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COVID-19: Legal Strategies for Association Meetings

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Due to the unforeseen and devastating effects of the rapidly spreading COVID-19 pandemic, associations 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 associations. While there are certainly many venues that are being cooperative and understanding – particularly if the association 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 we have ever seen in past (albeit less severe) crises.

With recent developments, including the classification of COVID-19 as a pandemic by the World Health Organization (WHO), President Trump's and the Centers for Disease Control and Prevention's (CDC) strong admonitions against gatherings of more than 10 people, and the bans, shelter-in-place mandates, and/or admonitions of so many states, cities and counties around the United States against the congregating of various numbers of people, associations are struggling to determine the best path forward for their conferences and meetings.

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 associations and their advisers to understand both the basics and the nuances in this area 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, 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" – 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. For hotel, convention center, and vendor contracts, the difference for associations 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 like associations generally attempt to negotiate force majeure provisions that are as broad as possible, making such terminations more easily achievable.

Force majeure provisions have two key parts and should be viewed as a two-part test; both parts of 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 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.

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, associations 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.

Associations 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 associations 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 association executives can attest, this is happening every day across the country, and has been a source of great frustration for many associations.

A force majeure analysis generally 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 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, many venues have taken the position 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, be sure to consider the possibility that this pandemic may extend longer than some expect, and be sure to protect your association's ability to cancel or further postpone that event without penalty, or at least not be liable for significant "attrition" penalties if attendance is less than expected.

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 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 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, as well as shelter-in-place orders, in an attempt to curb the spread of the COVID-19 virus. These state and local bans continue to be imposed and modified on daily basis.

This has had a critical impact on the ability – or lack thereof – of associations 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 association's scheduled meeting, the venues have virtually all conceded the association'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 association's meeting does not unambiguously fall into *all* of these "buckets" – even despite President Trump's and the CDC's admonitions – so many event venues and vendors have been denying the force majeure claims made by associations, 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 association for the full cancellation penalties. As such, there has been a very careful and deliberate decision on the part of many associations to *wait until the best strategic time to cancel a meeting.* The timing is key.

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 association's attendees, speakers and the like 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 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(s), 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(s).

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 associations 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 may be able to 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 incurred expenses – 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. 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. 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 (presuming you paid a higher premium to include such coverage) 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 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.

Refunds and Communications

Many associations' cancellation 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 associations 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 associations in so many ways, including with respect to their in-person meetings, conferences and events.

These are trying times for everyone. But 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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