majeure event and a decision is made to move forward with the event anyway, all attrition penalties will be waived (or at least reduced).
- *Two-part test*: qualifying force majeure event and its effect on your ability to perform your obligations under the contract.

Model Force Majeure Contract Provision

- **Force Majeure:** The performance of the Agreement by either party is subject to acts of God, war, government regulation, disasters, fires, **disease**, strikes, terrorism or threats of terrorism, civil disorders, curtailment of transportation facilities preventing or unreasonably delaying at least 25% of Event attendees and guests from participating at the Event, **or other similar cause**, including emergency or non-emergency conditions, **beyond the control of the parties making it inadvisable, illegal, impossible, or commercially impractical to hold the Event**, for the Hotel to provide the meeting and sleeping rooms or related facilities and/or services for the Event, or for either party to fully perform the material terms of the Agreement. The Agreement may be terminated without penalty and with performance fully excused for any one or more of these reasons by written notice from one party to the other. Should the Association decide to proceed with the Event when a force majeure event exists, all attrition penalties under this Agreement shall be waived by the Hotel.

Force Majeure Provisions: Impossibility/Illegality v. Commercial Impracticability/Inadvisability

- Hotels, convention centers, and other event venues generally strongly favor language allowing termination without penalty *only* if it is *impossible* or *illegal* to hold the event, and generally try to limit force majeure events to a specific, narrowly defined list.
- Event planners should try to negotiate the inclusion of verbiage referencing *commercial impracticability* and *inadvisability* – meaning that some unforeseen event outside of the parties’ control that took place after the contract was signed has made it *commercially impracticable* or *inadvisable* for one of the parties to perform and fulfill its obligations under the agreement. Also, be sure to attempt to broaden the list of force majeure events to include “or any similar cause...” or a similar catchall phrase.

No Contractual Force Majeure Provision?: Common Law Doctrines as Alternatives

- If a meeting contract does not contain a force majeure provision, other common law contract doctrines are relevant and may be applicable – such as the doctrines of *impracticability*, *impossibility* and/or *frustration of purpose*. While the common law governing these doctrines varies from state to state in the U.S., the doctrines of *impracticability* and *impossibility* generally may excuse nonperformance where a party establishes that (i) an unexpected intervening event occurred, (ii) the parties' agreement assumed such an event would not occur, and (iii) the unexpected event made contractual performance impossible or impracticable. For the *frustration of purpose* doctrine, the focus is on whether the event at issue has obviated the *purpose* of the contract, rather than whether it has made a party's contractual *performance* unviable.

Strategies and Options

- The analysis as to whether you cancel without penalty is as contingent on the provision's verbiage as it is on the factual circumstances at the time (e.g., WHO, CDC and/or other government declarations, government bans, shelter-in-place orders, or admonitions against large gatherings, government and/or private travel bans on your attendees, speakers, exhibitors, etc.). You generally will have more leverage if the force majeure provision provides for (i) cancellation due to *commercial impracticability* or *inadvisability*, and (ii) contains a broad list of force majeure events (or at least a catchall "or any similar cause" statement).
- Potential event cancellation insurance coverage will play a key role in the decision-making.
- In some circumstances, consider polling your registrants to get a sense of how many cannot attend due to pandemic-driven, employer-imposed travel bans; compile specific evidence to support an *impossibility* of performance position.
- Don't be afraid to "call the bluff" of the hotel or convention center.
- The written cancellation notice to the venue(s) is critical – make it very specific, substantive, comprehensive, and compelling, and don't be afraid to be aggressive.
- Even if you lack a strong legal position, the ability to either reschedule the meeting and/or contract for future meetings can (*sometimes*) help with negotiating your way out of penalties.
- Another consideration in your negotiation posture is whether the venue(s) has/have sizable deposits of yours already ("possession is 9/10th of the law").

Pros & Cons of Canceling Now or Waiting to Cancel or Attempt to Postpone

- While the terms of your existing force majeure provision are set and not modifiable, the facts “on the ground” that affect how the force majeure provision is analyzed and applied are changing on a daily basis.
- **Timing is key.** As such, there are instances when *waiting* to make a cancellation decision may well significantly strengthen your argument that the force majeure provision and/or event cancellation insurance applies; of course, there also are risks to waiting too long to cancel.
- For instance, federal, state and/or local government bans on mass gatherings, shelter-in-place orders, closures of hotels and convention centers, and travel bans can have a significant impact on whether the force majeure provision and/or event cancellation insurance will apply; in some cases, it can make a complete difference in how the event venue responds to your cancellation.
- At the same time, there are numerous other non-legal considerations that make it difficult to wait too long to make the cancellation decision.
- Be sure that your attendee and board communications align and are consistent with your communications with the venue(s), both before and after cancellation notice is given to the venue(s).

If You Proceed to Reschedule Your Event for Several Months from Now, How to Reduce Your and Your Attendees' Risk

- Consider all relevant factors in deciding whether to reschedule the event for several months down the road; very significant uncertainty and risk.
- Most event organizers are choosing to cancel this year's events and not postpone them, sometimes rescheduling next year's one at the same venue.
- Without question, if you decide to postpone with your meeting until later this year, the risk assessment (including potential cancellation again) and risk mitigation steps are critical.
- If you reschedule the meeting for later this year, attempt to negotiate all cancellation and attrition penalties out of the new contract.
- When holding events once the COVID-19 crisis subsides, the key will be to be able to demonstrate that your organization was not negligent in deciding to hold the event and in how it carried out the event, and should not be held liable if someone does, in fact, contract COVID-19 at your event (or suffers other harm, such as getting quarantined in the city of your event).

What About Event Cancellation Insurance?

- Event cancellation insurance can be critically beneficial but has its limitations. Definitions, exclusions and limitations are critical to analyze.
- The four leading event cancellation insurance policies are Showstoppers (Aon), Expo-Plus (Mercer), Houston Casualty Company (“HCC”), and Beazley.
- Presently, COVID-19 and all communicable disease-related claims are now expressly *excluded* from coverage under all four of the leading event cancellation insurance policies, and you cannot “buy back” such coverage.
- Many events are now uninsured because they did not bind their coverage before the COVID-19 exclusion was instituted (generally, mid-January 2020).
- Since 2003, all four of the leading policies excluded communicable disease-related claims in the base policy, but you could either purchase an endorsement to “buy back” the coverage or pay a higher premium to avoid the exclusion.

What About Event Cancellation Insurance? (cont.)

- If your organization has an event cancellation insurance policy that was bound pre-mid-January 2020 (with no COVID-19 exclusion), it may still have a provision that provides that there will be no coverage if the claim arises “directly or indirectly from *threat* or *fear* of Communicable Disease (whether actual or perceived).” Key issue; changing daily.
- It remains unclear how these insurance carriers will ultimately respond to claims during this pandemic, but due to the insuring clauses and/or definitions of “cancellation,” the analysis is similar to the “impossible or illegal” force majeure analysis – e.g., what government bans existed at the time of cancellation, how long are they likely to extend, what other factors make it impossible to hold the event.
- If there is coverage, it will cover not only complete cancellation but also Enforced Reduced Attendance (the “enforced inability of Participants to attend the Event solely and directly as a result of the same specific cause, which is beyond their control and is not otherwise excluded”). This is only relevant if you decide to hold the event later on.

Commercial General Liability Insurance

- If you do decide to proceed with your event and one or more attendees contracts COVID-19 and/or gets quarantined in the city of your event, and then brings a legal claim against your organization as a result, will your commercial general liability (“CGL”) insurance step in to defend the claim and protect your organization?
- Generally speaking, yes, it *should* provide coverage – at a minimum, to defend the claim (e.g., legal fees and costs). There is no communicable disease exclusion in the standard CGL insurance policies.
- That being said, the insurance carrier likely will push back on covering claims that your organization is responsible for attendees contracting COVID-19 at your event or for your attendees being quarantined.

Workers' Compensation Insurance

- Workers' compensation insurance generally *not exclude* COVID-19-related claims generated from your organization's employees.
- There are no exclusions in connection with any communicable disease.
- Unless another, unrelated exclusion applies.
- That being said, because it is so difficult to prove where and when someone contracted COVID-19, insurance carriers likely will push back on covering any such claims.

Best Practices for Negotiating Future Meeting Contracts

- Focus heavily on the details and nuance of the force majeure provision in your meeting contracts; try to get it as broad as possible.
- There is no question this will be a hotly contested provision in meeting contracts for the foreseeable future; we are seeing it already, including new and creative variations on force majeure provisions.
- Attempt to tie the force majeure provision into the attrition clause, so that attrition penalties can be waived (or at least reduced) in the event you decide to hold the event even when a force majeure event occurs – or try to negotiate away or significantly limit cancellation and attrition penalties altogether (and/or reduce guaranteed minimums for sleeping room and food and beverage revenue).
- Select the most favorable event cancellation insurance carrier and work hard to negotiate the most favorable definitions, endorsements and exclusions. Even without communicable disease coverage, event cancellation insurance remains valuable (albeit more expensive than it used to be).

Questions?

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