



HOTELS

PASSION FOR HOSPITALITY

HOTELS: NEWS

Force majeure: What owners, operators need to know

By Guest Contributor on 3/19/2020

The outbreak of COVID-19 will disrupt the travel industry on a scale possibly without precedent in modern history. The short-term financial impact of the outbreak on the hotel industry, in particular, will undoubtedly be severe.

However, neither hotel owners nor operators should assume that disruptions caused by COVID-19 will necessarily excuse the performance of contractual obligations under hotel purchase and sale agreements, hotel franchise agreements, hotel management agreements, group booking agreements, construction contracts or other hotel-related agreements. With respect to contracts in the United States, the question of whether, and to what extent, contractual obligations may be excused rests largely on the terms of any force majeure clause that may or may not exist.



Getty Images

Contributed by Joshua Bowman, partner and hospitality practice group chair; Thomas Hippler, of counsel in real estate and business law departments; and Joseph Wang, partner, at Boston-based law firm Sherin & Lodgen.

Force majeure translates literally from French as “superior force.” In law, the term often arises in the context of a force majeure clause in a contract, which is a clause that is meant to protect the parties to a contract in the event that all or part of such contract cannot be performed due to causes that are outside the reasonable control of the parties and could not have been avoided by the exercise of due care.

Under most contracts governed by U.S. law, unless there is an express force majeure provision, none will be implied by law. This reflects the principle of *pacta sunt servanda*, Latin for “agreements must be kept.” If a contract has no force majeure clause, the parties must fall back on the legal doctrine of impracticability, which is extremely vague and difficult to prove.

If you are considering declaring a force majeure event because of COVID-19, you should carefully review your agreement and consult with legal counsel. Moreover, any hotel owner or operator negotiating a new contractual arrangement should advise their legal counsel to give serious attention to the force majeure clause. While often overlooked, in extraordinary times such as these, it can be one of the most important clauses in any contract.

What force majeure can include

Force majeure clauses can vary in significant respects in different contracts. Ideally, a force majeure clause will specify exactly what events allow the clause to be invoked. If parties intend adverse weather conditions, war, civil commotion, riots, strikes and labor disputes to excuse contractual performance, the force majeure clause should specifically include those events. No force majeure in a contract that is more than a few months old will include the COVID-19 virus by name, but many will include terms like “disease,” “illness,” “pandemic,” “epidemic,” “contagion” or “outbreak.” In addition, emergency measures to address an outbreak such as COVID-19 may be covered under general terms such as “work stoppages,” “unavailability of labor or materials,” “government action or inaction,” “national or local emergency” or “quarantine.”

Finally, “catch-all” provisions like “causes beyond the parties’ [or party’s] control” or “acts of God” may also be useful, but these terms are not always included in force majeure clauses and they are far more open to interpretation (and opposition) than provisions that specifically deal with a given situation.

Even if a force majeure event is specifically covered by the force majeure clause, one should not assume that all performance is automatically excused. On the contrary: Sometimes the contract provides that the force majeure clause excuses performance under only a limited number of expressly identified provisions in the contract.

Moreover, reliance on a force majeure clause may require a direct or indirect causal link between the event and the affected party’s failure to perform under the specific provision of the contract. Force majeure clauses also often require the party seeking to be excused from performance to provide prompt or timely written notice of the occurrence of the so-called force majeure event in question in order to be entitled to claim any delay or excused performance; and the clause may require such party to mitigate damages, potentially by seeking alternative methods of performance.

Finally, many force majeure clauses do not excuse payment obligations, and some also allow for termination of the contract (which may not always be desired in a long-term beneficial contract) if the force majeure event continues for a specified (and specially negotiated) period of time.

At this point, there is no question that COVID-19 will affect virtually every major aspect of hotel ownership and operations. However, the party that will legally bear the risk of loss resulting from COVID-19 may in large part depend on the language in a contractual clause that is often viewed as a mere afterthought.



SUBMIT CANC

