Casinos, Contracts, and Force Majeure Clauses in Light of COVID-19

By Glenn Light, Karl Rutledge, Jeff Steffen, and Mary Tran

In a city that thrives in the bustling crowds of tourists wandering along the Strip, the once brightly lit Las Vegas Boulevard went dark earlier this year. On March 17th, in order to curb the spread of COVID-19, Nevada Governor Steve Sisolak ordered a statewide shutdown of all "non-essential businesses" and all gaming operations. For the first time since President Kennedy passed away in 1963, all casinos in Nevada shut down. This time, however, the shutdown lasted approximately 80 days, ending on June 4th.

The prolonged shutdown, coupled with the fact that no vaccine or cure is yet available to combat COVID-19, has left many gaming-related businesses – including casinos, gaming manufacturers, slot route operators, landlords, and vendors – in a precarious situation. In particular, even as casinos gradually reopen, the gaming floors have been significantly altered. Chairs have been removed from the tables, numerous slot machines have been powered down, restaurants are only partially open, and the showrooms and convention centers remain closed. Consequently, countless legal questions have arisen in regard to how COVID-19 affects commercial contracts when one of the parties is unable to perform their obligations due to the unprecedented quarantines, lack of consumer demand, closures and massive disruptions to transportation and supply chains caused by the pandemic. This results in attention being given to the often overlooked force majeure clause.

A force majeure clause is a common contract provision that excuses a party from having to fulfill their obligations under a contract when an unanticipated extraordinary event or circumstance beyond their control occurs, which event or circumstance makes their performance impossible or impracticable. Although a force majeure clause may excuse a party's non-performance, it does not do so indefinitely. It only suspends non-performance of an obligation for the duration of the force majeure event that triggered the clause. However, if the performance is affected

for a long period of time, the contract may allow for the right to suspend or terminate the contract or seek an extension of time.

As is typical with any contract-related issue, the answer to whether the COVID-19 pandemic qualifies as a force majeure event to excuse non-performance of a contract obligation depends on the specific contract language and the local applicable law. In order to determine whether a force majeure clause has been triggered, courts typically look to whether: (1) the event qualifies as force majeure under the contract; (2) the risk of non-performance was foreseeable and able to be mitigated; and (3) performance is truly impossible. Foreseeability is a primary factor in the determination of whether a non-performance will be excused. As the world has not seen a pandemic event of this nature since the SARS outbreak in 2002, and even then, not to this magnitude, it is unlikely that anyone could have foreseen the current events which have transpired.

With force majeure clauses, there can either be an exhaustive list of events or circumstances that constitute a force majeure event or a non-exhaustive list with general "catch all" provisions found in the clause. Epidemics and pandemics are generally not specifically mentioned in a contract; however, a force majeure clause can still be triggered if there is language in the contract that specifies additional factors such as acts of governmental authorities, labor and supply shortages, or any type of broad language that is beyond a party's control. Any broad force majeure clause language should apply as it pertains to COVID-19 since the World Health Organization has declared it to be a pandemic, unable to be caused or prevented by a private party. Even in the absence of specific language, past disease outbreaks such as the SARS epidemic, which was more geographically limited in size and scope, have qualified as a force majeure event in some cases.

However, as with many contract issues, the devil is in the details. For instance, although the current pandemic may qualify as a force majeure event under an agreement, that may not be enough to fully excuse one's performance under that agreement. Many lease agreements contain a force majeure clause – which is great – except that most force majeure clauses contain language specifying that a force majeure event will not excuse or delay a tenant's obligation to pay rent or other charges under the lease. For a tenant, the fact that this pandemic might be classified as a force majeure event under its lease provides little comfort if the tenant is still required to make rent payments while its business is closed.

Accordingly, in order to avoid any uncertainties in the future about whether another similar pandemic qualifies as a force majeure event, casinos should amend or redraft their contracts to include specific language regarding pandemics and epidemics and pay close attention to what contract duties will (or will not) be excused by a force majeure event.

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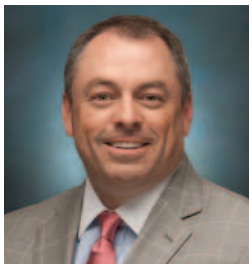

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