



Magazine Online | The Authority On African-American Conventions, Incentives, & Leisure Travel

Search BM&T

The Online Edition

Join Our E-mail List Now!

Click Here to visit our Leisure Travel section

BUSINESS TRAVEL

[Airline Industry Report](#)

[Canadian Connection](#)

[Cruise News](#)

[Current Events](#)

[Facilities Update](#)

[Food Service Beat](#)

[Tools Of The Trade](#)

[Greening of Hospitality Industry](#)

[Hospitality Heartline](#)

[In Your Own Words](#)

[Industry Briefs](#)

[Marketing Tips](#)

[Meeting Planner Packages](#)

[Pacific Asia Watch](#)

BM&T MAGAZINE ONLINE

[Home](#)

[About BM&T](#)

[Publisher's Message](#)

[Meetings & Conventions](#)

[Regional Travel Guides](#)

[Subscriptions](#)

BM&T MEDIA

[Blog](#)

[Events](#)

[Past Issues](#)

[Videos](#)

Issue: [December 2008/January 2009](#)

Be Prepared Just In Case The Deal Goes Sour: The Fine Art of Exit Clauses

By: [Michael Bennett](#)



The nuances of exit clauses can be somewhat dicey, so lets start with a true story to better illustrate the complexity of such clauses. Many of you might be familiar with this particular case. In 2003, the American Association for Cancer Research (AACR) scheduled its annual meeting in Toronto. A few days prior to the event, a provincial emergency was declared around the Toronto area due to the SARS epidemic.

Between November 2002 and July 2003 over 8,000 cases of SARS (Severe Acute Respiratory Syndrome) were reported globally through the World Health Organization. This highly communicable disease, thought to start in China, spread around the globe and eventually made its way to Toronto. In total, over 40 Canadians lost their lives to SARS or tangential health issues related to SARS.

As you have probably already figured out, just three days before the AACR conference was to begin in April 2003, AACR canceled for fear members would become ill and spread the virus to their own patients. Within two weeks, AACR rebooked the meeting for Washington D.C. later that summer.

Needless to say, a legal battle ensued between AACR, Toronto and the insurance company. At stake, the attendance of 16,000 medical professionals, signed separate contracts with 21 hotels and the convention center. Canceling an event of this magnitude would cost the city of Toronto collectively millions of dollars in potential revenues, plus funds already spent on event preparation.

Did AACR have an exit clause? If so, what were the terms of that clause? To answer those questions I turned to attorney John Foster of the law firm Foster, Jensen & Gullely, LLC of Atlanta. Foster and his partners handled this case. But first

ADVERTISEMENT

Meet Vibrantly



[LEARN MORE](#)

we need to work from the same terminology blueprint. Exit clauses are actually two different events. One is termination and the other is cancellation. Foster says, "People often erroneously use them interchangeably. They actually have two different legal meanings."

In broad strokes, termination clauses are terms under which a contract might be cancelled for reasons out of control of either party, without incurring monetary damages. The two best examples are of course Hurricane Katrina and the 9/11 attacks.

Many of you are familiar with the term "Force Majeure." It's a Latin phrase that means, "overpowering or irresistible force." For contract purposes it could mean acts of God, acts of third parties not under control of either party to the contract - it includes but is not limited to if the hotel burns down, supplier property is foreclosed or heaven forbid California falls into the ocean.

Termination clauses cover procedures and rights for terminating an agreement. "The law allows one or both parties to terminate a contract...that means go back to zero as if no contract had been entered into," Foster says. At that point you can negotiate a new deal or simply move on.

To be an enforceable force majeure and trigger a termination the reason must meet a standard according to Foster. That standard is impossibility, illegality, commercially impracticable or frustration of purpose.

The AACR case fell under frustration of purpose - that is an unforeseen event undermines a party's principal purpose for entering into a contract. When AACR booked their event several years earlier there was no "deadly disease going around with no known cure that caused people to drop dead," says Foster. From AACR's perspective, they were in no position to compel their attendees to show up. Compounding the problem for both parties was the inability on AACR's part to reschedule in the next few years because they book several years in advance, and when the AACR calendar opened up four or five years later, Toronto no longer had the facilities to handle an event of this size due to AACR's rapid growth.

The tornadoes that struck the city of Atlanta in March 2008 could have been a recipe for disaster. The city was in the midst of hosting several events, including the men's college basketball tournament. The damage to the Georgia World Congress Center forced a few conventions to lose a day or two, but not one group cancelled despite force majeure provisions in many of those contracts.

Why, because Atlanta officials worked closely with meeting planners and other organizers to resolve all the issues quickly regardless of what the contracts might have permitted. I mention that to say despite having all the appropriate contract terminology, nothing can replace having a good working relationship between both parties.

While that worked for Atlanta the nature of SARS would make this type of arrangement and close coordination impossible for Toronto and AACR.

When Foster addresses termination clauses in his contracts it lists specifics such as hurricanes, terrorism and deadly disease. "If there is an aspect of foreseeability to trigger a force majeure then it should be stated in the contract." Foster says this aspect of foreseeability has added a few pages to his standard contract, but it's worth it to spell things out. Sometimes an event such as Katrina occurs and six months later groups can't or won't show up for what might be some very valid reasons. This type of occurrence should be addressed contractually.

Foster says one of the top issues his practice has faced is one where the vendor wants to "narrow the trigger that would trigger the force majeure clause." Suppliers want to enforce a standard of impossibility. To a vendor, impossibility rises to the standard of the hotel burns to the ground or a hurricane wipes out the venue, or maybe the airlines shut down. They essentially want to make it impossible for the group to trigger a force majeure. From the association side it could mean something like SARS, where attendees could show up, but they risk their own lives to do so. The impossibility standard is tough for any meeting planner to acquiesce to.

The second type of exit clause is commonly referred to as a cancellation clause. Cancellation according to Foster "means one party or the other is not going to perform their obligations in the contract for reasons other than force majeure...it implies that the party that is not going to perform is going to owe contract damages to the injured party."

This portion of the contract is probably the area where you'll see the term

"liquidated damages." Liquidated damages actually stipulate the amount of money one party must pay the other when a contract breach occurs. "Liquidated damages" are not a penalty, but rather a fee of some kind for a reasonable approximation of actual damages as a result of cancellation. Damages are loosely defined as lost profit from the venue side of the equation. From the group side of the equation, it could include the cost of having to change venues.

It's important to note that the offended party is not entitled to collect penalties - funds above and beyond actual damages. Foster was quick to point out that penalties are unenforceable in contract law.

(CONTINUED)

Related Articles

<u>Classic Hotels For Spectacular Meetings</u>	1-Feb-2008
<u>Texas Gold Special</u>	1-Apr-2009
<u>Preparing For Power</u>	28-Jul-2010
<u>Don't Overlook A Major Source Of Revenue: Disabled Travelers</u>	29-Jul-2011
<u>NCBMP & NABHOOD Form Strategic Alliance</u>	29-Mar-2010
<u>BM&T Salutes Hospitality Industry Diversity Leaders</u>	1-Dec-2007