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Ebola, Disasters, and Your Meeting — Part 1

The Ebola outbreak is another in a long line of potential threats to meetings and events. What if your attendees say they're too concerned about its potential risk to travel? Can you cancel your program? What are the legal ramifications? Here is a refresher guide to dealing with unexpected risk in existing contracts.

Scare Tactics Does force majeure apply to events affected by Ebola? That depends on how your contracts are worded.

As government agencies in the United States and around the world discuss quarantines and restrictions on travel to destinations where Ebola has been diagnosed, meeting organizers are fielding concerns raised by their attendees regarding air-travel safety.

The meetings industry has faced many challenges to attendee travel over and above the Ebola scare, including terrorism attacks, hurricanes, earthquakes, floods, the SARS epidemic, volcanic ash, strikes and labor disputes, and power outages, to name just a few over the last decade or so. What steps should meeting professionals take when assessing whether a meeting should be canceled based on current events — including whether they have the right to terminate their contracts without liability, or cancel and potentially owe money damages? What terms should you negotiate and include in future contracts to address the reality that bad things happen to good meetings? Here are some guidelines.

WHY ARE FORCE-MAJEURE CLAUSES SO CONTENTIOUS?

Next to attrition and cancellation-performance clauses, the wording of force-majeure clauses is the most difficult and contentious to negotiate between meeting sponsors and suppliers. That's because the two sides view the issue differently. To a hotel, "force majeure" means it is totally impossible for the meeting to be held or for the venue, or other service provider, to provide its facilities or services. To a meeting sponsor, a "force majeure" is any act or event that occurs after the contract has been signed that materially affects the meeting and makes it substantially more difficult to stage the meeting as planned and/or attract the expected number of attendees.

These two views are not always compatible, but contracts can and should contain solutions that protect and satisfy both parties. Both sides need to insist on the inclusion of a realistic and comprehensive force-majeure clause that recognizes the realities in the world today and the complexities of getting potential attendees to attend meetings or the venue to provide its services. Before moving forward, it is important to understand the legal principles governing contracts.

Contract law provides that, absent wording to the contrary, either party can terminate its performance obligations if that party's performance is made impossible or commercially impracticable, or the purpose of the contract is frustrated by supervening events outside that party's control, making the value of performance worthless to that party (see Breakout, p. 58). These legal standards apply by default when a supervening act or

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occurrence affects the meeting and the parties did not allocate the risk and consequences in the contract. Whether specific concerns about Ebola — or any other potential catastrophe — rise to the level of any of these three standards must be analyzed on a case-by-case basis while considering known facts and the terms of your contract.

WHAT'S AT STAKE: TERMINATION VS. CANCELLATION

As previously stated, a force-majeure event allows a party to a contract to terminate its performance obligation(s) in the agreement if one of the standards set by the legal principles is met. By definition, if a contract is terminated, all obligations cease to exist and both sides go back to the position they were in before the contract was executed. Neither party owes any further obligations to the other party. Parties to a contract can protect themselves from losses that potentially arise when a force-majeure event occurs resulting in contract termination by obtaining the appropriate insurance coverage.

A concept similar to termination is cancellation of a contract. The two terms are not the same, and that difference should be specified in every contract. By definition, a contract is canceled when one party decides not to perform the contract for reasons other than a force-majeure event. When cancellation occurs, the canceling party may owe damages to the other party to give them the benefit of the bargain, which is generally defined as the lost profits suffered by the other party (i.e., injured party), if any. The injured party must first show that it took affirmative steps to mitigate its damages by offering to resell the canceled product or service to other parties in order to reduce or eliminate the potential damages the canceling party must pay. As you can see, whether a contract is validly terminated or is canceled has legal consequences important to both sides, because of the potential of monetary damages.

Following are some guidelines for meeting professionals to consider when faced with a current force-majeure event:

CONDUCT PROPER DUE DILIGENCE

Turning on the news, scanning blogs, and reading the newspaper are not for the faint of heart these days. Current headlines scream at us about Ebola coming to the United States. Although the people

BREAKOUT

Impossibility, Impracticality, and Frustration

Here are the legal standards governing force-majeure events:

Impossibility of Performance — The performance obligations of a party may be terminated without liability if the performance has been made (objectively) impossible by acts or occurrences outside the control of either party occurring after the contract was made. The act or occurrence must have been unforeseeable to the parties before the contract was executed. There are five main types of impossibility: (1) destruction, deterioration, or unavailability of the subject matter or tangible means of performance; (2) failure of the agreed-upon means of performance or contemplated mode of delivery or payment; (3) supervening illegality; (4) failure of the intangible means of performance; and (5) death or incapacity of a party.

Impracticability of Performance — Termination of obligations under a contract may be granted when performance has been rendered excessively difficult or harmful by an unforeseen act or occurrence outside the control of either party. The Restatement (Second) of Contracts defines impracticability as follows: "When, after a contract is made, a party's performance is made impracticable without his (or her) fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his (or her) duty to render that performance is discharged, unless the language or circumstances indicate the contrary."

Frustration of Purpose — In frustration cases, the party seeking discharge of the duty to perform the terms of the contract is not claiming that (s)he cannot perform, in the sense of inability. Rather (s)he is claiming that it makes no sense to him/her to perform, because what (s)he will get in return does not have the value expected at the time (s)he entered into the contract. The four main factors courts have considered in deciding the doctrine of frustration are: (1) the object of one of the parties in entering into the contract must be frustrated by a supervening act or occurrence; (2) the other party must have contracted on the basis of the attainment of this object, i.e., it was basic assumption common to both parties; (3) the purpose of the contract must be totally frustrated or nearly total; and (4) the party seeking to use the defense must not have contributed to the frustrating event or non-occurrence.

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being affected outside West Africa currently are all health-care professionals, that scenario could change overnight. At press time, there were no known cases of Ebola in the United States, and we all hope that remains the case.

Nevertheless, the traveling public is understandably nervous. Fears of getting on a plane with a person who has been exposed to Ebola are not far under the surface of many travelers' consciousness. Whether these fears are rational or irrational remains to be seen. What's a planner to do when association or company leaders suggest that the meeting be canceled or moved due to concerns that attendance will fall off because headlines are scary?

The decision to cancel or relocate a meeting to another location is a serious one. There are legal and financial risks regardless of the decision made, and there are no easy answers. Before a decision is made, planners must conduct proper due diligence. Here are some suggested steps:

› **Poll all stakeholders** — attendees, officers, exhibitors, sponsors, and vendors. What is the prevailing wisdom? Do the majority support moving forward with the meeting, or are their fears so strong based on negative perceptions that going elsewhere is the only path that makes sense? If a decision is made to move a meeting, it should be understood that contract law — and the specific terms in the existing contract — may not support canceling or relocating the meeting without the payment of cancellation damages. Each situation must be analyzed on a case-by-case basis and discussed with all parties concerned, including legal counsel.

› **Examine the viability of having the meeting** — albeit with fewer attendees and/or reduced support from exhibitors, sponsors, and other stakeholders. Maybe it makes sense to keep the meeting in place, even if attendance will fall short of original goals. Again, each case is different and potential contract liability must be considered.

› **Analyze your contracts** — in terms of termination and cancellation language. The typical force-majeure clause in convention-industry contracts limits termination of the contract without liability to situations where it is impossible for one or both parties to perform. If your contract limits the right to terminate performance to situations where it is impossible to perform, then current realities with Ebola probably don't support terminating a contract without liability. Your action in canceling a meeting or relocating it to another location may involve the payment of cancellation damages. Of course, this could all change if the circumstances of the disease generate quarantines or travel advisories by the Center for Disease Control (CDC), the World Health Organization (WHO), or other authority.

In part 2 of this Meeting Management column in the January 2015 issue, we will explore how to prepare future contracts that address the consequences of a potential catastrophe.

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ON THE WEB

Sites that address safety, security, health and travel issues, and risk management include:

› Centers for Disease Control and Prevention
cdc.gov

› World Health Organization
who.int/en/

› Federal Emergency Management Agency
fema.gov

› U.S. Department of Homeland Security
ready.gov, dhs.gov

› White House Office of Homeland Security
whitehouse.gov/homeland

› Department of State Overseas Security Advisory Council
osac.gov

› Department of State Travel Warnings
travel.state.gov/travel/warnings

› National Weather Service
nws.noaa.gov

› The Disaster Center
disastercenter.com

› Risk Management Resource Center
eriskcenter.org

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Covering Catastrophes in Contracts

In this conclusion to our two-part series on force-majeure clauses, we take a proactive approach to client-vendor contracts.

Hazardous weather needs to be included in contracts.

What is the hallmark of a well-prepared contract? It addresses the consequences of a potential catastrophe — e.g., communicable disease, hazardous weather, labor dispute, or any other calamity that could potentially affect the staging of a meeting or event — as well as the effect of an act or occurrence creating a significant risk of harm to the health or safety of anticipated attendees. The parties are always free to agree explicitly that certain contingencies will or will not trigger termination of the contract without liability. (See "Exploring Possibilities," p. 35.)

The legal standards of impossibility, commercial impracticability, and frustration of purpose will be applied at the discretion of a judge or jury only where the parties themselves did not allocate the risk of the events that rendered performance impossible, commercially impracticable, or frustrated in the contract. The section of the contract where the legal standards are specified with examples is generally referred to as the "force-majeure clause." It is also erroneously referred to as the "Impossibility Clause" or the "Act of God Clause." The more comprehensive and preferred name is "Force Majeure/Termination/Excuse of Performance" clause. If prepared properly, the clause will clearly and succinctly explain and list the circumstances under which one or both of the parties may terminate the contract and excuse their performance without liability.

PREPARING FUTURE CONTRACTS: TIPS

The typical force-majeure clause in convention industry contracts limits termination of the contract without liability to situations where it is impossible for one or both parties to perform. Impossibility is a very high standard to meet and may not adequately protect either meeting sponsors or vendors faced with today's realities that affect travel or the provision of facilities and service. Consider preparing the force-majeure clause with examples that apply to situations where performance of the contract may be terminated without liability by either party. This applies not only if performance is impossible but also if performance has been made commercially impracticable or the purpose of a party is frustrated by supervening events after the contract has been signed and the value of the contract has been substantially diminished or destroyed.

› **Make the force-majeure clause broader in scope** to provide for partial termination of a contract as well as total termination of performance. For instance, suppose a major U.S. city temporarily closes its airport due to bad weather, quarantine, or labor dispute. If 30 percent of a meeting's

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Exploring Possibilities

Here is a partial list of potential events that can affect meetings and travel, and therefore should be addressed in meeting contracts:

- Acts of God.
- Hazardous weather (actual or forecasted).
- War (declared or undeclared), or specific threat of war.
- Construction and/or renovation at meeting or event venue.
- Government regulations restricting travel, including advisories, quarantines, or curfews.
- For overseas meetings: government regulations by the United States (or foreign country) or region(s) of a country.
- Strikes, labor disputes, picketing, or work stoppages (actual or threatened) materially affecting the meeting or event.
- Changes in the ownership of the facility or venue, or changes in management where the meeting or event is to be held.
- Deterioration of the facility or venue where the meeting or event is to be held.
- An epidemic or disease in the city or region where the meeting or event is to be held or from where potential attendees would be traveling.
- Any act or occurrence creating a significant risk to the health or safety of potential attendees.
- Damage or harm to the city or region materially affecting basic government services or functions, or to the city's reputation where the meeting or event is to be held.
- Damage to the reputation of the facility or the city or region materially affecting the meeting sponsor's ability to attract attendees.
- Acts of terrorism (or specific threats of), (domestic or foreign) affecting potential attendees' travel to the meeting or event.
- Cancellation or restriction of commercial travel to or from the meeting or event location.
- Use of convention center: inability of the parties to negotiate a mutually agreeable license agreement or the inability or unwillingness of the convention center to provide actual use of its facility over the meeting or event dates.
- Use of one or more hotels: unavailability of a sufficient number of hotel rooms suitable to the meeting/event sponsor for use within (X)-block or -mile radius, or the inability of the meeting/event sponsor to negotiate mutually agreeable contracts with a sufficient number of hotels over the meeting/event dates.

anticipated attendees were scheduled to fly from or through this airport, and alternate arrangements can't be made, then the facility and vendor contracts should state that the meeting sponsor may terminate 30 percent of its obligations to pick up hotel rooms or meal guarantees. The meeting sponsor is still obligated to perform with the other 70 percent of attendees who can attend. The contract should also state what percentage of potential attendees must be affected before the meeting sponsor can enforce a total termination of the contract without liability; 40 to 50 percent is usually considered reasonable.

- **Write clear and inclusive force-majeure clauses** to cover known as well as unknown hazards that could materially affect the performance of either party. Foreseeability is a critical issue in whether the law will allow a party to terminate its performance under the contract for supervening events not mentioned in the contract. Because disease epidemics, terrorism, labor disputes, and hazardous weather (actual and forecasted) are now foreseeable, these and other similar events must be mentioned in the contract. Some courts have held that failure to list a foreseeable event in the contract means the parties accepted the risk from such an event and waived the right to use the occurrence of that event as a valid reason to terminate the contract without liability. Use of the phrase "including, but not limited to..." preceding the obvious foreseeable risks is helpful.

- **Address the possibility of communicable diseases.** A few years ago, it was SARS and the swine flu epidemics scaring travelers. Today it is Ebola. Tomorrow it will be a disease with a different name. Don't limit termination of a contract to a specific-named disease.

- **Provide for credible threats of a force-majeure act or occurrence** and not just

the actual occurrence. Participants in the meetings and travel industry must make plans days, months, and sometimes years in advance to prepare for a future meeting to take place successfully. Frequently, decisions must be made and actions taken before all of the information is known surrounding a potential or actual force-majeure event. Vendor contracts should be clear that meeting sponsors and/or vendors should have the right to terminate the contract if credible evidence exists today that a specific force-majeure event will, or could potentially have, a material impact on the success of a meeting. For instance, if the National Weather Service forecasts that a hurricane is expected to hit a certain coastal city in four days where a specific meeting is to be held, the sponsor of that meeting should be able to cancel the meeting and reschedule it in the same city, or move it to a different city on the same date, without liability for the contract.

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› **Include a "Purposes of Meeting" clause** that states the "purpose" of the meeting on which accomplishing the successful holding of the meeting is contingent. The clause should further state that performance obligations in the contract are based on that party's ability to meet the purpose(s) stated without acts or occurrences outside that party's control materially frustrating or preventing successful performance.

› **Don't forget appropriate contingency clauses.** If the performance of a third party is critical to the success of a meeting or event, that contingency should be stated in the contract as well. For example, suppose a convention sponsor has a contract with a headquarters hotel for housing and is still negotiating with the local convention center to host an exposition or trade show. The contract with the headquarters hotel should have a contingency provision that the convention sponsor may terminate its contract with the hotel if: 1) the convention sponsor cannot negotiate a mutually agreeable license with the convention center within a specific timeframe; and 2) the convention center is unable or unwilling to provide the facility on the dates contracted and a suitable alternate facility cannot be found. The convention center license should contain similar contingency wording involving the willingness and ability of the hotel to provide housing on the contracted dates. Hotel and convention centers can negotiate contingencies for their obligations as well if they apply.

It's important to keep in mind that the "Force Majeure/Termination/Excuse of Performance" clause in a contract is not intended to be an "easy-out" for either party to terminate its contractual obligations. The party claiming the right to terminate its contract without liability by claiming impossibility, commercial impracticability, or frustration of purpose must be able to substantiate the legitimacy of its claim based on the facts and the terms of the contract.

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BREAKOUT

Extra Insurance

Both parties to a contract should consider obtaining convention-cancellation or business-interruption insurance. Read the fine print and know what's covered and what's excluded. Epidemics and diseases, such as Ebola, have frequently been excluded since the SARS epidemic caused major interruptions and losses in meetings and travel in 2003. Terrorist attacks also have limitations or exclusions. Sometimes limitations and exclusions in the policy can be removed with the payment of an additional premium.

+ ON THE WEB

Part 1 in this series discussed the legal ramifications of canceling a meeting when the contract may not have adequately provided for a catastrophic event: **convn.org/force-majeure-p1**.

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