



We will fly again...

Legal Update by Jeff Ment



Planning for the future

- As we move ahead with planning, we need to rethink the way that we contract with customers. Some areas of consideration are showing deposits as non-refundable administrative/service fees.
- We need to be more thoughtful about accepting credit cards.
- We need to do a better job with Force Majeure clauses

Force Majeure

- In the wake of coronavirus (COVID-19), parties may (1) be in a contractual relationship with a counterparty that asserts it cannot perform or (2) find themselves unable to fulfill their own contractual obligations. Thus, force majeure clauses, doctrines of impossibility and frustration, and material adverse change clauses are of utmost importance.

Irresistible Force

Force Majeure

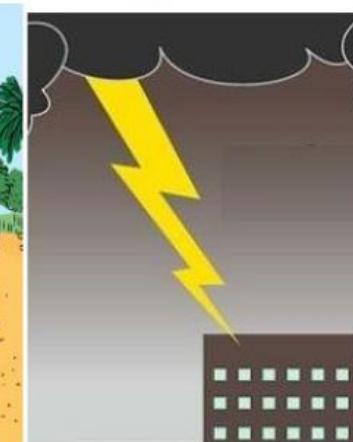
Superior Force

Vis Major

Unforeseeable circumstances or events that prevent a party from fulfilling a contract.

Cas Fortuit

Force Majeure is French for Superior Force



Earthquake

Hurricane

Tsunami

Lightning

War

The application and interpretation of a force majeure clause is governed by contract and state law. Such clauses are typically construed narrowly.

- Performance is excused only when the event is expressly included within a force majeure clause.
- “Catch-all” provisions may only encompass events that share the same characteristics of the enumerated occurrences.

Absent the express inclusion of a specific event, relief is typically not granted unless the disabling event was unforeseeable at the time of contracting.

There must be a causal connection between the alleged force majeure event and a party’s inability to perform.

The party invoking the clause must show what action it took to perform regardless of the disabling event.

Hotel/Bus Contracts

- Every contract should provide for termination in the event of an event over which neither party has control. State that this includes an event beyond either party's control that makes it **operationally** impossible to hold the event because more than half of the expected attendees are unable or unwilling to travel to the event or the hotel. State that the supplier will provide a full refund.

What doesn't work

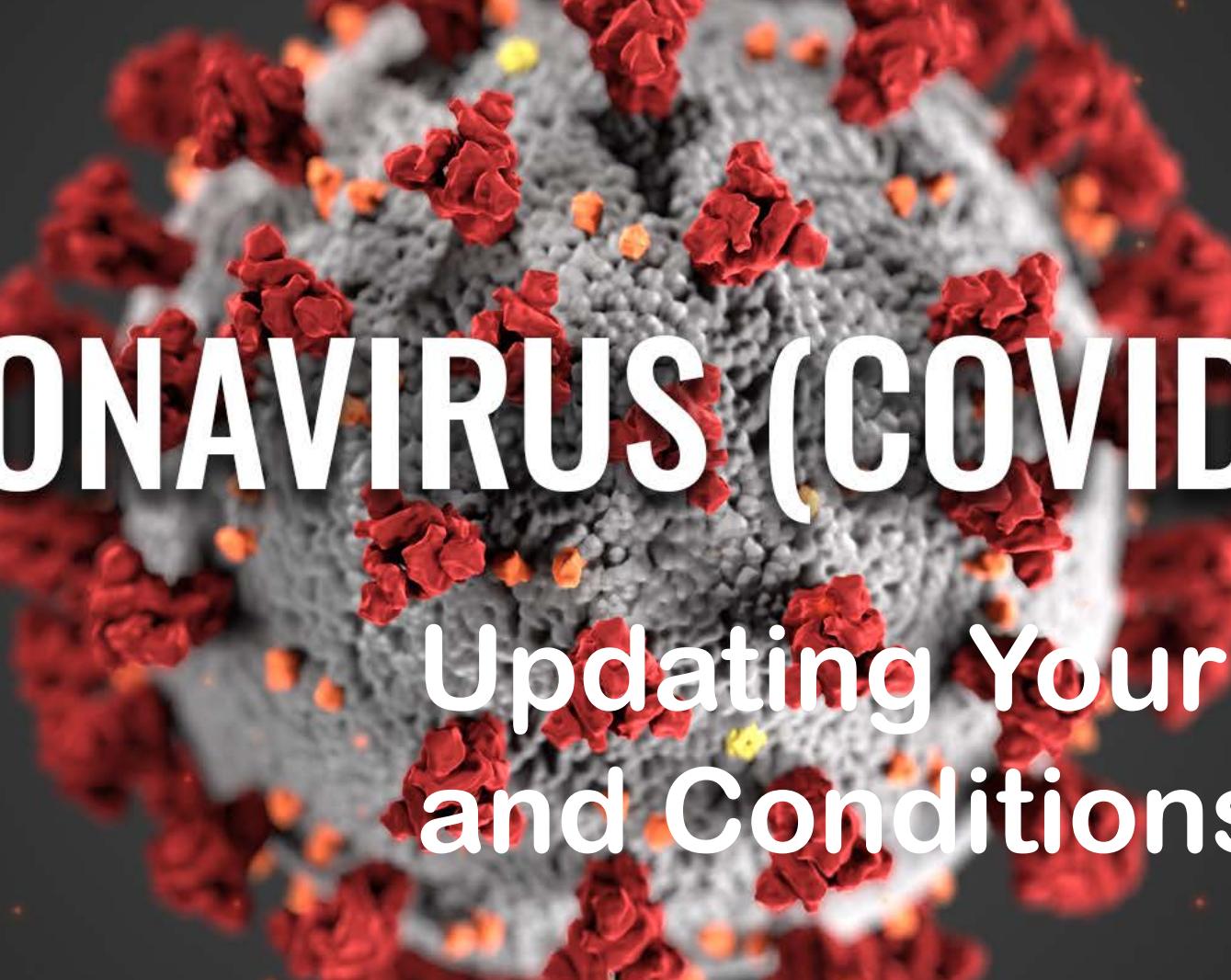
- Force Majeure with No Refund: If the supplier does not have to perform its duties if prevented by causes beyond its control such as floods, then almost without exception, there is no provision for a refund.
- One-Way Force Majeure: While the supplier may be excused from performing its duties, the group is not. This means that the group still owes the money if it must cancel due to terrorist incidents, for example.

A (new) sample clause for your suppliers

Operator cannot accept liability, and shall be entitled to a full refund, not a credit, where the performance or prompt performance of either parties contractual obligations is prevented or affected or a tour is cancelled either by us or our guest, as a result of circumstances amounting to “force majeure”. “Force majeure” means any event or circumstances which we could not foresee or avoid. Such events and circumstances may include, acts of God, actual or threatened, war, insurrection, riots, strikes, civil action, decisions by governments or governing authority, technical or maintenance problems with transport, changes of schedules or operational decisions of air carriers, terrorist activity or the threat thereof, industrial action, natural or nuclear activity, epidemic, pandemic, illness, physical injury, quarantine, medical or customs or immigration regulation, delay, or cancellation, adverse weather conditions, fire and all similar events outside our control. In the case of Force Majeure, supplier shall promptly refund all money paid for services and cease all work for the specified event effected by Force Majeure.

A (new) sample clause for your Customers

We cannot accept liability, provide any refund, or pay any compensation where the performance or prompt performance of our contractual obligations is prevented or affected, or you otherwise suffer any loss, injury, death, inconvenience or damage as a result of circumstances amounting to “force majeure”. “Force majeure” means any event or circumstances which we or the supplier of the services in question could not foresee or avoid. Such events and circumstances may include, acts of God, actual or threatened, war, insurrection, riots, strikes, civil action, decisions by governments or governing authority, technical or maintenance problems with transport, changes of schedules or operational decisions of air carriers, terrorist activity or the threat thereof, industrial action, natural or nuclear activity, epidemic, pandemic, illness, physical injury, quarantine, medical or customs or immigration regulation, delay, or cancellation, adverse weather conditions, fire and all similar events outside our control.



CORONAVIRUS (COVID-19)

Updating Your Terms and Conditions

New Covid Terms

- We are now seeing on a regular basis new landing pages on websites with titles such as “Travel Update” “Covid 19 Update” “Flexible Travel Update” What are these pages?
- Essentially these are updated terms and conditions. So what do they have in common?
 - Upbeat messaging with a we are getting through this together mantra.
 - Offer credits and rescheduling in place of refund.

New Covid Terms- Should you Get on Board?

- Yes. While we don't know the legal success of such changes in a court challenge, inevitably this messaging will be effective with many guests.
- What to include:
 - Consider a short message from your president with positive language about working through this crisis together.
 - Make it sound like an offer not a command. “We are providing you flexibility in your travel and our assistance to reschedule your tour.”

New Covid Terms- Looking Forward

- You should update your terms and conditions now to include a clause to allow you to update and change terms and conditions at your discretion.



WARNING!

CHARGEBACKS AHEAD

Is there anything we can do
about chargeback?

Chargebacks- A History

Some more Stats About Chargebacks:

- 81% of customers freely admit to filing a chargeback out of convenience. Most customers can't see any difference between a chargeback and a standard return. They either don't know—or don't care—about how a chargeback negatively impacts merchants.
- A customer who successfully files a chargeback is nine times more likely to file another one, and 40% of customers who file a chargeback will file another one within 60 days.
- Merchants only hear from 4% of dissatisfied customers, and only 1 in 20 customers will call and complain if there is an issue with their order. The remaining 19 are at risk of filing a chargeback.
- Chargebacks increase 41% every two years. The issue will only get worse as the problem spreads to other markets like the EU, Japan, and China. **The financial impact of chargebacks will reach close to \$30 billion by 2020.** This estimate was before the current pandemic!

Chargebacks- Deal And Dispute

Deal With the Customer Directly

- Try to communicate with the customer to reach an agreement without a chargeback. If you know the customer is planning a chargeback send a pre chargeback letter
- Continue Communicate!!!! This is hard. People are angry, but the feeling of being heard can help.

Chargebacks- Deal And Dispute

Dispute The Chargeback

- Include the date of booking
- The name of the person who cancelled and when
- Your pertinent terms and conditions and the guest's knowledge of said terms.
- Signed CC Authorization
- Attach Invoice

Chargebacks- The Future

- Avoid taking Credit Cards
- And a chargeback waiver to your terms and conditions
- Get signed authorizations for every transaction



NO REFUND

Italy, Greece, France, Germany, Colombia ...

- Italy: In order to protect the survival of the small family business and the travel industry as whole, strongly affected by this situation, as of the night of March 17th 2020, the Italian government has granted all tour operators, travel agencies, museums, transportation sectors and hotels to proceed with credit vouchers, with expiration on the 31st of December 2021 of the same amount of original reservations instead of refunds, which could suddenly lead to a default of the entire Italian tourism industry.

Italy, Greece, France, Germany ...

- The Greek Tourism Ministry recently announced that under a new regulation, tourism enterprises and airlines in Greece will be able to reimburse their customers by issuing 18-month vouchers in efforts to mitigate the effects of cancellations due to the coronavirus (Covid-19) pandemic.

Italy, Greece, France, Germany. . .

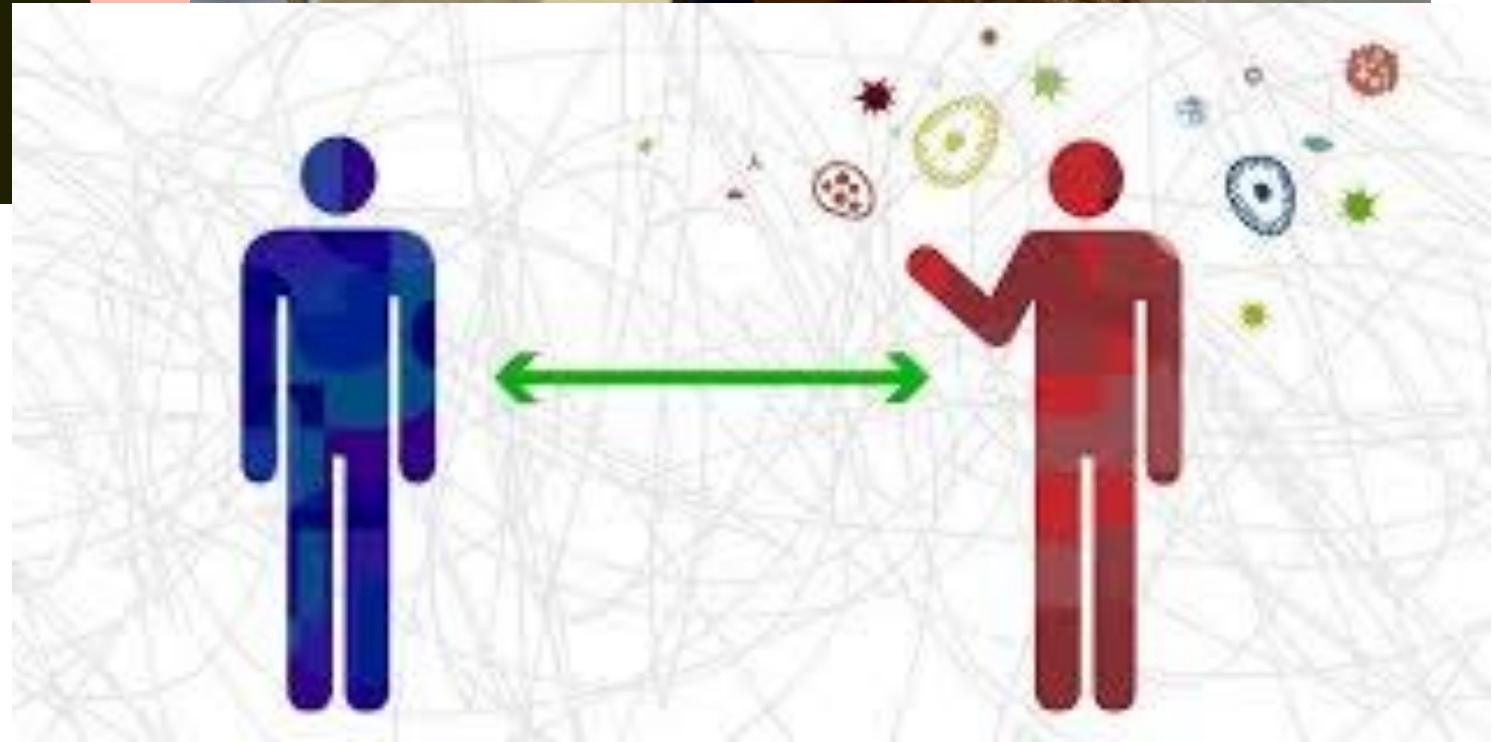
- The so-called “Corona-Cabinet” of the German Federal Government recently decided to temporarily suspend the reimbursement obligation for flights canceled due to the coronavirus (Covid-19) pandemic.
- The regulation advocated by the Federal Government sees that direct repayments to consumers be made only in cases of hardship. In all other cases, customers shall receive vouchers valid until 31 December 2021. Customers not redeeming the voucher by that date shall then receive a refund.

Italy, Greece, France, Germany. . .

- Colombia Decree 557 of 2020 authorizes tourist service providers and airlines that receive requests for cancellation, withdrawal and other circumstances related to refunds to make refunds to users through reprogrammed services and subscription to future services.

Italy, Greece, France, Germany. . .

- The EU countries tend to work towards the same ends so there is a high possibility this could become the standard in Europe.
- Let's see if other countries outside to EU follow to protect the travel industry.



Life After Covid-19: Updating Behavior

Updating our Behavior!

Consumers Post Covid will have Expectations:

- People will want to travel and be with others. There is a psychological need for this. The difference will be expectations on the provider.
- Consumers – “When will it be safe to travel?” and what information will they rely upon?
- Sources for consumers: CDC, news media, travel companies

Updating our Behavior!

Consumers Post Covid will have Expectations:

- Providing and Promoting a Healthy, Sanitary Environment for travel:
 - Hand Sanitizer/ Masks Readily available.
 - Accommodations/Transport should promote sanitary practices.
 - Transport should allow for social distancing.
 - Provide low touch options for check ins/check outs (Promote the In-room Check-out).
 - Provide for smaller group sizes at lower traffic destinations.

Updating our Behavior!

Make Offering Flexible:

- Travel Lay-A-Way:
 - Client makes an initial deposit and then selects their own payment terms up to the final payment date.
 - Provides clients a sense of control over their travel.
- Non-insurance change/cancellation “policies”
- My inbox today: JetBlue and AMAWaterways...selling

Updating our Behavior!

Make Offering Flexible:

- **Buy Now Get More Later Gift Card**
 - This new travel gimmick is a great way to get people excited to travel again in the future while infusing the industry with cash now.
 - Offer the guest the ability to purchase a gift card for travel/hotel at a discount. i.e. buy a gift card for \$200 and redeem for \$300 worth of travel or hotel stay. (Most are 25% to 33% discount).
 - Think about tying the purchase in with a Covid related charity.

What about Liability?

What should you do about liability due to future guests diagnosed with Covid while on tour or at your accommodation?

- Duty to Warn:
 - All sellers of travel have a duty of care to protect their travelers from unreasonable risk of harm.
 - For a plaintiff to be successful in a lawsuit, it must be established that a duty of care was owed; the duty of care was breached; and the breach caused a loss of life or harm to the traveler's quality of life after the trip.
 - It is incumbent upon travel companies to assess risks associated with an activity, a destination, transportation, and lodging; and warn and protect their travelers from foreseeable risks.

Risk Management Plan

- Update waiver and assumption of risk to include Covid specifically
- Require high risk individuals to purchase travel protection with medical coverage
- Develop strong terms related to travel protection insurance
- Educate Employees of New Procedures for Covid Safety
- Develop a Plan for guests who become sick while traveling

Risk Management Plan

- Pre-trip Health Questionnaire:
 - Exposure to Covid
 - Symptoms in the last 5 days
- Day of trip health assessment.
- Terms allowing for dismissal for any reason at sole discretion of the tour operator.

Risk Management Plan

- Hotels and Transportation Providers
 - Be prepared to advertise and provide to TO's and others that you are following best practices including cleanliness of accommodations, measures to promote social distancing, and best practices regarding employee sick leave.

Thinking About Commercial Insurance

- Business Interruption Coverage: Likely does not apply or has an exclusion.
 - Not a “physical loss or damage”
 - Often excluded under pollutants exclusion
- Contingent Business Interruption or Supply Chain Coverage: May be applicable....
 - This covers you in case of a physical loss or damage to the supplier causes interruption to your business.
 - Often must be a direct supplier
 - Again a physical loss or damage.

Thinking About Commercial Insurance

- **Business Interruption Coverage Extension- Civil Authority**
 - This Policy covers the Actual Loss sustained and Extra Expense incurred by the Insured during the Period of Liability if an order of civil authority prohibits access to the Insured Location provided such order is the direct result of physical damage of the type insured against under this Policy at the Insured Location or within five statute miles of it.

Thinking About Commercial Insurance

- Event Cancellation Insurance
 - This type of specialized insurance provides coverage if an event is cancelled or postponed or otherwise adversely affected by a “covered event.”
 - What constitutes a “covered event” is defined in the policy and typically extends to the physical, practical, or legal inability to hold an event as planned, including as a result of a government order.
 - These policies also are subject to exclusions and must be carefully reviewed at the time of purchase.

Thinking About Commercial Insurance

- Liability Insurance
 - Commercial general liability (“CGL”) insurance policies are intended to protect the insured in the event of claims for bodily injury (or property damage) brought by third parties (i.e., typically excluding employees). CGL policies often include coverage not only for any settlement or judgment amount resulting from a third party’s liability claim but also for mounting a defense to the claim. Thus, CGL policies may be the first line of protection that a business has to coronavirus-related liability claims.
 - Look at timing and exclusions

Questions/Comments?

**If you have additional
questions please contact
Jeff Ment:**

jment@mentlaw.com



MENT
LAW GROUP, LLC