

RESPONDING TO CORONAVIRUS-RELATED GROUP TERMINATIONS

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This article is intended to help hotel owners and operators who are likely facing cancellation requests for group events due to concerns about the COVID-19 (the “coronavirus”). We are offering our ideas, but all hotel owners should contact their legal counsel and consider the appropriate response for each situation.

Although not officially a pandemic, the coronavirus is currently spreading rapidly. The news is constantly reporting on major conference cancellations or companies restricting travel and conference attendance. One state has already declared a state of emergency to marshal resources to respond to the outbreak. Hotels, which are places to which people travel and meet, are on the tip of the spear, and requests for meeting cancellations are accelerating.

Hotels, of course, want to find some way to help minimize the spread of the coronavirus and maintain the relationship with event planners and group customers without damaging the hotel P&L unnecessarily. In many cases this will mean finding a way to accommodate requests to reschedule or cancel but to obtain reasonable compensation for the lost business. In this context, it is important to understand what the group contracts require or allow and to think about how to respond appropriate to requests.

There are risks to responding inappropriately. In many cases, there may be a tension between what the courts will likely allow based on accepted law and the individual contract and the reputational and relationship issues. Consider the public perception and potential lawsuits that might result from a news story in which hotels are characterized as unwilling to act in the public interest to reduce the spread of coronavirus by allowing cancellation to protect hotel workers and attendees. This is not to suggest that hotels should act without regard to the financial impact of cancellation, but it would be wise to respond in sympathetic terms and frame the discussion not as an unwillingness to allow cancellation but as a discussion of attrition clauses or cancellation fees or some commiserate financial consideration for the hotel. In all events, you should act in a manner consistent with public health recommendations, even if those recommendations are not requirements, and keep customers aware that the responsibility to address the health risk is on both parties.

TOOLS

Below is a simplified checklist to help with discussions. The overview that follows will help you understand those tools and what people are talking about when you hear “force majeure” allowing termination of the sales contract.

BEFORE YOU BEGIN DISCUSSION WITH CUSTOMERS

Now is a good time to determine if you have business interruption insurance that may protect some of the hotel’s lost income. If you are lucky and may have such coverage, which will often not be the case, it may change how you negotiate with your customers, thereby preserving relationships from the start of discussions.

Before you make any final decision to rely on the group contract, your legal counsel should review the actual customer contract. That said, you may want to review the standard group sales contract for the hotel or your major customers now to prepare. In either case, the major relevant provisions will probably be the same:

- Cancellation rights and fees
- Deposit refunds
- Attrition
- Force majeure or extraordinary events

Cancellation rights, cancellation fees, deposits, and attrition clauses are provisions that are normal discussion items in group sales discussions. Force majeure, however, does not normally receive much attention.

FORCE MAJEURE AND FRUSTRATION OF PURPOSE

Force majeure is a legal term that is sometimes replaced in contracts with a defined term “Extraordinary Events.” Generally, in the U.S. force majeure would apply if there is an event beyond the control of the parties, such as fire, war, riot, epidemics or other things that make it illegal or impossible to hold the meeting or travel. Fear of travel or crowds because of the coronavirus or the desire of a company to cut costs is not a force majeure event. But there are contracts with more general clauses that include unanticipated events that materially impact performance and would otherwise be characterized as “commercial impracticability.” It is always a mistake not to check the wording of your contract!

Normally in the U.S., force majeure is determined solely by the definition in the contract, which may also state the remedies for force majeure. There are cases interpreting force majeure clauses in the context of disease outbreaks, and many, but not all, follow an approach of excusing performance of the contract only when (i) the disease was unanticipated, (ii) clearly falls within the definition in the contract, and (iii) performance is impossible, not just difficult or expensive. Those cases are probably consistent with language in many sales contracts. At least one of the brand’s group sales contract form provides that infectious diseases, such as SARS or

avian flu, are a force majeure if the disease makes performance “illegal” or “impossible.” Many owners use the forms of sales agreement of the major brands, so this may be relevant to you.

Force majeure excuses performance or partial performance and does not normally allow the contract to be terminated, voided, or cancelled. Unless the contract expressly allow termination for force majeure, do not agree to termination even if the request meets the definition of “force majeure” because termination may eliminate the ability for the hotel to obtain any compensation. Put another way, the hotel owner should consider whether it wants to allow a cancellation because of the coronavirus scare but require the customer to pay some a fee that is either set forth in the contract or, if the contract does not allow cancellation, that the parties agree makes sense because the hotel is agreeing to cancel. **If the customer will not agree to anything, it is important to document that you are not agreeing to cancellation and that you expect the customer to honor the contract (but word this in a way that you would be comfortable seeing in the news).**

There may also be relevant laws or government actions that apply to determinations of force majeure. In many countries outside of the U.S., force majeure is statutory. The February 28 announcement by the French government that small-to-medium sized enterprises may declare a force majeure based on the coronavirus is understandable because France is a civil law jurisdiction in which there is statutory force majeure. And there will likely be specific governmental actions in many jurisdictions that may not directly address contract rights but may prohibit large public gatherings and meetings.

Finally, you should also be aware that there is a doctrine in the U.S. law known as “frustration of purpose,” or “impossibility,” which often overlaps with force majeure and may apply even if the contract does not have a force majeure clause. To simplify, if the meeting cannot occur because people cannot travel or meet in groups, this defense may apply as opposed to concern that if the meeting goes forward, most people will not attend out of fear. This may especially be the case if the meeting has local attendees and is in an area not yet affected by the disease. But impossibility is normally a difficult case to prove.

HANDLING THE INFORMAL CANCELLATION REQUEST

Before agreeing to cancel a meeting, gather as much information from the customer as reasonably possible. Some questions that you may want to consider include:

Who is making the request? Someone who is weighing options? Or someone who has been tasked with cancelling and has the ability to negotiate on behalf of the customer? Although you want to be helpful, you don’t want to negotiate against yourself by agreeing to cancel if the customer is “shopping” the idea.

Is the request for complete cancellation, rescheduling, or modification of the attrition clause? Your customer may not have thought about options other than cancellation, and this is a good time to introduce alternatives.

What is the reason for the request? Don't make assumptions. Why is the request being made: fear of travel, company policy, or inability to travel because of government travel or meeting restrictions? Fear is not a sufficient business or legal reason to support cancellation. Government or airline travel restrictions (not corporate travel restrictions) and public health requirements, on the other hand, are sufficient. As of today, World Health Organization has declared the outbreak a "public health emergency of international concern" but neither it nor the Centers for Disease Control and Prevention have declared the outbreak a pandemic even though it may be an epidemic in some countries. Tomorrow, of course, may be different.

Context is also important. Is the business cancelling all meetings and has the company implemented a written policy? From where are the attendees traveling?

In terms of your hotel, consider how much of the hotel has been allocated to the meeting. What other groups will be in-house? Are there procedures that the hotel can implement that would accommodate customer concerns?

Finally, does the customer have cancellation insurance that might help? Event cancellation insurance may cover force majeure situations, although there also may be relevant exclusions in the insurance contract.

WHAT TO DO IF YOU RECEIVE NOTICE OF CANCELLATION?

Don't forget that if a hotel ultimately seeks damages or insurance coverage, the hotel will have to show that it attempted to mitigate or lessen the damage. In other words, that the hotel sought replacement business or took action to minimize the losses due to the loss of the meeting. You may feel like any attempt to replace the business is a "fool's errand," but you should do what you can.

Respond in the manner required by the contract, and always in writing after any discussion. If the group cancels an event and asks the hotel to credit its cancellation fee against the cost of a later event, before agreeing, consider minimizing its loss by (a) requiring the event to be rescheduled during a need time and/or (b) giving the group less than 100 percent credit for the cancellation fee. Also, consider collecting the cancellation fee up front to be applied later against the cost of the rescheduled event, and insist on a deadline for the rescheduling.

CANCELLATION CHECKLIST

1. Who is making the request?
2. What exactly is the request?
3. Is the meeting far enough in the future to allow for the decision to be delayed?
4. What is that status of the contract?
 - a. Deposits?
 - b. Cancellation deadlines?
 - c. Attrition allowances?
 - d. Cancellation fees?
5. Why is the request being made (specifically, not “because of the coronavirus”)?
6. Can you offer any flexibility to rebook or to increase allowed attrition?
7. Do you or the customer have any relevant insurance?
Have you responded in writing?