



## 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.

### 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

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.

## 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



# MEETING MANAGEMENT

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.

► **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



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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](http://convn.org/force-majeure-p1).