

# Cancelled And Sued

## Legal strategies during COVID-19



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**D**ue to the complete, unforeseen and devastating effects of the rapidly spreading COVID-19 pandemic, nonprofit managers are facing incredibly tough decisions right now regarding upcoming and long-scheduled conferences and meetings in the United States and around the world.

Even for those organizations with meetings slated for the next month or two, while most do not believe it is realistic that those events will be able to move forward as planned, the game of “chicken” being played with hotels, convention centers, meeting vendors, and event cancellation insurance carriers – is a high-stakes one with potentially crippling adverse financial consequences for many nonprofits.

While there are certainly many venues that are being cooperative and understanding – particularly if the organization agrees to reschedule its meeting or book one or more new ones in the future – there are just as many more, due to the remarkable economic pressures they are under, that are taking a harder line than has been seen in past (albeit less severe) crises.

Leaders are struggling to determine the best path forward for their conferences and meetings. It is a challenge with recent developments, including the classification of COVID-19 as a pandemic by the World Health Organization (WHO), President Donald Trump’s recommendation against gatherings of more than 10 people, the Centers for Disease Control and Prevention’s (CDC) strong urging to ban any gatherings of more than 50 people, and the bans or admonitions of so many states, cities and counties around

the United States against the congregating of various numbers of people.

The issues and considerations that are driving much of this analysis are legal in nature – contract provisions, insurance coverage, and governmental bans and advisories, to name a few – and it is critical for nonprofit managers and their advisers to understand both the basics and the nuances in this area to make the most informed, strategic decisions that will best protect the organization now and into the future.

### **Force Majeure Contract Provisions**

The first step is to take a long, hard look at your event contracts. Specifically, you will want to focus on the cancellation provisions in your contracts, especially the “*force majeure*” provision (sometimes referred to as “impossibility” or “termination for cause”).

“*Force majeure*” is a French term literally meaning “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. For hotel, convention center, and vendor contracts, the difference for nonprofits between being able to successfully apply such provisions – or not – is often the difference between avoiding or paying the significant cancellation penalties built into most such contracts, as well as the ability to recover previously paid deposits.

Typically speaking, hotels, convention centers, and meeting vendors strongly favor narrow *force majeure* provisions making it difficult to terminate without penalty. In contrast, event organizers such as nonprofits generally

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attempt to negotiate *force majeure* provisions that are as broad as possible, making such terminations more likely.

*Force majeure* provisions have two key parts and should be viewed as a two-part test. Both parts of the test need to be satisfied for the *force majeure* provision to apply. The first is whether there is a qualifying *force majeure* event. The second is what effect does that event have on the ability of the parties to perform their obligations under the agreement.

Regarding the first part of the test, for nonprofits, it is important not only to have as broad a listing of qualifying events (e.g., Acts of God, disasters, war, terrorism, disease, etc.), but most importantly, to include a catch-all phrase -- such as "including but not limited to" or "or other similar cause beyond the control of the parties" -- that allows for other unforeseen events beyond those expressly listed.

Regarding the second part of the test, event venues generally advocate for limiting the applicability of *force majeure* to those events that make it "illegal or impossible" for either party to perform its obligations. In contrast, nonprofits should seek to include additional effects of such *force majeure* events, particularly those that make it "inadvisable" or "commercially impractical" for the parties to perform their obligations.

Nonprofits with the broader, more expansive language in their *force majeure* clauses have generally had a much easier time being able to cancel without penalty their upcoming meetings that are simply unable to happen in the midst of the current crisis. In contrast, those nonprofits with the much more restrictive "illegal or impossible" standard in their clauses -- which is the majority, by far -- have generally faced hotels and convention

centers that will not accede to a cancellation without penalty unless, in their view, the meeting is unambiguously legally prohibited from happening by a federal, state or local government on and at that particular date and location.

While this is certainly not universally the case across the board, as scores of nonprofit executives can attest, this is happening every day across the country, and has been a source of great frustration.

A *force majeure* analysis involves applying the precise verbiage of the provision to the facts that exist at the moment the cancellation notice is provided to the event venue, effectively locking in place those facts. For

"attrition" penalties if attendance is far less than expected.

**Cancellation Strategy and Options**

The decision to cancel an event is a big one with the potential to have a significant impact on your organization's financial position. Carefully consider the various *force majeure* provisions in all of your relevant agreements; each one may be different. This analysis is generally the sole basis for whether you will be able to cancel without penalty.

In the current crisis, the federal government to date has made a deliberate decision to issue significant guidance and admonitions, but to not ban large gatherings of individuals or domestic travel.

But so many states, cities and counties, on the other hand, have gone ahead and imposed varying bans on individuals' ability to gather in groups of certain sizes in certain venues, in an attempt to curb the spread of the COVID-19 virus. These state and local bans continue to be imposed and modified on a daily basis.

This has had a critical impact on the ability -- or lack thereof -- of nonprofits to be able to successfully exercise their *force majeure* contract termination rights. In cases

where a governmental ban on gatherings of a certain size and type in a particular geographic location clearly applies to the nonprofit's scheduled meeting, the venues have virtually all conceded the nonprofit's right to cancel without penalty.

But in situations where, for instance, the meeting dates are two months out and the governmental ban only extends for 30 days (for now), or the geographic reach of the ban does not extend to the adjoining county, or the ban is limited to gatherings over a certain number of people (as most do), if the nonprofit's meeting does not unambiguously fall into all of these "buckets" -- even

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instance, in numerous recent cases, where a cancellation notice was provided on a day with no applicable governmental ban and then the next day a state or local ban is instituted that applies to the meeting at issue, most venues have taken the position that the ban is inapplicable and the nonprofit is liable for the full cancellation penalties.

Finally, if you are considering rescheduling a meeting for this summer or fall, be sure to consider the possibility that this pandemic might extend longer than some expect, and be sure to protect your nonprofit's ability to cancel or further postpone that event, or at least not be liable for significant

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despite President Trump's and the CDC's admonitions – so many event venues and vendors have been denying the *force majeure* claims made by nonprofits, on the basis that it is not technically “illegal or impossible” to hold the meeting on the scheduled date(s).

The result following such unsuccessful *force majeure* assertions has generally been the presentation of an immediate invoice to the nonprofit for the full cancellation penalties. As such, there has been a very careful and deliberate decision on the part of many nonprofits to wait until the best strategic time to cancel a meeting.

While many event venues and vendors are taking the position that it is only clearly applicable governmental bans that can satisfy an “illegal or impossible” standard in a *force majeure* clause, if a vast majority of the nonprofit's attendees, speakers and the like are prohibited from attending due to employer-imposed travel bans -- and that can be substantiated -- this provides another potential vehicle for satisfying the “impossibility” standard.

Do not underestimate the importance of the written cancellation notice provided to the venue, and be sure to include, with great specificity and evidence, all of the reasons why you believe the conditions for *force majeure* termination have been satisfied.

Finally, if all of the above fails, the tried-and-true way of negotiating away or reducing cancellation penalties has been to either reschedule the current meeting for a later date or to schedule one or more new meetings with the venue. Numerous nonprofits have had success with this approach in the current crisis, more every day that goes by. While a successful *force majeure* termination will enable you to avoid cancellation penalties, it will not bring you back your

lost profits -- but a rescheduled meeting can help you do just that.

#### Event Cancellation Insurance

While event cancellation insurance can be very beneficial -- including the ability to recover lost profits along with losses -- it has many limitations. It is critical to analyze all of the definitions, exclusions and limitations to the coverage. This is especially true as it relates to communicable disease coverage. As of mid-January 2020, the four leading event cancellation

existed at the moment of , how long did they extend, and similar considerations.

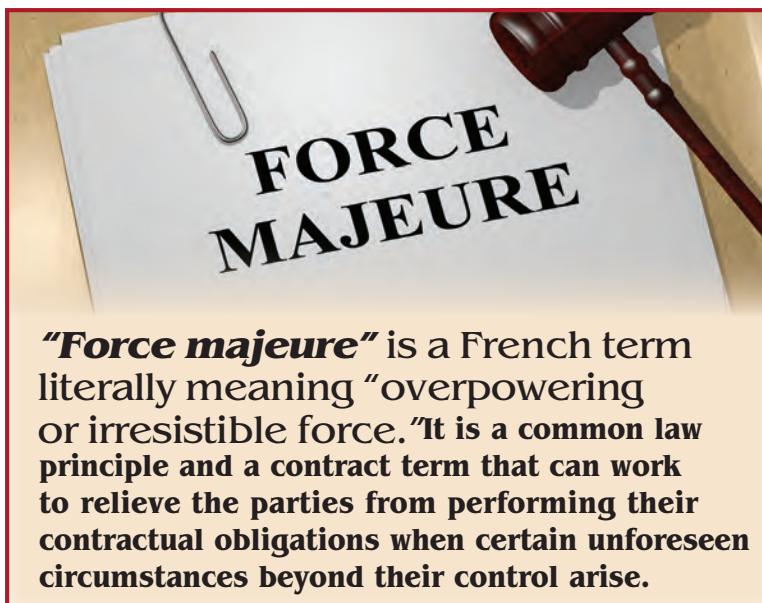
#### Refunds and Communications

Many nonprofits' policies with respect to the ability of meeting registrants and the like to seek refunds of amounts paid in connection with canceled events have gone out the window in the current crisis. There are many critical considerations -- from financial impact to member, exhibitor and sponsor relations, among others -- that make these difficult decisions. Different nonprofits are treating these issues differently. Just always be sure to remember the importance of these long-term relationships in these critical times and take care to word your written communications appropriately in this regard, including from a legal perspective.

#### Looking Forward

Unfortunately, no one can predict what the next several weeks, months and years will hold as it relates to this pandemic. Every day, new details and guidance emerge on how to respond to COVID-19, as do predictions for the future. All of this has and will continue to have a dramatic and adverse impact on nonprofits in so many ways, including with respect to their meetings, conferences and events.

These are trying times for everyone. The nonprofits that have a robust and nuanced understanding of these legal issues likely will have the most success in strategically navigating their way through the current crisis, as well as using the lessons learned to negotiate the most favorable meeting contracts and event insurance policies moving forward. **E**



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insurance policies in the U.S. specifically exclude COVID-19-related claims from coverage for all new policies “bound” after that time. But for policies issued before then, for the two most-commonly purchased policies, since 2003, communicable diseases were already excluded unless you purchased an endorsement/rider to include such coverage.

One of the other leading policies did not include such an exclusion for communicable diseases but includes a narrower definition of “cancellation” than the other policies. It remains unclear how these insurance carriers will be responding to claims in the current crisis. But what has become clear already is that they are focused on the same sort of analysis that event venues are undergoing with respect to *force majeure* claims -- including what governmental bans

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