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COVID-19: Legal Strategies for Nonprofit Meetings

Webinar

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American Bar Association

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Agenda

- Focus of webinar is on impact of COVID-19 on nonprofit 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 to cancel or attempt to postpone
- If you proceed with rescheduling the meeting for several months from now, 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 has been front and center in the negotiations in this crisis, but the former can be helpful if the contract lacks a force majeure/impossibility/termination for cause provision.
- “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.
- 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, 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* (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 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).

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 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, be sure to attempt to broaden the list of force majeure events to include “or any similar cause...” or a similar catchall phrase.

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 bans or admonitions against large gatherings, government and/or private travel bans on your attendees, speakers, exhibitors, etc.). 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 a lot 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 cannot attend due to employer-imposed travel bans; compile specific evidence. Without attendees and/or critical third-party speakers or other attendees, you may have grounds to claim *impossibility* of performance and/or *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 (*sometimes*) help with negotiating your way out of penalties.
- Another consideration 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.
- 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.
- For instance, federal, state and/or local government bans on mass gatherings, 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 considerations that make it difficult to wait too long to make the cancellation decision.

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 and risk mitigation steps are critical.
- When holding events once the height of 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.
- 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), but define “cancellation” as being “physically” or “legally” unable to hold the event. Key issue.

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.
- 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.” Moot point now in this situation but relevant in the future.
- 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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