On January 31, 2020, Alex Azar, Secretary of the U.S. Department of Health and Human Services declared a public health emergency for the 2019 novel coronavirus or COVID-19. As this virus has spread to a pandemic stage across globe, the devastation left in its wake is substantial on those who are infected and their families, our healthcare workers, schools and universities, and not to mention the ripple effect felt by the drastic erosion of equity in our stock markets. The judiciary, including the U.S. Supreme Court, has postponed hearings. Entertainment outlets that we take for granted are not immune as the NBA and NHL have suspended their seasons, MLB has canceled spring training and delayed the start of its season and March Madness has been lost as the NCAA men's and women's basketball tournaments have been canceled. The events planned for the NFL Draft in Las Vegas have been abandoned as well. On March 24, 2020, the International Olympic Committee and Japanese Prime Minister, Shinzo Abe made the unprecedented decision to postpone the Games of the XXXII Olympiad to 2021. Even the Wimbledon tennis tournaments have been canceled this year, the Kentucky Derby postponed until this fall, and the PGA and LPGA tours have suspended operations.

Pandemics Covered By Force Majeure Clauses?

To further aid in curbing the reach of the coronavirus, the U.S. Centers for Disease Control and Prevention (CDC) issued guidance on March 15, 2020 to limit in-person gatherings to no more than 50 that was subsequently revised to no more than 10. Further guidance continues to be provided on an ongoing basis. Many states have since imposed restrictions or stay-in-place orders. In Nevada, Governor Steve Sisolak imposed a stay-at-home order and ordered all non-essential businesses and K-12 schools to close through at least April 30, 2020. Casinos on the Las Vegas Strip and gaming throughout the state, and across the country are temporarily closed to protect guests and workers from further exposure.

These disruptions are forcing all of us to rethink travel, business and everyday life considerations, as well as grasping new terms for our lexicon like “social distancing.” Many are asking if the force majeure provisions in their contracts have been triggered by this pandemic. Maybe.

The force majeure provisions define the scope of unforeseeable events that may excuse performance under a contract when certain circumstances beyond a party’s control make performance of contractual obligations inadvisable, commercially impracticable, illegal or impossible. The term “force majeure” comes from the Code of Napoleon in France to mean “superior force.” Typically, these forces are natural disasters—hurricanes, earthquakes, floods, or other weather phenomenon, more commonly known as, “acts of God.” Other events may be included, such as war, terrorism, civil disobedience, labor strikes, fire, disease or pandemics, loss or delay of transportation, or significant decrease in expected attendance for...
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Upcoming Events and Publications

- March 25th - the Gaming Law Section made $5,000 donations to both the “United Way of Northern Nevada and the Sierra” and “United Way of Southern Nevada” to aid ongoing COVID-19 relief efforts throughout the state.

- May 1st - deadline for current Gaming Law Section members to submit their resume or biographical statement, along with a letter of interest to Robert Horne, Communications Manager for the State Bar of Nevada at rhorne@nvbar.org or 702-382-2200) to be considered for nomination to the 12-member Executive Committee.

- June 30th - deadline for submission of draft articles for the 2020 issue of the Nevada Gaming Lawyer magazine (that will be published on or about September 1st).

- November 6, 2020 - 2020 Gaming Law Conference will be held at the Red Rock Casino Resort & Spa. Opening night reception will be November 5th (5:30 – 7:00 p.m.) in T-Bones Chophouse by the pool (free to registered attendees who RSVP).

Online registration now open at https://members.nvbar.org/cvweb/cgi-bin/eventsdll.dll/EventInfo?SESSIONALTCD=CLE-4470-2002


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events. A well-crafted force majeure clause should address these conditions, including “any other events” whether emergencies or non-emergencies. The burden rests solely with the nonperforming party to demonstrate that a force majeure event has occurred that is beyond his or her control and the moving party is without fault or negligence. It is not a force majeure event if the event merely makes performance difficult, burdensome or not economically advantageous.

The terms of these provisions are left for negotiation between the parties. The courts have historically given a narrow interpretation of these clauses. To be effective, a force majeure provision should specifically define, at a minimum: (i) the covered events; (ii) what triggers the event; (iii) the result of an event occurring; (iv) the notice requirements; (iv) whether the event excuses, delays, or suspends performance; (v) the effect on the agreement if the event continues for a period longer than is specified; and (vi) whether the event excuses both performance and liability, and/or liability associated with underperformance.

Many boilerplate force majeure provisions excuse a party’s performance only if the event makes it “impossible” to perform. Impossibility is a very high threshold or standard to show. Circumstances of the event, such as a pandemic, may make performance difficult or inadvisable, but not impossible. For example, holding a conference or convention may be inadvisable, but not impossible (assuming no government order would prevent such conference). Thus, for greater flexibility, especially given the fluid nature of the day-to-day updates on the coronavirus, it would be more prudent to use language such as “illegal, commercially impracticable, inadvisable or impossible.”

Parties to all contracts assume the risk of certain contingencies occurring, which cannot later be used as a shield to performance. For COVID-19, in particular, contracts entered into before December 2019 may provide stronger grounds for a party to exercise the force majeure provision since the virus was not publicly known until its outbreak was first detected. Contracts entered before the World Health Organization (WHO) recognized the COVID-19 as a pandemic on March 11, 2020, still may be able to argue the unforeseen nature/scope of the disease.

In the absence of a force majeure provision, the parties are left with the common law doctrines of impracticability, impossibility and frustration of purpose. These doctrines rarely excuse performance.

Similar to well-defined force majeure clauses, it is important to consider the insurance coverage in your contract, such as, business interruption insurance to provide for direct physical loss. Certain situations may give rise to coverage where the business or workplace becomes contaminated and requires closure for some period of time. Likewise, this may apply to suppliers who experience disruption from a pandemic or other force majeure event.
On January 30, 2020, the Nevada Gaming Control Board (Board) issued Industry Notice # 2020-12 setting the date for a public workshop to hear comments on the proposed changes to Regulations 1, 4, and 5. The proposed revisions would address gaming employees, armed security personnel, independent hosts, and application fees. Some key highlights of these proposed revisions are:

- Submission of an employee for an armed security position will be considered “temporarily registered” to work as a gaming employee only in an unarmed position until full registration is obtained. Registration for armed security personnel is effective upon notice from the Board or expiration of the 120-day temporary registration period, whichever occurs earlier.

- Licensees that employ armed security personnel are required to have written policies and procedures for these individuals. The Board and the Nevada Gaming Commission (Commission) will consider, without limitation, the following criteria in evaluating such policies and procedures:
  
  (a) The extent of the licensee’s background investigation utilized prior to hiring the employee;
  
  (b) The extent of the licensee’s required firearms training for such employees prior to employment;
  
  (c) The extent of the licensee’s annual training and qualifications for armed personnel; and
  
  (d) The extent of drug testing of armed personnel.

- Temporary reassignment of gaming employees to affiliated properties of the licensee do not require notice to the Board if:

  (a) The gaming employee does not act in an armed or unarmed security position;
  
  (b) The gaming employee is not reassigned to an affiliated property for more than 14 consecutive days; and
  
  (c) Licensees are required to keep records of such temporary reassignments for a period of five years.

In addition to the above, the proposed amendments address the Board’s temporary suspension of a registration and what constitutes effective notice to both the licensee and gaming employee, the requirement of the licensee to move the employee into a non-gaming employee position, and the appeal procedures and deadlines that the employee may exercise.

Lastly, the Board proposed changes to Regulation 4.070 regarding application fees. For the first time in nearly 35 years, the application fees would be increased. The nonrefundable application fee for an individual restricted license would increase from $150 to $500, and the nonrefundable application fee for all applications, other than findings of suitability under NRS § 463.167(2)(a), would increase from $500 to $1,000.