

Group Sales and Event Contracting During (and After) COVID-19

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1. In the Beginning: February/March 2020

Certain challenges associated with group sales and event contracting have made the coronavirus pandemic that much more difficult for hoteliers, many of whom rely on large meetings, events and programs to generate profit. In particular, the concept of suspending or delaying performance during the pendency of a force majeure event—which might make sense or help parties mitigate their losses in other contexts—is not meaningful. Events either occur or they don't; contracts must be terminated in their entirety. Beginning in February or March, groups cancelled or attempted to cancel event contract after event contract for events scheduled in April 2020 through February 2021. Much of this business had been on the hotels' books for at least a year.

The outcome of these cancellations relied and continue to rely almost entirely on the interpretation of the contracts' force majeure clauses and whether the contract could be terminated without payment of contractual damages (cancellation fees) and whether and when deposits should be refunded. Even in "normal" times, this clause is often the subject of negotiation as it articulates the tension between the hotel's desire for confirmed business on the books and the group's desire for more flexibility to account for attendee attrition, shifting market conditions and any number of other factors that may affect the group's ability to fulfill its obligation to pay for a block of hotel rooms, function space, catered events and other amenities. The pandemic exacerbated that tension, with all involved spending more time than usual arguing over the meaning of the words "illegal," "impossible," impracticable," and "inadvisable." Does an outbreak that the World Health Organization declares to be a pandemic in March make performance in July impossible? If the governor of Oregon merely declares a state of emergency in April to free up federal funds and implement inter-agency communication, does that make performance two weeks later in April impossible? Is anything truly impossible?

2. The Continuing Pandemic

Once the states of emergency and pandemic declarations turned to travel bans, public health agencies' recommendations against non-essential travel of any kind, "stay home, stay safe" orders at the state, county and municipal levels, outright quarantines and gathering size restrictions, focus shifted from parsing force majeure clauses to negotiating compromises. The most common compromise is one where the group is permitted to cancel without paying cancellation fees (or paying less than the agreed-upon cancellation fees) if it rebooks the cancelled event for later in the year or the following year, with all deposits and any cancellation damages applied to the total cost of the rebooked event. Given the opportunity to amend an existing agreement to change the dates, many groups took, and continue to take, the opportunity to renegotiate the force majeure clause to make it easier for them to terminate without paying damages for COVID-related cancellations as well as a handful of other clauses that relate to the group's ability to produce the required revenue. More so than ever, the party holding the money has the upper hand in negotiations as many companies became ever more strapped for cash as the pandemic continued.

3. Present Day and the Future

As restrictions have loosened and hotels are beginning to reopen, groups continue to book event business and push for more favorable terms, including specifying particular functions within the event as a whole that are essential, listing amenities that must be open, available and fully staffed or the group may terminate and multiple iterations of these terms and more. The parties are also attending more carefully to indemnification obligations, with hotels wanting to be clear that claims for coronavirus infection are excluded and groups wanting to be clear that they are, at least if occurring as the result of the hotels' breach of lengthy health and safety requirements or their negligence. Force majeure clauses, once a few sentences, now run to a page or longer. Language about a coronavirus vaccine, or its absence, is also entering the discussion. Many groups have attempted to include language to the effect that if the group decides to suspend all business travel for health reasons, that in and of itself constitutes a force majeure event permitting termination without payment of cancellation damages. COVID-19-specific clauses have begun to appear, including those giving the group additional termination rights if the pandemic does not improve or worsens as of the date of contracting as well as lengthy health and safety representations and warranties as to compliance with U.S. Centers for Disease Control guidelines. On the other side, hotels are implementing their own health and safety policies and programs in response to the pandemic and terms about those requirements are also incorporated into agreements and a requirement that the group inform its attendees that they will be expected to comply with them.

Despite loosening restrictions, there is still a worldwide pandemic and groups and hotels are confronting the challenge of allocating risk while contracting during it. This can take many forms but all attempt to answer one or both of the following questions: can COVID-19 epidemics or pandemics constitute a force majeure event now that the virus and disease are a known quantity and who is liable if someone is infected? The latter implicates employer/employee and health information privacy issues as well—may an employer disclose the fact that an employee has coronavirus to a third-party? If a group demands all staff working an event be tested for coronavirus before being permitted to work, who has access to that data? May an employer require staff to be tested as a condition of employment? If so, how far does that mandate stretch? There are no clear answers to these questions, nor many of the others asked above, and we expect more and more difficult questions to arise throughout the rest of 2020 and likely well into 2021. Perhaps the most important lesson lawyers in the field have learned during this period is that a technical legal answer to a question or a near perfect legal argument is rarely as important as the effect that answer or that argument will have on present and future business between the parties.