

**ALOFT HOTEL MANAGEMENT, INC.
d/b/a ALOFT BOSTON SEAPORT DISTRICT**

v.

ARISIA, INC.

JAMS Ref. No. 1400017695

Arbitrator: Hon. Peter M. Lauriat (Ret.)

DECISION AND AWARD

Claimant Aloft Hotel Management, Inc. d/b/a Aloft Boston Seaport District (“Aloft”), filed this arbitration to recover damages from Respondent Arisia, Inc. (“Arisia”) for its alleged breach of the parties’ contract. Arisia had contracted with Aloft to book and reserve a block of rooms over a five-night period in connection with a convention it was holding at a nearby Westin Hotel in Boston over the Martin Luther King Holiday weekend in January of 2019.

This matter was heard in arbitration on June 25, 2019. Upon consideration of the testimony of the witnesses, the exhibits offered by the parties, and the memoranda and oral arguments of counsel, the Arbitrator makes the following decision and award.

I.

On August 31, 2018, Aloft and Arisia executed an Agreement (“the Agreement”) by which Arisia committed to rent a block of guest rooms at the Aloft Boston Seaport District Hotel rooms in specified numbers, from 20 to 175 per day, on different dates during the period from January 17, 2019 through January 21,

2019, in connection with its 30th Annual Convention. Exhibit 1 and Exhibit 6. Aloft agreed to charge \$163 per room night, plus applicable state and local taxes. The parties further agreed that the Agreement would generate a minimum of revenue for Aloft from the guest rooms, food and beverages, and charges for ancillary services in the amount of \$88,835, failing which Arisia agreed to pay damages as provided in the “Attrition” and “Cancellation” provisions of the Agreement as liquidated damages for Aloft’s losses. Exhibit 1.

The “Cancellation” paragraph of the Agreement provided that Arisia could cancel the Agreement without cause upon written notice to Aloft at any time prior to the event upon payment of a charge of 50% of the total minimum revenue, that is, \$44,417.50, which the parties agreed were reasonable estimates of the hotel’s incurred losses and its ability to mitigate those losses through resale of Arisia’s booked rooms.

The “Impossibility” paragraph of the Agreement provided that the Agreement was subject to termination without liability

“upon the occurrence of any circumstances beyond the control of either party – such as acts of God, war, acts of terrorism, government regulations, disaster, strikes, civil disorder, or curtailment of transportation facilities – to the extent that such circumstances make it illegal or impossible for the Hotel to provide, or for groups in general to use, the Hotel facilities. The ability to terminate this Agreement without liability pursuant to this paragraph is conditioned upon delivery of written notice to the other party setting forth the basis for such termination as soon as

reasonably practical – but in no event longer than ten (10) days – after learning of such basis.”

Exhibit 1.

On October 3, 2018, the *Boston Globe* reported that “[h]otel workers walked off the job at seven Marriott hotels in Boston . . . , launching the city’s first major hotel strike in modern history following months of fruitless hotel negotiations.” Exhibit 7. Aloft is a hotel owned and operated under the umbrella of Marriott International, Inc. It is not clear from the record whether Aloft was one of the Marriott hotels in Boston where the workers went on strike, but Aloft remained open and operating during the strike, hosting groups ranging from 5 to 150 people in size. Exhibit 2. The strike apparently ended on the evening of November 16, 2018.

On November 13, 2018, Arisia emailed Aloft, as well as the Westin Boston Waterfront Hotel (“the Westin”), which was hosting Arisia’s convention, and which is also owned and operated under the umbrella of Marriott International, Inc., that it was “exercising its right to cancel our contract without penalty under the *force majeure* clause for our event scheduled to take place January 2019 from the 18th to 21st if the ongoing strike is not resolved by Friday, November 16th, 2018 at 12:00pm Eastern Standard Time.” Exhibit 8. This was the first written notice of intended cancellation that Arisia delivered to Aloft, although Arisia had been in negotiations with the Park Plaza Hotel in Boston since October 29, 2018, to move its convention and hotel needs there.

On November 16, 2018, Arisia notified Aloft and the Westin in writing that it “is exercising its right to cancel our 2019 contracts . . . without penalty under the force majeure clause due to strike, . . . as the strike at the Westin . . . and Aloft . . . has not yet been resolved by noon today, Friday November 16th, 2018.” Exhibit 3.

Aloft rejected Arisia’s notice of cancellation as untimely and in violation of the Agreement, and rendered a Cancellation Invoice to Arisia in the amount of \$44,417.50 plus taxes, with a total balance due of \$50,835.83. Exhibit 4. After Arisia failed to pay Aloft’s invoice, Aloft filed its Demand for Arbitration.

II.

Aloft contends that Arisia breached the parties’ Agreement by its improper and untimely notice of cancellation. Arisia first counters that it is excused from the Agreement by reason of its invocation of the Impossibility paragraph of the Agreement. However, Arisia has failed to show that it met the requirements of that provision.

The Marriott workers strike began on October 3, 2018, and Arisia was aware of that strike from its inception. In order to terminate the Agreement without liability under the Impossibility paragraph, Arisia was required to deliver to Aloft written notice setting forth the basis for its cancellation “as soon as reasonably practical – but in no event longer than ten (10) days – after learning of such basis.” Arisia did not deliver the required written notice to Aloft that it was cancelling the

Agreement due to the strike until November 16, 2018 – 44 days after it became aware of the strike. While Arisia understandably may have hoped that the strike would resolve quickly, thereby obviating the need for its cancellation, it was legally obliged to act by October 13, 2018, if it wished to avoid liability for its cancellation on this basis.

The evidence shows that throughout the strike, Aloft was open and able “to provide, or for groups in general to use, the Hotel facilities.” Exhibit 1. While some of Arisia’s convention attendees may have expressed concerns about crossing picket lines or otherwise appearing not to support the striking workers, it has failed to show that Aloft could not have provided its facilities for use by those attendees despite the ongoing strike. Accordingly, Arisia’s contention that it had a right to cancel the Agreement without liability pursuant to the Impossibility paragraph must fail.

III.

Arisia has also invoked the defense of impracticability to relieve it of its obligations under the Agreement, independent of any impossibility provision in the Agreement. This defense also fails.

The doctrine of impracticability appears to be a more modern, restated version of the doctrine of impossibility. See *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122 (1974). Application of the impossibility doctrine requires “an unanticipated circumstance [which] has made performance of the promise vitally

different from what should reasonably have been” contemplated by the parties. *Id.* at 129. The *Restatement of Contracts Second*, § 261 provides that “[w]here . . . a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”

“[I]n order for impossibility or impracticability to excuse the performance of a contract under the Restatement's formulation, the following four factors must be established: (1) the occurrence of an event that has made performance impossible or extremely or unreasonably difficult; (2) the event occurred without the fault of the party seeking to excuse performance; (3) the nonoccurrence of the event was a basic assumption upon which the contract was made; and (4) the party seeking relief did not assume the risk of the event he is asserting as the basis for discharge.” 14 Mass.Prac.Series § 5.76.

In the present case, Arisia has failed to prove at least the first and fourth requirements of the doctrine of impracticability. There is no evidence that the ongoing strike made it impossible or extremely difficult for Arisia's convention attendees to use the hotel's rooms that they booked. The hotel was open and it was receiving guests and hosting groups throughout the strike. That some of the convention attendees may not have wished to stay at the hotel while the strike was

underway is a circumstance that falls far short of making their stay impractical or impossible.

Moreover, while a strike was one of the circumstances beyond the control of either party that was recognized in the Agreement as a basis for termination without liability, the invocation of that circumstance was circumscribed by the contract itself. First, the ability to terminate without liability arose only if or “to the extent that such circumstances make it illegal or impossible for the Hotel to provide, or for groups in general to use, the Hotel facilities.” There is no evidence that such was the case here.

Second, if Arisia believed that the strike would make it impossible or extremely difficult to perform under the Agreement, the Agreement itself authorized Arisia to terminate it without liability “upon delivery of written notice to [Aloft] setting forth the basis for such termination as soon as reasonably practical – but in no event longer than ten (10) days – after learning of such basis.” The evidence shows that Arisia knew of the nature and existence of the strike on or shortly after it began on October 3, 2018. Under the Agreement, it could have waited until October 13, 2018 to cancel the Agreement without liability – a period of ten days in which to assess the impact, if any, of the strike on its planned mid-January 2019 convention.

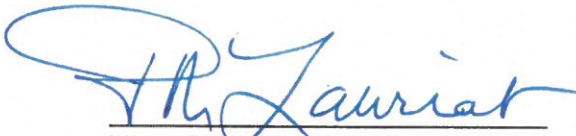
In the circumstances of this case, the doctrine of impracticability does not excuse without liability Arisia’s failure to perform under the parties’ Agreement.

Accordingly, Aloft is entitled to charge Arisia a cancellation fee under the Agreement of \$44,417.50. It is not, however, entitled to recover any room tax on that cancellation fee, both because a room tax was not included in the Cancellation paragraph of the Agreement and because Aloft did not include that sum in its Demand for Arbitration or Statement of Claim.

AWARD

Upon consideration of the foregoing decision, Aloft Hotel Management, Inc. is awarded the sum of \$44,417.50 against Arisia, Inc., together with its reasonable attorneys fees and costs, and any accrued prejudgment interest.

Aloft shall serve and file an itemized and detailed bill for its attorneys' fees and costs, as well as its calculation of pre-judgment interest on the Award in this matter within twenty days of the date of this Decision. The Arbitrator will review its submission and amend its Award to include reasonable attorneys' fees, costs and pre-judgment interest.


Hon. Peter M. Lauriat (Ret.)
Arbitrator

Date: July 9, 2019

SERVICE LIST

Case Name: Aloft Hotel, Inc. dba Aloft Boston Seaport District vs. Arisia, Inc.
Reference #: 1400017695
Panelist: Lauriat, Peter M.,

Hear Type: Arbitration
Case Type: Business/Commercial

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Seaport Dist

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Aloft Hotel, Inc. dba Aloft Boston Seaport District / Arisia, Inc.
Reference No. 1400017695

I, Christopher Justis, not a party to the within action, hereby declare that on July 9, 2019, I served the attached Award of Arbitrator on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Boston, MASSACHUSETTS, addressed as follows:

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Parties Represented:

Arisia, Inc.

I declare under penalty of perjury the foregoing to be true and correct. Executed at Boston, MASSACHUSETTS on July 9, 2019.



Christopher Justis
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