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MAY THE FORCE MAJEURE BE WITH YOU
Understanding Force Majeure and Excused Non-Performance Provisions.

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Prior to September 11, 2001 and Hurricane Katrina, a large number of event organizers (i.e. meeting professionals and exhibition managers) paid little attention to Acts of God, Impossibility of Performance or Force Majeure provisions in the contracts they signed. Since then, many event organizers have come to the realization that not incorporating a carefully drafted "Force Majeure" provision into their hotel agreements and convention center leases or licenses can be extremely problematic, and costly.

The majority of the Force Majeure provisions found in the contracts drafted by hotels and convention centers only allow the event organizer to terminate the contract if the hotel or convention center facility is destroyed or becomes totally unavailable, thereby making it impossible to hold the event in their facility. This type of Force Majeure provision is known as an "impossibility provision", which in essence means if it is not impossible to hold the event then you cannot terminate the contract without incurring liability. These types of impossibility provisions caused a great deal of problems for event organizers in the wake of the September 11th terrorists attacks, since all of the country's convention centers or hotels (outside of lower Manhattan) were physically available, yet vast amounts of attendees refused to travel to events in the days and months following the attacks, which in turn exposed event organizers to severe attrition and cancellation fees under their existing unmodified contracts.

Event organizers have now come to realize that in addition to physical facilities becoming unavailable, there are numerous factors beyond their reasonable control which can make it not only impossible, but also unreasonable, inadvisable or impracticable to hold their event at a particular location or, as the parties originally intended, under the terms and conditions of this Agreement. Therefore, to avoid potential liability and undue hardships an event organizer must carefully review the Force Majeure provisions contained in the contracts they sign and modify them as necessary to protect their organizations.

A well-drafted Force Majeure provision will actually serve a broader purpose and function as an "Excused Non-Performance provision" which allows one or both of the parties to be excused from their contractual obligations or liabilities if one or more events occur which are beyond the reasonable control of the affected party and makes that affected party's performance illegal, impracticable or impossible as originally intended under the terms and conditions of the contract. Using this type of a provision no longer makes the event organizer's contractual obligation solely dependent on whether the physical facility is destroyed or becomes totally unavailable to serve as the site of the event.

Neither party should be able to remove itself from any liability arising out of forces or events beyond its reasonable control, without providing the same protection for the other party. Therefore, whether drafting or modifying an Excused Non-Performance provision in a contract the event manager should make the Force Majeure provision a bilateral provision that protects the organization as well as the facility.

To draft a well thought out and equitable Excused Non-Performance provision consider incorporating as many as possible of the following factors into your facilities contracts:

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- (i) A "force majeure" component that specifically addresses events (war, labor strike, terrorism, government directives, epidemics, etc.) or effects that cannot be reasonably anticipated or controlled, these are also known as "fortuitous events";
- (ii) An "Act of God" section which addresses extraordinary natural events such as extreme weather, flood, hurricanes, tornadoes, earthquake or similar natural disasters that cannot be reasonably foreseen or prevented;
- (iii) An "unavoidable accidents or causes" segment focusing on accidents or causes that is not proximately caused by the negligence of any party or that is unforeseeable or not preventable by exercise of reasonable precautions and for which liability based on fault is not imposed (blackouts, lack of transportation in/from the meeting location, fire or other casualty causing unavailability of essential facilities such as necessary hotels or the convention center, etc.);
- (iv) Specify how and when previously paid deposits will be refunded, and
- (v) State that the hotel or convention center as applicable, will waive any minimum room night usage requirements or attrition fees, food and beverage function minimum guarantees or cancellation fees or any other performance damages provided for under the contract, if the organization decides to proceed with the event either during the Force Majeure occurrence and/or a for specified period of time afterwards, and
- (vi) For hotel contracts, add a clause stating that the hotel will offer the event's attendees the lowest guestroom rate being offered by the hotel over the dates of the event, regardless of the organization's previously contracted room rates.

The end result should be an Excused Non-Performance that clearly addresses the issue of how and when each party's obligations and liabilities will be excused.

As a practice pointer, in addition to incorporating a bilateral Excused Non-Performance provision into your facilities contracts, always make sure to include similar types of provisions into all of your supplier and vendor contracts, so if a disaster strikes you will be excused from performance or relieved from unnecessary liability in all of your contracts, not just your facility contracts.

The Law Office of Mark Roysner specializes in all matter related to the meetings and exhibition industry. Questions can be e-mailed to Mark Roysner at roysner@roysnerlaw.com.

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