

Contracts and COVID-19: What Restaurants Need to Know



Jeanne M. Hamburg, Esq.
jhamburg@norris-law.com



Deanna L. Koestel, Esq.
dlkoestel@norris-law.com

Introduction

- As businesses, we rely on contracts to outline our business obligations, rights, and remedies.
- Contracts help businesses:
 - Memorialize terms
 - Limit liability
 - Shift liability
 - Get paid
 - Enforce in Court
- How are these obligations, rights and remedies impacted by the current COVID-19 situation?

Are my current contracts affected by the current situation?

- Does the spread of COVID-19 and/or the governmental actions taken provide contractual defenses to current contracts ?
- Can I cancel, suspend or terminate my contract as a result of COVID-19 impacts?

What is *force majeure* and does it apply?

- *Force majeure* generally refers to the occurrence of an event which is outside the reasonable control of a party and which prevents that party from performing its obligations under a contract, temporarily or permanently.
 - Many contracts include specific clauses addressing force majeure events.
 - When does it apply?
 - Carefully review the specific terms of your contract.
 - How likely is it that the force majeure applies?
 - Narrowly interpreted by NY Courts.
 - May differ state by state.

Factors to consider in determining whether COVID-19 constitutes a force majeure event under your contract.

- Was COVID-19 pre-existing or foreseeable at the time you entered into the contract?
- How far in the distance are the contractual obligations?
- Is COVID-19 genuinely a force majeure event making performance impossible?
- Is COVID-19 the real cause of the non-performance?
- Did you comply with any contract notice requirements?
- What obligations are excused due to force majeure

What if my contract does not have a *Force Majeure* clause?

- Even if your contract does not have a specific force majeure clause, there are other potential defenses that may apply similar principles that may excuse performance under a contract:
 - Frustration of Purpose;
 - Impossibility (or impracticability) of performance; and
 - Commercial Impracticability under the Uniform Commercial Code (UCC § 2-615).

Current Contract Issues and *Force Majeure*

- Supply Contracts
- Catering/Event Contracts
- Commercial Leases
- Construction Contracts

When You Have to Enforce Rights

- Forum clause
 - State to bring case, arbitration?
- Disadvantages of arbitration
 - No equitable relief, not nationwide
- State vs federal court
 - Do you need relief across state lines?
 - Diversity/amount in controversy 75k
- Enforcing a US judgment abroad (your US counsel can help)
 - Supreme Court has made it easier to serve lawsuit on foreign parties under Hague

The Need for Practical Solutions

- Contract interpretation can be laborious and involve time consuming lawyering—just look at all the law on force majeure alone!
- Enforcing rights against a foreign supplier brings special and expensive challenges
- Public policy concerns will prevail if there is a government shutdown

The Need for Practical Solutions

- Is there a way that you can negotiate new dates, times, or obligations rather than cancel the agreement?
- Can you amend the contract to address the challenges?
- How do you address COVID-19 in pending/future contracts?
- Business Interruption Insurance:
 - Analysis of the terms, endorsements and exclusions is critical to determining coverage
 - Timely notice
 - Some states are considering legislation that would compel insurers to provide coverage for business interruption:
 - New Jersey first state to propose bill mandating coverage for COVID19 related losses
 - NY, PA, Louisiana, Ohio, Mass and South Carolina

Other Practical Solutions to a Unique Problem

- Consider pivoting to a new business during the crisis
 - Meal kits (for menu items and beyond)
 - Packaged food (items for which you are known)
 - “Pantry items”
 - Produce boxes
 - Grocery store supplies
 - Meats
 - Enables you to take advantage of your restaurant name
- Consider partnering with a packaged food business to provide supplies or even co-branding with them

Finding Partners (continued)

- NYSRA can help you find others who have pivoted
- News articles can help you learn what others have done
 - <https://www.nytimes.com/2020/04/26/nyregion/coronavirus-groceries-nyc-restaurants.html>
 - <https://www.nytimes.com/2020/04/28/dining/super-fat-rice-mart-chicago-coronavirus.html>
- Organizations that cater to food manufacturers can help you pivot to a packaged food business. E.g. Specialty Food Association

About Jeanne & Deanna



Jeanne Hamburg is a transactional attorney and litigator with over three decades of experience in trademark and copyright prosecution before the US Trademark and Copyright Offices, counseling on brand availability, managing global portfolios, litigating complex intellectual property matters, and drafting contracts common to the food and beverage industry. She practices out of Norris McLaughlin's New York City office and is a member of the firm's Food, Beverage and Hospitality group which serves clients in the industry with all their legal needs. For more information about Jeanne please see https://norrismclaughlin.com/attorney_profiles/jeanne-hamburg/



Deanna L. Koestel is a business law attorney and commercial litigator for Norris McLaughlin, practicing in New Jersey and New York, where she focuses her practice on both the food & beverage and the construction industries. Deanna brings a practical and business savvy approach to the law, serving as general “outside counsel” for several businesses in the food and beverage industry. In this capacity, she provides advice and strategy to these businesses and drafts their business agreements to manage their legal needs to avoid or streamline future litigation risks. Deanna is also an experienced litigator handling complex commercial litigation matters for her clients. For more information, visit https://norrismclaughlin.com/attorney_profiles/deanna-l-koestel/