



Conquering Contracts During the Coronavirus Pandemic

Ciarra Chavarria, Staff Attorney
cchavarria@lawyersalliance.org

Bee-Seon Keum, Staff Attorney
bkeum@lawyersalliance.org

Resource Call Hotline: (212) 219-1800 ext. 224

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Overview

- Contracts 101
- Contracts and coronavirus
 - Amendment
 - Termination
 - Force majeure
- Other considerations



Contracts 101



What is a contract?

- A set of promises between two parties
- Entitles one party to remedies if the other party breaches or fails to perform
- Terms are negotiable
- Can be oral or written



Elements of a contract

- All contracts have three basic elements:
 - offer
 - acceptance
 - consideration
- “Meeting of the minds”



What does having a contract mean?

- Legally binding
- Clarifies responsibilities: establishes the basic understanding of the parties as to how the relationship is going to work
- Identifies and assigns risks
 - Addresses the “what ifs?”



Common contracts for nonprofits

- Leases
- Vendor contracts
- Agreements with funders
- Consultant agreements
- Services/partnership agreements
- Grant agreements
- Employment agreements



Contract considerations during COVID-19



COVID-19 (novel coronavirus)

- Coronavirus disease 2019 (COVID-19) is a respiratory illness that can spread from person to person
- Key events:
 - 3/1: First case of COVID-19 confirmed in New York State
 - 3/7: State of emergency declared in New York
 - 3/11: Pandemic declaration by the World Health Organization (WHO)
 - 3/12: State of emergency declared in NYC
 - 3/18: Families First Coronavirus Response Act (FFCRA) signed into law
 - 3/20: Executive Order 202.8 “New York State On PAUSE” signed into law. Essential businesses may remain open (e.g. healthcare providers, human services providers)
 - 3/27: Coronavirus Aid, Relief, and Economic Security Act (CARES Act) signed into law
- Guidance issued by federal and state agencies
 - e.g. Center for Disease Control (CDC), Occupational Safety and Health Administration (OSHA), NYS Department of Health (DOH)



Take stock of the contracts you have

- Get copies of every contract, including:
 - amendments
 - documents incorporated by reference
 - riders
 - subcontracts (if applicable)
- Ideally, have these documents electronically available so they can be easily accessible to multiple parties
- Make sure you know of any deadlines



Reviewing your contracts

- Important provisions:
 - Amendment
 - Termination
 - Force majeure
- Key words:
 - breach
 - cancellation
 - material adverse change
- Important to read the entire contract!
 - Not just the headings or just one or two provisions



Reviewing your contracts - amendment

- Who has the right to amend?
- What must the party seeking amendment do?
- Must amendments be in writing?
- Do amendments require approval?
- Are there any notice requirements?



Sample amendment clause – hotel accommodation contract

CHANGES, ADDITIONS, STIPULATIONS, OR LINING OUT

Any changes, additions, stipulations or deletions including corrective lining out by either Hotel or [NONPROFIT] will not be considered agreed to or binding unless such modifications have been **approved in writing** by the other in the form of **a contract or addendum provided by the hotel**.



Sample amendment clause – charity sporting event contract

12. MISCELLANEOUS

E. Amendment/Modification. This Agreement may not be modified or amended other than by a **writing signed by both Parties.**



Reviewing your contracts - termination

- Who can terminate?
- Under what circumstances can the contract be terminated?
- What are the notice requirements?
- How will payment be calculated for partially performed work (e.g., pro rata?)
- Are there any penalties for termination?



Sample termination clause – hotel accommodation contract

CANCELLATION CLAUSE

[NONPROFIT] agrees to provide Hotel with **written notice of any decision to cancel** or otherwise abandon its use of the Total Room Nights (a “Cancellation”) **within five (5) days of such decision**. [NONPROFIT] acknowledges that a Cancellation would constitute a **breach** of [NONPROFIT’S] obligation to Hotel and Hotel would be harmed. If a cancellation occurs, the parties agree that:

In the event of Cancellation, the following schedule applies for responsibility as **liquidated damages** . . .

[NONPROFIT] therefore **agrees to pay Hotel, within thirty (30) days** after any Cancellation, as liquidated damages and not as a penalty, the amount indicated according to the schedule above. Provided that [NONPROFIT] timely notifies Hotel of the Cancellation and timely pays the above liquidated damages, Hotel agrees not to seek additional damages from [NONPROFIT] relating to the Cancellation.



Sample termination clause – charity sporting event contract

11. FORCE MAJEURE/CANCELLATION

A. [Force majeure clause]

B. In the event that the **Event is cancelled at any time and for any reason, the Charity is not entitled to a refund of any Charity Fees**, nor is the Entrant or the Charity entitled to a refund of any Event Fees. Further, the Charity is not guaranteed acceptance into the Program for the subsequent year's Event and may not defer any Entries. [EVENT ORGANIZER] will use best efforts to notify the Charity of the cancellation. [EVENT ORGANIZER] does not dictate whether the Charity must return any Donations received in connection with the Program, nor is [EVENT ORGANIZER] liable to reimburse the Charity for any Donations that the Charity may elect to refund.



Sample termination clause – independent contractor agreement

6. TERMINATION

[NONPROFIT] shall have the right to terminate this Agreement for convenience upon ten (10) days' prior written notice to Contractor. In the event of termination, Contractor shall be paid for work satisfactorily performed under this Agreement to the effective date of termination. Contractor shall not be paid for work contemplated but not done, for anticipated profits in connection with work not actually done, or for incidental or consequential costs, expenses or damages.



Reviewing your contracts - force majeure

- Literal translation is “a superior force”
- Typically means an event or circumstances that cannot be reasonably foreseen or controlled
- Can be something that narrowly affects only the parties or can be much broader



Reviewing your contracts - force majeure

- A force majeure clause:
 - covers what happens when that event that is beyond the control of the parties occurs
 - might give option to terminate, or might excuse non-performance
 - is commonly seen in contracts, but it is not a given – and the substance can vary widely



Force majeure – sample definition

An event of force majeure is an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which by the exercise of reasonable diligence the party affected was unable to prevent **provided that event or circumstance is limited to the following:**

- *(a) riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not) acts of terrorism, civil war, rebellion, revolution, insurrection of military or usurped power, requisition or compulsory acquisition by any governmental or competent authority;*
- *(b) ionizing radiation or contamination, radio activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radio active toxic explosive or other hazardous properties of any explosive assembly or nuclear component;*
- *(c) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;*
- *(d) earthquakes, flood, fire or other physical natural disaster, but excluding weather conditions regardless of severity; and*
- *(e) strikes at national level or industrial disputes at a national level, or strike or industrial disputes by labor not employed by the affected party, its subcontractors or its suppliers and which affect an essential portion of the works but excluding any industrial dispute which is specific to the performance of the works or this contract.*



Force majeure – sample definition

- *Force Majeure* means any act or event beyond either party's reasonable control, including, but not limited to, acts of God, terrorism, war, strike, labor disturbance, national defense requirement, government action, state ordinance, rule regulation, failure of normal sources of supply, or any similar or dissimilar contingency that would make timely performance by such Party commercially impracticable.



Force majeure – sample definition

Events of Force Majeure shall include, but not be limited to:

- fire, chemical or radioactive contamination or ionizing radiation, earthquakes, lightning, cyclones, hurricanes, floods, droughts or such other extreme weather or environmental conditions, unanticipated geological or ground conditions, **epidemic**, famine, plague or other natural calamities and acts of God;
- explosion, accident, breakage of a plant or equipment, structural collapse, or chemical contamination (other than resulting from an act of war, terrorism or sabotage), caused by a person not being the affected Party or one of its contractors or subcontractors or any of their respective employees or agents;
- acts of war (whether declared or undeclared), invasion, acts of terrorists, blockade, embargo, riot, public disorder, violent demonstrations, insurrection, rebellion, civil commotion and sabotage; and
- strikes, lockouts, work stoppage, labor disputes, and such other industrial action by workers related to or in response to the terms and conditions of employment of those workers or others with whom they are affiliated save, when such event is directly related to, or in direct response to any employment policy or practice (with respect to wages or otherwise) of the party whose workers resort to such action.



Force majeure in a contract

- A properly-drafted force majeure clause will include:
 - List of potential triggering events, including a catch-all clause (allowing for unforeseeable events)
 - Standard for a triggering event (e.g., impossibility, impracticability of performance, % of loss or damage, etc.)
 - Effect of the force majeure provision
 - Notice requirements



Force majeure in a contract - considerations

- Who can invoke it?
 - Do both parties have the right, or is it one-sided?
- How broadly is it drafted?
 - Does it cover something like a global pandemic or disease?
 - Does it excuse nonperformance only if performance is impossible, impractical, unlawful, inadvisable?
- Does it apply if you are taking steps proactively?
 - i.e., before the government or official body requires you to
- What are the notice requirements?
- Are you required to mitigate damages?
- What is the effect of the clause?
 - postponement
 - cancellation of a certain event or services to be provided
 - termination of contract
 - penalties



Force majeure in a contract – sample provisions

- *Force Majeure.* **Party A** will not be liable for and will not be considered in default or breach of this Agreement on account of, any delay or failure to perform as required by this Agreement as a result of a Force Majeure Event.
- *Force Majeure.*
 - **Each party** shall be excused from liability for the failure or delay in performance of any obligation under this Agreement by reason of any Force Majeure Event. Such excuse from liability shall be effective only to the extent and duration of the Force Majeure Event and provided that the Party has not caused such Force Majeure Event(s) to **occur and continues to use diligent, good faith efforts to avoid the effects of such event and to perform the obligation.**
 - Notice of a Party's failure or delay in performance due to force majeure must be given to the unaffected Party promptly thereafter but **no later than five (5) days after its occurrence** which notice shall describe the force majeure event and the actions taken to minimize the impact thereof. All delivery dates under this Agreement that have been affected by force majeure shall be tolled for the duration of such force majeure.
 - Notwithstanding the foregoing, **should the Force Majeure Event suffered by a Party extend beyond a four-month period, the other Party may then terminate this Agreement** by written notice to the non-performing Party, with the consequences of such termination as if this Agreement had expired (and was not terminated) in accordance with this Agreement.



Interpreting force majeure

- In New York, force majeure clauses are “narrowly construed.”
 - *Reade v. Stoneybrook Realty*, 63 A.D. 3d 433 (1st Dep’t 2009).



Interpreting force majeure

- In New York, the standard for non-performance is high
 - typically must show that the event made performance *impossible*



Interpreting force majeure

- The existence of a force majeure event does not mean an automatic out
 - there must be a *connection* between the event and nonperformance



What if there is no force majeure in my contract or it doesn't apply?

- Two doctrines:
 - Impossibility of performance
 - Frustration of purpose
- New York courts apply these narrowly



Impossibility of performance

- “Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance **objectively impossible**. Moreover, the impossibility must be produced by an **unanticipated event** that could not have been foreseen or guarded against in the contract.” *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900 (1987)
- Objective standard
- The intervening event must make performance **truly impossible**
 - Different from financial hardship, lack of profitability, commercial impracticability



Frustration of purpose

- “For a party to a contract to invoke frustration of purpose as a defense for non-performance, ‘the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense’.... The doctrine applies “when a change in circumstances makes one party's performance **virtually worthless** to the other, frustrating his purpose in making the contract.” *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (App. Div. 1st Dep’t 2011)
- The frustrated purposes must be “substantial”



Negotiating a change in your contract

- Even if your contract won't allow you to terminate or delay your obligations, you can still try to negotiate
- Consider what leverage you may have
- Talk to the other party
- Work with an attorney to determine what options you have



Other considerations



New York state and city government contracts

- Not just “boilerplate”
- Binding on both parties
- Don’t forget about appendices
- Government contracts can vary widely
- Understand key provisions – check your actual contract
 - What does it say about delivery of services? Reporting? Amendments? Emergencies? Force majeure?

See: Lawyers Alliance legal alert, “*Contract Considerations for Nonprofits During the Coronavirus Outbreak*” (3/16/20), available at <https://lawyersalliance.org/legal-alerts>



New York state and city government contracts (cont'd.)

- **Pay attention to government orders and guidance**
 - e.g. Who is an essential businesses?
- **Specific agency guidance**
 - Mayor's Office of Contract Services (MOCS)
 - [Nonprofit Business Continuity Guidance](#) (updated 3/15/20)
 - [Letter to Human Service Provider Partners](#) (3/18/20)
 - NYS Division of the Budget
 - [Not-for-Profit Human Services Providers - Performance Requirements for Funding during COVID-19 Disaster Emergency](#) (4/6/20)



Sample language: NYC standard human service contract (2018) – state of emergency

ARTICLE VII — PROGRAM FACILITY

Section 7.03 Security and emergency plan.

A. Prior to the commencement of services under this Agreement, Contractor shall adopt, implement, and instruct staff regarding a **written plan** to provide for the safety and security of clients, participants, staff, and Contractor’s facility, **including procedures to follow during emergencies**. Contractor shall maintain a current file of emergency contacts for each client and participant, which shall include, to the extent available, the names, addresses, telephone numbers, and locations where such contacts can be reached. A security plan applying to all of Contractor’s operations rather than specifically to the City-funded operations shall be sufficient to comply with the terms of this requirement. Contractor shall cooperate with the City during any emergency affecting Contractor’s services and/or facilities.

B. **In the event that a State of Emergency (“SOE”) is declared by the Mayor of the City, the City may suspend Contractor’s normal operations until further notice. No damages shall be assessed for suspension of normal services during this time.** All other terms and conditions of this Agreement shall remain in effect, except as modified by a contract amendment registered pursuant to Charter § 328 or other appropriate contract action. Contractor may, at the request of and in a manner determined by the Department, assist the Department in carrying out emergency procedures during a State of Emergency. Emergency procedures shall remain in effect until the Mayor has determined that the SOE has expired. **In consideration thereof, the City agrees to indemnify Contractor against all claims by third parties arising out of the actions of its employees during the SOE that are directed by the City and not otherwise required to be performed under this Agreement,** except for those arising out of the employees’ gross negligence or intentional misconduct.



Sample language: NYC standard human service contract (2018) Appendix A – Amendments

ARTICLE 9 - CONTRACT CHANGES

Section 9.01 Contract Changes

Changes to this Agreement may be made only as duly authorized by the ACCO [Agency Chief Contracting Officer] or his or her designee and in accordance with the PPB [Procurement Policy Board] Rules. **Any amendment or change to this Agreement shall not be valid unless made in writing and signed by authorized representatives of both parties.** The Contractor deviates from the requirements of this Agreement without a duly approved and executed change order document or written contract modification or amendment at its own risk.



Sample Language: NYC standard human service contract (2018) Appendix A – Force Majeure

Section 10.04 Force Majeure

A. For purposes of this Agreement, a **force majeure event** is an act or event beyond the control and without any fault or negligence of the Contractor (“Force Majeure Event”). Such events may include, but are not limited to, **fire, flood, earthquake, storm or other natural disaster, civil commotion, war, terrorism, riot, and labor disputes not brought about by any act or omission of the Contractor.**

B. In the event the Contractor cannot comply with the terms of the Agreement (including any failure by the Contractor to make progress in the performance of the services) because of a Force Majeure Event, **then the Contractor may ask the Commissioner to excuse the nonperformance and/or terminate the Agreement.** If the Commissioner, in his or her **reasonable discretion**, determines that the Contractor cannot comply with the terms of the Agreement because of a Force Majeure Event, then the Commissioner shall excuse the nonperformance and **may terminate the Agreement.** Such a termination shall be deemed to be without cause.

C. If the City terminates the Agreement pursuant to this Section 10.04, the following provisions apply. **The City shall not incur or pay any further obligation pursuant to this Agreement beyond the termination date. The City shall pay for services provided in accordance with this Agreement prior to the termination date.** Any obligation necessarily incurred by the Contractor on account of this Agreement prior to receipt of notice of termination and falling due after the termination date shall be paid by the City in accordance with the terms of this Agreement. In no event shall such obligation be construed as including any lease or other occupancy agreement, oral or written, entered into between the Contractor and its landlord.



Insurance

- Insurance coverage may cushion the economic loss for breach or failure to perform
- Be proactive and contact your insurance broker or agent to assess coverage/timely file claims. Examples:
 - Business interruption insurance
 - Event cancellation insurance
- Every coverage determination will depend on the wording of the policy itself, including exclusions, and the insured's own facts
- See, Legal Alert, April 2, 2020, “COVID-19 and Insurance Coverage Considerations for Nonprofits” <https://lawyersalliance.org/legal-alerts>



Consider the future

- Don't forget about contracts that will terminate or have deadlines over the summer or even next year
 - If you have subcontracts, make sure these are reviewed
- Future contracts
 - Plan ahead and make sure future termination and force majeure provisions are broadly drafted and work in your favor
 - Work with an attorney to draft appropriate language



Legal assistance

- Lawyers Alliance can help
- Our Coronavirus information page:
<https://lawyersalliance.org/coronavirus-information>



Questions?