

Coronavirus/COVID-19: Implications of Event Postponement and Cancellation

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The outbreak of coronavirus/COVID-19 has caused numerous companies and event organizers to postpone, reschedule or even cancel public events. Due to regulations and advisories from governments and public health organizations banning large gatherings of people, various local, national and international events, including sporting events, concerts and conferences, will not take place as scheduled, if at all.

Event postponements and cancellations due to the COVID-19 pandemic raise a host of commercial concerns, including whether performance may be excused under a *force majeure* provision or a common law doctrine, such as impossibility or frustration of purpose; the extent of each party's insurance coverage; and whether the event organizer must provide refunds to ticket purchasers. We provide below a summary of key principles and possible considerations in evaluating these issues.

Force Majeure Provisions

Before postponing, rescheduling or canceling an event because of COVID-19, all parties should promptly analyze their rights and obligations under relevant material agreements. Such agreements may include lease agreements, sponsorship agreements, ticket agreements, ticketbacks or other related commercial contracts.

First and foremost, the parties should identify whether the agreements have *force majeure* or excuse of performance provisions. If so, it is important to see which situations are specifically covered by the clauses. Many courts, including New York courts, narrowly construe *force majeure* clauses such that an event may only constitute a *force majeure* event if the clause expressly includes that event. *See, e.g., Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296-97 (N.Y. 1987). In addition, while New York courts typically require impossibility of performance to excuse a party's nonperformance, a contract's *force majeure* clause may allow a party to assert a *force majeure* defense even where performance is not impossible — *e.g.*, a *force majeure* clause instead may provide that such performance can be excused if it is merely hindered or directly affected by the *force majeure* event.

If the relevant agreement contains a *force majeure* provision, the parties should take into account the following considerations:

- whether notice is required before declaring a *force majeure* event and in what form;
- whether COVID-19 and its spread was known to the parties when the agreement was formed;

Coronavirus/COVID-19: Implications of Event Postponement and Cancellation

- whether delayed or substitute performance is permissible;
- whether the parties must negotiate the terms of any delay or rescheduling of the event;
- whether the agreement provides liquidated damages or requires the nonperforming party to reimburse the other party for costs associated with the event cancellation; and
- whether performance would truly be unfeasible or illegal, rather than simply inconvenient or more costly.

Impossibility or Frustration of Purpose

If an agreement does not contain a *force majeure* provision but the parties are contemplating postponement or cancellation, the doctrines of impossibility or frustration of purpose may allow the parties to do so without breaching the agreement.

However, both doctrines have been narrowly construed in many jurisdictions, including New York. For example, the means of performance must be objectively impossible for a party's nonperformance to be excused based on impossibility. *See Kel Kim Corp.*, 519 N.E.2d at 296. For the parties to postpone or cancel an event based on frustration of purpose, New York courts have found that there must be a "cataclysmic, wholly unforeseeable event" that renders the contract "valueless" to one of the parties. *A + E Television Networks, LLC v. Wish Factory Inc.*, No. 15-CV-1189 (DAB), 2016 WL 8136110, at *12 (S.D.N.Y. Mar. 11, 2016). Under California law, however, the frustration of purpose defense may be available even if a party's performance is not impossible — a party may assert the defense if its performance becomes significantly more onerous due to the intervening event.

Refunds and Other Considerations Before Postponement, Rescheduling and Cancellation

After analyzing its rights and obligations under relevant agreements and common law, an organization must also weigh additional legal and practical considerations before deciding whether to postpone, reschedule or cancel an event.

Parties should consider whether delayed performance (*i.e.*, rescheduling the event) is permitted under the relevant agreement, or whether it constitutes a breach, or even a material breach. Parties facing nonperformance (or delayed performance) by the other side must decide whether to treat that nonperformance as a material breach and terminate the agreement, or to continue to perform and preserve a damages claim for the delay or nonperformance. Such considerations may be more difficult with multiyear agreements, particularly those for which there already has been substantial performance.

If the event involves the sale of tickets or hospitality suites, the event organizer must consider whether it is required to offer a refund to ticket purchasers if the event is canceled or rescheduled. Several states have statutes that specifically address ticket refund obligations, including New York:

- New York law provides that ticket purchasers are entitled to a refund if the event is canceled or rescheduled.¹
- But no refund is required if the event is rescheduled due to an act of God or catastrophe and the ticket purchaser is given the right to use the ticket for the rescheduled event or to exchange the ticket for a comparable ticket to a similar event.
- A refund is also not required if the back of the ticket conspicuously states that if the performance is canceled or rescheduled, the ticket purchaser will have the right, within 12 months of the originally scheduled event, to attend the rescheduled event or to exchange the ticket for a comparable ticket to a similar event.

Event organizers should keep in mind that even absent a statutory refund requirement, an organization's failure to provide a refund, credit or replacement event of comparable value could be challenged as a violation of a state's consumer protection law or as a breach of contract under common law. Indeed, a putative class action suit was filed in California against Do Lab, Inc. (DLI), the organizers of the annual Lightning in a Bottle music festival, which was postponed (and potentially canceled) due to the COVID-19 outbreak. The complaint alleges that DLI's refusal to provide a refund constitutes an unconscionable contractual term in violation of California's Consumer Legal Remedies Act. The plaintiffs also claim that DLI engaged in deceptive business practices by stating in the event's terms and conditions that purchasers shall not be entitled to a refund.

Companies must also assess various practical considerations, including whether the event can be held virtually, or without attendees, and whether the event organizer has insurance that would cover any potential liability for postponement, rescheduling or cancellation. There are several types of insurance policies that may provide coverage, including event cancellation, business interruption, contingent business interruption and commercial general liability.

Best Practices for Companies Considering Event Postponement or Cancellation

Event organizers and other companies involved in events that already have been, or potentially will be, affected by COVID-19 should consider the following checklist before deciding to postpone, reschedule or cancel an event:

¹ See N.Y. Arts & Cult. Aff. Law § 23.08.

Coronavirus/COVID-19: Implications of Event Postponement and Cancellation

- Consider whether the event can be rescheduled, and if so, whether doing so constitutes a breach/material breach;
- Review any relevant agreements, and identify and review *force majeure* clauses and any related remedies and requirements;
- In the absence of a *force majeure* provision, assess doctrines of impossibility and frustration of purpose;
- Identify any notice requirements and be aware of any notice deadlines;
- Review relevant ticket refund statutes and consider practical implications of offering refunds to ticket purchasers if rescheduling is not possible;
- Consider alternatives, including holding a virtual event if possible;
- Review insurance policies;
- For parties that cannot perform, document all efforts made to hold the event as scheduled and all factors precluding performance; and
- For parties accepting performance, discuss and provide alternate, acceptable methods of performance to the other side.

Looking Ahead

In the coming months, events inevitably will continue to be postponed, rescheduled or canceled due to COVID-19. Companies and event organizers can prepare themselves by considering the principles set forth above. Going forward, organizations also should strongly consider including viruses, epidemics and pandemics in the list of *force majeure* events in all agreements.

Even as government regulations are gradually lifted in the coming months, many public events may be negatively affected by COVID-19, as attendees still may be reluctant to attend large gatherings. Although such situations likely would not be covered by *force majeure* provisions, parties may consider whether the residual effects of COVID-19 are sufficient to frustrate the purpose of the parties' agreement.

Finally, companies and event organizers should prepare themselves for potential litigation arising out of the postponement, rescheduling and cancellation of events, particularly with respect to whether COVID-19 constitutes a *force majeure* event or otherwise makes holding the event impossible and/or frustrates the purpose of the event.