

FCA | GRAND OUEST

AVOCATS ASSOCIÉS

ROUEN: 4 Passage de la Luciline, Immeuble Le Vauban A, 76000 ROUEN- Tel: 00.33.(0)235.591.134

PARIS: 16 Avenue de Friedland, 75008 PARIS - Tel: 00.33(0)142.272.852

EVREUX: 26 bis rue du puits carré 27000 EVREUX- Tel: 00.33(0)232.382.923

CAEN: Immeuble Odyssee, 4 Avenue de Cambridge 14200 HEROUVILLE SAINT CLAIR - Tel 00.33 (0)277.645.363

Web: www.fca-avocats.com - **Mail:** l.clerc@fca-avocats.com

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Cancellations of events between professionals, under French law: How to anticipate, manage, negotiate the relationship organiser/client - partner?

The news is full of cancellations or postponements of exhibitions and fairs, or sporting events such as Roland-Garros, or now due to the bans on gatherings and the containment decided by the government, and the suspense does not remain anymore for the Olympic Games which were postponed until 2021.

Faced with this kind of situation, how can we react, find solutions and also learn from these cancellations to plan for the future?

Some practical tips for event organisers.

1. The risk is inherent to the event.

We don't take part in an event like we would hire a venue for a seminar.

We have to be ready for D-Day.

We cannot hide the risks inherent to such events and in particular the risk of cancellation.

Risks of storm, marine pollution (Erika) or land pollution (Lubrizol), natural disaster, flooding, epidemic (SARS 2003, H1N1 2009, Ebola 2014, COVID 19), major fires (Australia and California), volcanic eruption (Indonesia), blocking of access (locks, bridges), not to mention terrorist attacks or the yellow vests movement in France, make regular headlines.

Every party to the event must be aware of the risk.

The event is carried out in the interest and at the risk of the organiser but also in the interest of exhibitors, partners, participants who wish to promote their products, or achieve excellence, and who find there an effective means of advertising.

It is therefore necessary to think together about the difficulties that may arise in order to anticipate solutions in the event of cancellation.

2. Inform the partner from the start

This is the purpose of negotiating the contract and the general terms and conditions to prevent the contract being characterised as a standard form contract and the significant imbalance (article 1171 of the French Civil Code), conditions which must be accepted (Article 1119 of the French Civil Code).

Draw the partner's attention to the risk of cancellation so that they cannot blame the other partner of not informing them of a determining element of the contract (article 1112-1 of the French Civil Code).

3. Be properly insured and offer insurance to your partner

The organiser's insurance

Of course, all organisers are insured for "Organiser" civil liability, for their social agents, for volunteers and for classic risks that can arise in the course of events such as fire, flooding, vandalism, etc.

But what about cancellation? Here are some ways to negotiate one's policy.

- What risks can be covered for total cancellation, suspension or postponement of the event?
- What risks are excluded?
- If there is cover, is it only a reimbursement of expenses or of losses actually incurred?
- What about refunds from clients who have paid their financial contributions?
- Negotiate an excess, a cap, a refund if there is no damage
- Plan for waivers of recourse from customers and their insurers
- Plan for partners to be additionally insured by paying a premium

Partner's insurance

- Imperatively request that clients insure themselves for cancellation for their indirect damage (caterer, marketing, client invitations, travel expenses, etc.) i.e. the non-refundable part, if required, by the organiser?
- Offer them a cancellation policy as an option
- Obliging the client to insure themselves for cancellation can save the business relationship if, on the other part, the organiser is also insured for cancellation.

And this enables to contractually limit the organiser's liability.

The situation of insurance in the coronavirus period.

An article published in *Les Echos* (French economic newspaper) on 09/03/2020 provided an update on the situation with interviews from authoritative brokers: Marsh, Gras-Savoie, Siaci Saint Honoré, Axa.

"On the French market, 80% of events are insured 6 months in advance" [Gras Savoye].

And in case of cancellation, they benefit from the reimbursement of their costs.

But corporate events are not always guaranteed in the event of cancellation because it was not provided for.

Since January 2020, there is now a provision for exclusion for coronavirus in policies.

For the cancellation of events, there are very few contracts where the risk of pandemic is not excluded (AXA).

The impact of the cancellation of the Olympic Games would be catastrophic for the cancellation insurance market given the budget of around 100 million euros.

4. Use of the contractual arsenal.

The reform of French contract law that has been in place since 1 October 2016 has provided for a number of provisions in this area, not all of which are public policy.

Are public policy, only:

- Pre-contract information requirement (article 1112-1 of the French Civil Code)
- Provision of essential obligation under the contract (article 1170 of the French Civil Code)
- Significant imbalance in a standard form agreement (article 1171 of the French Civil Code)
- The judge's assessment of the amount of the criminal clause (article 1231-5 of the French Civil Code)

It is therefore possible to provide for contractual arrangements or to waive the application of the other provisions.

But if we don't waive them, they will apply automatically!

Limit liability and couple it with a cancellation insurance policy

For example, we can limit the reimbursement to 50% and insure up to 50%. Limitation authorised by article 1231-3 of the French Civil Code.

Subject to fulfilling one's essential obligation (article 1170 of the French Civil Code), of course.

Organise the termination / cancellation of the contract

The partner wants to pay when he receives the benefit and the organiser to be paid in advance.

How can these two imperatives be reconciled in the event of cancellation of the contract by one of the parties or in case of force majeure?

Provide a compensation table, by cancellation date:

- In the event of a wrongful cancellation by the organiser on such a date, he owes such amount
- In the event of a wrongful cancellation by the partner on such a date, he owes such amount
- In the event of cancellation for force majeure, no refund or limited refund, in connection with the insurance cover.

Force majeure in contracts

Definition

Art 1218 of the French Civil Code: "There is *force majeure* in contractual matters where an event beyond the debtor's control, **which could not reasonably be foreseen** at the time of the conclusion of the contract and **whose effects cannot be avoided** by appropriate measures, prevents the debtor from carrying out its obligation.

If the impediment is **temporary**, the performance of the obligation is suspended unless the resulting delay justifies the resolution of the contract.

If the impediment is **final**, the contract is resolved as of right and the parties are released from their obligations under the terms and conditions of articles [1351](#) and [1351-1](#).»

Art 1351 of the Civil Code: "The impossibility of performing the service frees the debtor proportionally when it comes from a case of

force majeure and is final, **unless he had agreed to do so** or had been previously put on notice.

Article 1218 of the French Civil Code is not public policy.

Two criteria:

Unpredictability: Some authors will tell you that everything can now be predicted, that there are studies on all subjects, and that as a result nothing is more unpredictable. One can answer that forecasters can be wrong which makes the reality unpredictable.

The storm can be predicted for ages but is still considered a case of force majeure.

Irresistibility: the debtor of the obligation must be unable to do anything to save the situation.

Several consequences:

- Exoneration of the liability of the organiser to whom damages cannot be claimed for non-performance of the event unless he contractually planned to bear the cost of consequences
- In the event of an outright cancellation, the contract being "cancelled", each party theoretically finds itself in the state in which it was before the conclusion of the contract: the organiser no longer has to set up the event, and the client can request the return of the instalments paid.
- Suspension or postponement: who will bear the costs strictly related to this situation (all budget items are allocated)?
- Cascading cancellation of the chain of contracts for the organiser and partner (supplier contracts)

Case law

Unpredictability is appreciated on the day the contract is signed

Irresistibility is assessed on a case-by-case basis, particularly in relation to the link between force majeure and the promised performance

Decisions made in situations similar to the coronavirus epidemic

The courts have treated Ebola as a case of force majeure (Court of Appeal of Paris 17 March 2016), but refused it for absence of causal link with the decline of activity of a company or when the virus had not made the performance impossible (Court of Appeal of Paris 29 March 2016) or when the virus is recurrent (Court of Appeal Nancy 22 November 2010) or been announced for some time (Court of Appeal Besançon 8 January 2014)

But in the case of Covid 19, we have:

- The virus
- + the World Health Organization's publication of 30 January 2020 which called the coronavirus epidemic a "public health emergency of international concern"
- + the French Minister of Economy's statement of 28 February 2020 stating that coronavirus will be "considered a case of force majeure for businesses"
- + the ministerial decree banning gatherings of more than 5,000 people in a closed environment of 4 March 2020
- + the confinement of persons by decree of 16 March 2020 which does not provide a waiver for participation in an event.

There is therefore a reasonable chance that the coronavirus will be considered a case of force majeure, especially if your contract provides that the administrative ban on your event is a case of force majeure.

In this case, there is a case of force majeure for the organiser who can no longer organise (decree of 4 March) and for the partner who can no longer participate (decree of 16 March)

How to contractually formalise?

Add cases of force majeure to the usual list (war, natural cataclysm or social unrest), such as IT failure for example (Court of cassation 17 February 2010), or administrative ban on the event. However, the situations involved must meet the criteria of unpredictability and irresistibility.

Provide for payments made to not be refunded.

If the contract implies "successive performance", i.e. it runs over a long period of time with the granting of image services, use of logo, public relations before the event, the partner will have received a consideration before the cancellation.

Each party can keep the costs incurred on the date of the cancellation and no refund will be made.

Suspension/Postponement of the event

The cost of "saving" the event, in the event of a suspension, remains the responsibility of the person who initiates the cost or can be shared by the parties.

Provide for objective criteria of the postponement by the organiser and objective criteria of refusal as well by the sponsor/supplier applying the principle of good faith.

Cascading cancellation of the chain of contracts for the organizer and partner (supplier contracts)

The organizer booked in advance 200 hotel rooms for the event. If the hotel was aware of the event, the booking can be cancelled without any penalty (art 1186 of the French civil code)

Include in the sub-contract a provision for cancellation if the event is cancelled.

Partial contractual non-performance and price reduction

One of the possibilities offered by contract law is to request a price reduction in the event of "imperfect performance of the benefit", the amount of which may be arbitrarily decided by the judge in the event of disagreement (article 1223 of the French Civil Code).

As this text is not a matter of public policy, the parties may waive any request for a price reduction or arrange the reduction by contract.

Penalty clause

The contract may provide that the party who has not executed the contract will pay the other a certain amount as damages. But the judge may automatically reduce or increase the penalty, and this text is public policy (Article 1231-5 of the French Civil Code).

Unpredictability clause/hardship

This clause, different from force majeure in that it deals only with the financial aspect, allows for a price revision in the event of an excessive increase in the cost of the event.

The question is at what point the performance of the contract becomes "excessively expensive for a party that had not agreed to take the risk"? It is then necessary to provide financial criteria for triggering the re-negotiation mechanism provided for by the text, with the possibility of intervention by the judge and/or cancellation of the contract in case of disagreement (article 1195 of the French Civil Code).

This text is not a matter of public policy and can be waived or contractually arranged.

In conclusion

Between insurance cover and contract negotiation a balance must be found between the partners, this is the purpose of negotiating the original contract. In the event of a conflict, the proposals mentioned will bring the points of view closer together.

Thierry CLERC

Avocat

FCA Grand Ouest - Paris- Normandy (Rouen- Evreux- Caen)

Member of Eurojuris International

"clerc@eurojuris.fr"