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# Understanding Force Majeure Clauses


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The aftermath of recent large-scale disasters like the terrorist attacks of September 11, 2001 and the storm and flood damage caused by Hurricane Katrina in 2005 have reinforced the importance of carefully planning for the unexpected when negotiating meeting contracts. If disaster strikes, will you be able to cancel your meeting without liability for cancellation fees? Will you be able to go ahead with the meeting, despite reduced attendance, without liability for attrition damages? A key tool in managing the risk of such challenging circumstances is the force majeure clause.

A "force majeure" clause (French for "superior force") is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. In the absence of a force majeure clause, parties to a contract are left to the mercy of the narrow common law contract doctrines of "impracticability" and "frustration of purpose," which rarely result in excuse of performance. Instead of relying on the common law, meeting planners can better achieve flexibility during times of crisis through a carefully negotiated force majeure clause. Whether negotiating with or without the assistance of legal counsel, the following key elements of a force majeure clause should be addressed:

**Anticipate and Specify Force Majeure Events.**

Determining which types of circumstances will be covered by the force majeure clause is essential. Provisions often cover natural disasters like hurricanes, floods, earthquakes, and weather disturbances sometimes referred to as "acts of God." Other covered events may include war, terrorism or threats of terrorism, civil disorder, labor strikes or disruptions, fire, disease or medical epidemics or outbreaks, and curtailment of transportation facilities preventing or delaying attendance by at least twenty-five percent of meeting participants.

Courts tend to interpret force majeure clauses narrowly; that is, only the events listed and events similar to those listed will be covered. For example, while acts of terrorism might be a specified force majeure event, it does not necessarily follow that a court would also excuse a party's performance based on "threats" of terrorism. Thus, it is especially important to specify any types of circumstances that you anticipate could prevent or impede your meeting from being held.

To the extent possible, take into consideration the location of the meeting and any special needs or responsibilities of your organization and the meeting participants. What types of weather-related incidents are common for the meeting location? If there are major disruptions to transportation systems, will your participants be prevented from attending? What percentage of reduced attendance would make continuing with the meeting inadvisable? Asking and answering these types of questions will help you anticipate and specify the most critical force majeure events for your meeting. Even so, not all potential events can be specified or anticipated in the contract. A concluding catch-all phrase should be appended to the list, such as "and any other events, including emergencies or non emergencies," to cover other unforeseeable events.

**Beware of Restrictive Language.**

It is common to find boilerplate force majeure language in meeting contracts limiting excuse of the parties' performance obligations only when it would be "impossible" to perform due to the unexpected circumstances. Impossibility is a high threshold; many circumstances will make holding a meeting inadvisable, even though it would still be possible to do so. For greater flexibility, consider instead excusing performance when it would be "inadvisable, commercially impracticable, illegal, or

impossible" to perform.

Additionally, even if you have negotiated a specified list of force majeure events, be sure to carefully read the language that comes before and after the list. Language appended after a comma can significantly alter the scope of the force majeure clause. For example, adding the words "or any other emergency beyond the parties' control" to the end of a list of specified force majeure events serves to narrow the scope of triggering events only to "emergencies." With such language, non-emergency circumstances making it inadvisable to hold a meeting would not be covered.

**Consider Excusing Underperformance Due to Force Majeure.**

Although a force majeure clause should always allow for complete cancellation of a meeting without penalty, cancellation will not always be the meeting planner's preferred course of action. There may be circumstances in which going ahead with the meeting is preferred, despite the fact that the force majeure event will likely result in lower-than-expected attendance. However, groups that fail to meet minimum room or food and beverage commitments will often risk incurring significant attrition fees. To help make going-forward a viable option in such circumstances, the force majeure clause should be drafted to excuse liability associated not just with nonperformance (i.e. cancellation) but also with underperformance (i.e. failure to meet minimum guarantees).

A carefully negotiated force majeure clause is an important tool for reducing the risk of liability associated with cancelling or scaling back a planned meeting in response to a disaster. When significant resources are on the line, meeting planners should consider seeking advice of legal counsel prior to signing contracts, and should also consider obtaining meeting insurance. Taking appropriate precautions at the outset can provide reassurance that, even in the worst of circumstances, you will have the flexibility to make the best decision for your meeting.