

Nonprofit Organizations Committee Legal Quick Hit: Revisiting Force Majeure for Nonprofit Meetings and Events

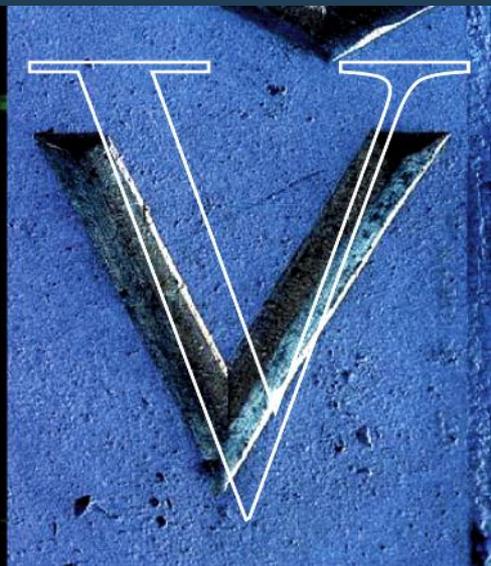
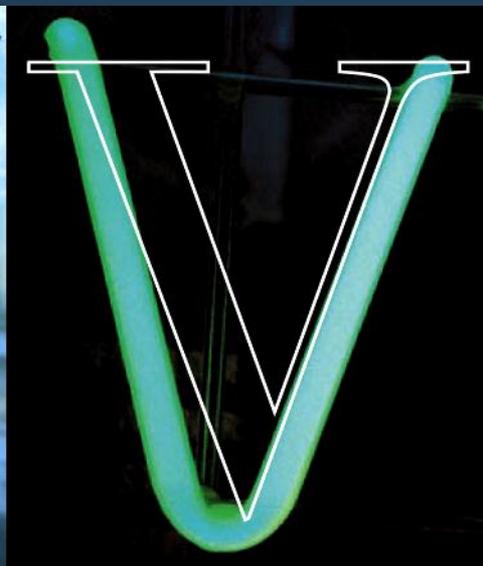
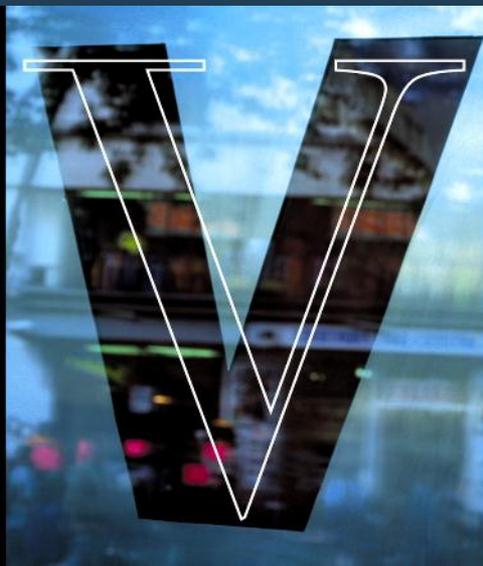
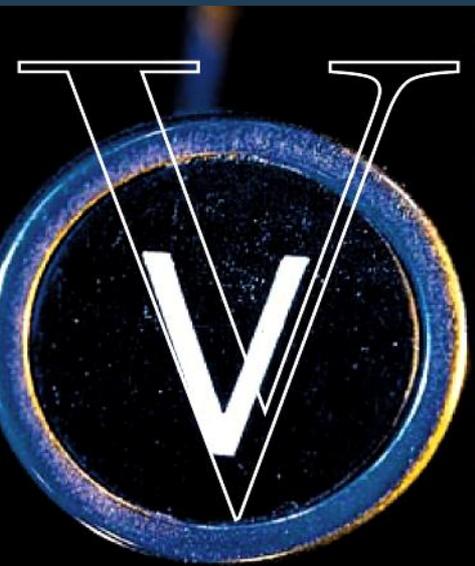
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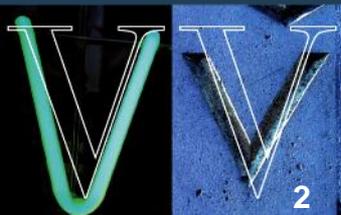
TUESDAY, MAY 14, 2013

3:00 p.m. EDT



Agenda

- Excuse of Contract Performance Due to Supervening Events: Legal Framework
 - Common Law
 - Impracticability
 - Frustration of Purpose
 - Contract Clause
- *Force Majeure* in Meeting Contracts
- Drafting Tips



Excuse of Performance

- After a contract is signed, the parties must perform or suffer liability for contract damages, unless circumstances arise permitting excuse of performance
- Legal rules governing excuse of performance:
 - Common law doctrines
 - Contract language



Common Law

Impracticability Doctrine

- Early “impossibility” standard
 - Performance obligation could be discharged only if performance was absolutely impossible
- Later “impracticability” standard
 - Performance obligation could be discharged only in the event of unforeseen, severe hardship
 - “It is now recognized that ‘a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.’”

Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966).



Common Law (cont'd.)

Impracticability Doctrine

- Generally three conditions:
 - Unexpected contingency or event occurs
 - Performance of the obligation would be extremely difficult, if not impossible
 - Promisor did not assume the risk that the event would occur (by agreement or by custom)



Common Law (cont'd.)

Frustration of Purpose Doctrine

- Closely related to impracticability doctrine
- Typically used when it would be possible to perform, but performance would be pointless
 - *Krell v. Henry* [1903] 2 K.B. 740 (C.A.) and other English coronation cases
 - Contractual obligation to pay for room rented for purpose of viewing coronation parade was discharged when King fell ill and coronation festivities were cancelled



Common Law (cont'd.)

Remedy for excuse of performance

- Where impossibility or frustration have been recognized before either party has performed, the court generally leaves the parties where it finds them
 - Each deemed to have assumed certain risks of not getting the benefit of performance
 - If the buyer does not receive the promised goods or services, it does not have to pay for them
 - If the buyer paid all or part of the price in advance, the buyer has a right to a refund



Common Law (cont'd.)

- Defenses of impracticability and frustration of purpose are rarely successful
- Cases turn on:
 - Degree of hardship caused by the event
 - Foreseeability of the event
 - Contract language or trade custom allocating risk of the event
 - Relative fault of the parties in causing or failing to anticipate the event
 - Any other facts indicating that one party should suffer the loss rather than the other



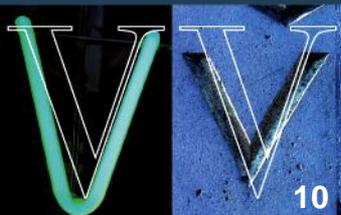
Force Majeure Clause

- A contract clause that excuses performance when supervening circumstances outside of the parties' control prevent or impede performance
- Expressly addressing the risk of supervening events in the contract is preferable to relying on the narrow common law doctrines of impossibility or frustration of purpose
- Usually enforceable, but nonetheless narrowly construed



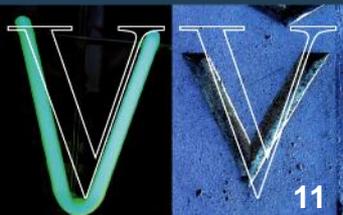
Force Majeure Clause (cont'd.)

- Four key elements:
 - List of supervening events
 - E.g., “acts of God, strikes, natural disasters, acts of terrorism”
 - “Catch-all” phrase
 - E.g., “and any other occurrence beyond the parties’ control”
 - Phrase governing standard for excuse
 - E.g., “rendering performance illegal or impossible”
 - Operative phrase
 - E.g., “the parties shall be excused from performance”



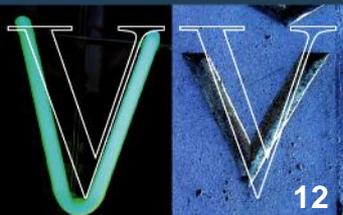
Force Majeure in Meeting Contracts

- Standard *force majeure* clauses in meeting contracts usually aren't sufficient to protect your group against liability associated with supervening events that could derail your meeting
- Scope of standard *force majeure* clause in a hotel or convention center agreement is usually drafted narrowly, and lacks specificity with regard to the types of supervening events that could present significant obstacles to your group meeting its performance obligations



Force Majeure in Meeting Contracts (cont'd.)

- Meeting contracts often require the meeting sponsor to guarantee use of specified meeting rooms, sleeping-room blocks, and food and beverage service
- Standard meeting contract provisions impose steep cancellation and/or attrition fees
 - Attrition fees are supposed to be a reasonable approximation of actual damages in the event of failure to meet minimum room-block and food and beverage commitments (i.e., liquidated damages)
- A carefully drafted *force majeure* clause is an important tool for managing risk of liability for damages associated with unforeseen events that could have a negative impact on your meeting



Drafting Tips

Anticipate and Specify Supervening Events and Risks

- Because courts interpret *force majeure* clauses narrowly, it is especially important to specify any types of circumstances that you anticipate could prevent or impede your meeting
- Consider risks associated with:
 - Meeting location
 - Time of year
 - Needs/circumstances specific to your organization and meeting attendees



Drafting Tips (cont'd.)

Anticipate and Specify Supervening Events and Risks

- Common anticipated risks:
 - Weather-related disasters or disruptions
 - Acts or threats of terrorism
 - Public health threats
 - E.g., SARS or other communicable or infectious disease outbreak
 - Government regulation or action
 - E.g., budget sequestration, GSA meeting scandal
 - Curtailment of transportation facilities preventing attendees from attending the meeting
 - E.g., grounding of airline flights



Drafting Tips (cont'd.)

Anticipate and Specify Supervening Events and Risks

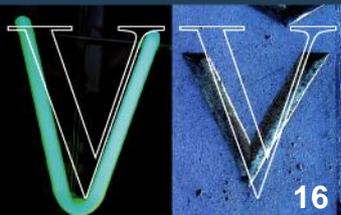
- Describe potential supervening events carefully and expansively
 - “Acts” of terrorism are not necessarily the same as “threats” of terrorism



Drafting Tips

Beware of Restrictive Language

- Standard meeting contract *force majeure* clauses commonly excuse performance only if it would be “impossible” to perform
- For greater flexibility, revise the provision to permit excuse of performance when it would be “***inadvisable***, commercially impracticable, illegal, or impossible” to perform
- Alternatively, re-draft to avoid use of such restrictive terms altogether



Drafting Tips

Beware of Restrictive Language

- Not all supervening events can be anticipated and specified in the agreement
- Use expansive, rather than restrictive, language in “catch-all” and similar phrases
 - “Including, **but not limited to**”
- Be attentive to punctuation, sentence structure, and word placement:
 - For example, adding the words “and 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”
 - Courts will use *ejusdem generis* contract interpretation principle to narrow the scope of a general term following a list of enumerated events only to other events which are similar in kind to those enumerated



Drafting Tips

Excuse Underperformance

- Always ensure that complete cancellation of the meeting is permitted (usually standard)
- Also be sure to permit excuse of **underperformance** in order to provide your group with flexibility to go forward with a meeting despite lower-than anticipated attendance and avoid any associated attrition fees



Example

Narrow Force Majeure Clause

If acts of God or government authorities, natural disasters, or other emergencies beyond a party's control make it illegal or impossible for such party to perform its obligations under this agreement, such party may terminate this agreement upon written notice to the other party without liability



Example

Broad Force Majeure Clause

The parties' performance under this agreement is subject to events or occurrences beyond their control including, but not limited to: acts of God; war or threat of war; terrorism or threats of terrorism; governmental regulation, action, or decision or implementation of the same; civil disorder; public health threats as determined or recognized by the Centers for Disease Control and Prevention or local public health agency; disaster; fire; strikes either actual or threatened (exception: Hotel may not terminate or suspend this agreement for strikes or work stoppages involving Hotel's employees or agents); informational picketing; curtailment of transportation facilities preventing or unreasonably delaying at least twenty-five percent (25%) of Event attendees and guests from attending or participating in Group's Event; or any other cause beyond the control of the parties making it impossible, illegal, impracticable, or inadvisable from an economic, personal safety, or policy basis to hold the Event, provide the Facilities, or otherwise fully perform as outlined in this agreement. The agreement may be terminated without liability and/or specific nonperformance or underperformance may be excused without liability for any one or more of such reasons upon written notice from one party to the other.



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