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## Legal Strategies for Association Meetings



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**Amid the coronavirus pandemic, association leaders need a clear understanding of the force majeure provisions in their meeting contracts and the coverage provided in their event cancellation insurance policies as they make critical decisions about future in-person events.**

Due to the unforeseen and devastating effects of the rapidly spreading COVID-19 pandemic, associations are facing tough decisions regarding upcoming conferences and meetings in the United States and around the world. Even for 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 financial consequences for many associations.

While many venues are being cooperative and understanding—particularly if the association agrees to reschedule its meeting or book one or more new ones in the future—many more, due to the remarkable economic pressures they are under, are taking a harder line than in past (albeit less severe) crises.

Associations are struggling to determine the best path forward. Many of the issues under consideration are legal ones—contract provisions, insurance coverage, and governmental bans and advisories, to name a few—and associations and their advisers need to understand both the basics and the nuances in these areas in order 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, focus on the cancellation provisions, especially the “force majeure” provision (sometimes referred to as “impossibility” or “termination for cause”).

*Force majeure*—a French term literally meaning “overpowering or irresistible force”—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. These provisions in hotel, convention center, and vendor contracts, when successfully applied, allow associations to avoid paying significant cancellation penalties and to recover previously paid deposits.

Force majeure provisions have two key parts and are evaluated using a two-part test. Both parts need to be satisfied for the provision to apply.

- **Is there a qualifying force majeure event?** For associations, 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.
- **What effect does the force majeure event have on the parties’ ability to perform their obligations under the agreement?** Event venues generally advocate for limiting the applicability of force majeure to events that make it “illegal or impossible” for either party to perform its obligations. In contrast, associations should seek to include additional effects of force majeure events, particularly those that make it “inadvisable” or “commercially impractical” for the parties to perform their obligations.

Associations with broader, more expansive language in their force majeure clauses have generally had a much easier time canceling without penalty their upcoming meetings that cannot be held in the midst of the current crisis. In contrast, associations with the much more restrictive “illegal or impossible” standard in their clauses—the majority, by far—have generally faced hotels and convention centers that will not agree 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 that particular date and at that particular location. This has been a source of great frustration for many associations.

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A force majeure analysis generally involves applying the precise language 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 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 was instituted that applies to the meeting at issue, many venues have claimed that the ban is inapplicable and the association is liable for the full cancellation penalties.

Finally, if you are considering rescheduling a meeting for this summer or fall, consider the possibility that this pandemic may extend longer than some expect. Be sure to protect your association's ability to cancel or further postpone the event without penalty, or at least not be held liable for significant "attrition" penalties if attendance is far less than expected.

## Strategy and Options

The decision to cancel an event is a big one with a potentially significant impact on your organization's financial position. Carefully consider the force majeure provisions in all of your relevant meeting contracts; each one may be different. This analysis is generally the sole basis on which you can rely if you seek to cancel without penalty.

In the current crisis, the federal government to date has issued significant guidance and admonitions, but has not chosen to ban large gatherings of individuals or domestic travel. On the other hand, many states, cities, and counties have imposed bans on individuals gathering in groups of certain sizes in certain venues, as well as shelter-in-place orders. These state and local bans continue to be imposed and modified daily, but still do not exist in many places.

These state and local restrictions have a critical impact on associations' ability to 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 association's scheduled meeting, the venues have virtually all conceded the right to cancel without penalty.

But in other situations, associations have struggled to apply force majeure clauses when their meeting doesn't meet all the particulars of a local ban. For instance:

- The meeting dates are two months out and the governmental ban only extends for 30 days (for now).
- The geographic reach of the ban does not extend to an adjoining county where the meeting is booked.
- The ban is limited to gatherings over a certain number of people (as most are).

If an association's meeting does not unambiguously fall into *all* of these "buckets"—despite federal guidelines from the **Centers for Disease Control and Prevention** and **the White House**—many event venues and vendors have denied force majeure claims, arguing that it is not technically "illegal or impossible" to hold the meeting as scheduled. The association is then typically invoiced for the full cancellation penalties. As a result, many associations are waiting until the best strategic time to cancel a meeting.

Many event venues and vendors argue that only a clearly applicable governmental ban can satisfy an "illegal or impossible" standard in a force majeure clause. However, if a vast majority of the association's attendees, speakers, and other participants are prohibited from attending due to employer-imposed travel bans that directly arise from the pandemic and specifically from governmental admonitions not to travel—and if this can be substantiated—this may provide another way to satisfy 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 your association believes the conditions for force majeure termination have been satisfied. Also be sure that your correspondence with your attendees and volunteer leaders is consistent with your notice to the venue.

Finally, if all else fails, the tried-and-true way to avoid or reduce cancellation penalties is to reschedule the current meeting for a later date or to schedule one or more new meetings with the venue. Many associations have succeeded with this approach in the current crisis. 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 may help you do just that.

## Event Cancellation Insurance

While event cancellation insurance can enable an association to recover lost profits along with incurred expenses, it has many limitations. Be sure to analyze all of the definitions, exclusions, and limitations to your coverage—especially communicable disease coverage.

In mid-January 2020, the four leading event cancellation insurance policies in the U.S. specifically excluded COVID-19-related claims from coverage for all new policies “bound” after that time. For policies issued earlier, for the two most-commonly purchased policies, since 2003, communicable diseases were already excluded unless you purchased an endorsement/rider to include it. One of the of the other leading policies did not have an exclusion for communicable diseases (presuming you paid a higher premium to include that coverage), but it defines “cancellation” more narrowly than the other policies.

It remains unclear how these carriers will respond 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 using with respect to force majeure claims—including what governmental bans existed at the time of cancellation, how long such bans are likely to extend (where cancellation has not yet occurred), whether other factors make it impossible to hold the event (such as most attendees being on the front lines of the pandemic), and similar considerations.

## Looking Forward

Unfortunately, no one can predict what the next several weeks and months will hold as it relates to this pandemic. What seems certain is that the COVID-19 crisis will continue to have a dramatic and adverse impact on associations in so many ways, including with respect to their in-person meetings, conferences, and events.

These are trying times for everyone. The associations 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 cancellation insurance policies moving forward.

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