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## COVID-19: Legal Strategies for Nonprofit Meetings

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# Agenda

- Focus of webinar is on impact of COVID-19 on 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
- Options to attempt to cancel without penalty or reduce penalties
- Pros and cons of canceling now or waiting
- If you proceed with the meeting, what steps to take to reduce attendee risk and risk to event sponsor
- Event cancellation insurance, commercial general liability insurance, and workers' compensation insurance
- Best practices for negotiating future meeting contracts

# Force Majeure Overview

- There is a difference between common law force majeure *principles* and force majeure provisions in *meeting contracts*; the latter will be front and center in the analysis, but the former should not be ignored and can be very helpful in negotiations.
- “Force majeure” means “overpowering or irresistible force.” 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 – far from it. The devil is in the details.
- 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 the analysis.
- Contractual force majeure clauses generally only excuse *complete* (and not *partial*) performance of contractual obligations if force majeure conditions exist.

## 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 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).

# 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, medical epidemics, 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 Organization 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 (and Common Law Principles)

- 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, attempt to broaden the list of force majeure events to include “or any similar cause...”

## Force Majeure Provisions: Impossibility/Illegality v. Commercial Impracticability/Inadvisability (and Common Law Principles) (cont.)

- The precise language of the force majeure provision is incredibly important to the analysis of whether it excuses performance; every provision is different and can be applied differently.
- Even if the force majeure provision is not as favorable as desired, there may be common law arguments – such as *frustration of purpose* – that may legally excuse performance (i.e., an unforeseen event has undermined a party's principal purpose of entering into the contract in the first place). However, expect a difficult negotiation with the event venue in such cases, and even more so if that *purpose* is not reflected in the contract itself.

# Cancelation Options

- Read your agreement's force majeure provision carefully. The analysis as to whether you cancel without penalty is as contingent on the provision's verbiage as it is on the factual circumstances (e.g., WHO, CDC and/or other government declarations, government and/or private travel bans on your attendees and/or speakers). If the force majeure provision provides for (i) cancelation 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), you likely have more leverage to negotiate.
- The potential for event cancelation insurance coverage will play a significant role in that decision; more on that later.
- In some circumstances, consider polling your registrants to get a sense of how many may cancel their attendance and why. Without attendees and/or critical third-party speakers or other attendees, you may have grounds to claim *frustration of purpose*.
- Even if you lack a strong legal position, the ability to either reschedule the meeting and/or contract for future meetings can help with negotiating your way out of penalties.
- Another consideration is whether the venues have sizable deposits of yours already.



# Pros and Cons of Canceling Now or Waiting to Cancel

- 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 may well change on a daily basis.
- As such, there are instances when waiting to make a cancellation decision may well strengthen your argument that the force majeure provision and/or event cancellation insurance applies.
- For instance, WHO, CDC and/or government declarations and government and/or private travel restrictions can have a significant impact on whether the force majeure provision and/or event cancellation insurance will apply.
- At the same time, there are numerous other considerations that make it difficult to wait too long to make the cancellation decision.

## If You Proceed, How to Reduce Your and Your Attendees' Risk

- Consider all relevant factors in deciding whether to proceed with the meeting; every situation is different and has different facts.
- Without question, if you decide to proceed with your meeting, be sure to follow all aspects of the [CDC's guidelines for large events and mass gatherings](#).
- Doing so will not only help to protect your attendees from contracting COVID-19 at your event, but it will go a long way toward demonstrating that your organization was not negligent and should not be held liable if someone at your event 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.
- As of mid-January 2020 (for all policies bound after that time), COVID-19 is now expressly *excluded* from coverage under all four of the leading event cancellation insurance policies.
- Many events are now uninsured because they did not bind their coverage before the COVID-19 exclusion was instituted. In other words, while they may have purchased an endorsement extending Communicable Disease coverage, it will contain an exception for all claims arising from COVID-19.
- That being said, many *HCC* policies pre-mid-January 2020 did not contain a Communicable Disease exclusion (not the case for the other policies).

## 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.
- In some policies, the Communicable Disease exclusion generally only applies if the disease “has been declared as an epidemic or pandemic by the World Health Organization or by Federal or Local Government Agencies responsible for monitoring healthcare and disease.” In other words, if there has been no such declaration, then Communicable Diseases arguably is excluded from coverage. But these declarations are changing and expanding on an almost-daily basis, and likely this is no help at this point.
- 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 key if you decide to proceed with the event anyway.

# 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 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 *will* cover 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.

# 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.
- 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.
- State the principal purpose(s) of the event in the contract, so as to support a frustration of purpose claim later if needed.
- Select the most favorable event cancellation insurance carrier and work hard to negotiate the most favorable definitions, endorsements and exclusions.

# Questions?

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