4 Dangerous Contract Clauses

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Associations frequently enter into contracts, and quite often those contracts are fraught with one-sided or vaguely worded clauses that could leave an association vulnerable to significant penalties or liability should they be triggered. Here are four contract clauses that often pose danger to associations and how to fix them in the negotiation process.

Contract management is a common, often routine practice for most associations. Although, however standard contract clauses may appear, dangerous clauses are always lying in the weeds. Whether dangerous by way of included language or excluded language, recognizing and addressing these hidden traps can save time and money and reduce an association's liability. This article provides examples of such dangerous clauses, why they're dangerous, and what can be done to limit their threat.

Force Majeure

The force majeure clause provides a party with an excuse for nonperformance without liability if an event beyond the party's reasonable control prevents the party from performing its contracted obligations. For contracts with hotels, meeting-space venues, and service providers at meetings (e.g., transportation, food, entertainment, special events) and other arrangements in which the association is licensing or renting space for an event or meeting or guaranteeing attendees, associations should avoid force majeure provisions that are unilateral, vague, and allow for only a delay in performance without liability rather than termination.

Example 1:

Notwithstanding this paragraph, VENDOR shall not be liable for any loss or damage caused by any act of God or other cause beyond the control of the parties.

Example 2:

VENDOR and ASSOCIATION shall not be liable for any delays resulting from circumstances or causes beyond their reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order, or requirement of any governmental agency or authority.

Unilateral force majeure provisions, as shown in Example 1, only describe one party's excuse for nonperformance. The other party, the association in this case, is left having to prove an excuse for nonperformance without contractual language as support. This should be avoided.

What constitutes a force majeure event varies widely from contract to contract; it is said to be "limited only by the size of one's dictionary and imagination."[1] In Example 1, the parties have not enumerated specific force majeure events. Although the burden of proof for nonperforming

parties is to show the event was beyond that party's control, it is beneficial for an association to negotiate with vendors what specific events will allow for nonperformance.[2] Recommended items include:

> Strikes;
> Government regulation or advisory (including travel advisory warnings by the government or World Health Organization);
> Quarantine;
> Civil disturbance;
> Terrorism or threats of terrorism in the United States as substantiated by governmental warnings or advisory notices;
> Curtailment of transportation;
> Disaster;
> Fire;
> Earthquakes;
> Hurricanes;
> Unreasonable extreme inclement weather;
> Shortages or disruption of the electrical power supply causing blackouts or rolling blackouts (in the city where the Event is held);
> Any other comparable conditions that occur either in the location of the event or in the countries or states of origin of at least 40 percent of the guests or along their routes of travel.

In Example 2, the party whose performance is affected by forces beyond that party's control is excused from performance only for the period of delay or as long as the inability to perform exists; here the force majeure event does not give cause for termination of the agreement without liability. Delay in performance may be acceptable if the obligated performance includes hosting an event or conducting a service that can be reasonably postponed and rescheduled with little harm (e.g., a small committee meeting with a flexible window of times to meet). However, for events scheduled years in advance for a particular time period (e.g., an annual meeting or a meeting that must occur on or before a specific date), postponing may not be a reasonable option. Furthermore, the severity of the force majeure event factors in. The reason an association chooses to contract with a particular venue or for a specific service may be significantly altered by a force majeure event. Thus, in most cases, negotiating to have the ability to terminate the contract for a force majeure event is preferred.

Lastly, in clauses addressing changes in performance or the end of performance as contracted and the associated fees (e.g., damages, termination fees, etc.), the force majeure clause should be referenced as an exception to such changes in performance and corresponding fees. [3]

Disputed Payments

Often contracts will not explicitly account for disputed charges in clauses concerning late payments. The value of adding this language is that it allows an association to avoid making payments before disputed charges are resolved or paying interest on disputed charges.

Example:

Any undisputed unpaid License Fee, Ancillary Services Fee, or other amounts owed to VENDOR are due and payable upon demand or presentation of an invoice to ASSOCIATION. Undisputed invoices that remain unpaid after thirty (30) days, shall accrue interest on the unpaid balance at the rate of one and one-half percent (1.5%) per month.

Most contracts will have a dispute resolution clause (mediation, ADR) and the option of one party suing the other due to nonperformance (lack of service or payment for service) always exists. However, using this language allows negotiation time for the party who disputes the payment, with the goal of solving without litigation, and protects disputed payments from late fees and interest charges.

Indemnification

The indemnification clause is the primary risk-allocation mechanism in contracts. A unilateral indemnification clause that excludes the other party from indemnifying the association is always dangerous.

Example 1:

ASSOCIATION agrees to indemnify, defend and hold harmless VENDOR from any claims, costs, expenses, damages, obligations or losses (including attorneys' fees), including but not limited to bodily injury to or death of any person or damage to or destruction of any property that is caused by any act or omission of ASSOCIATION contracted employees or subcontracted contractors through ASSOCIATION.

Unfortunately, negotiating a bilateral indemnification clause may be difficult, particularly with city- or state-run organizations such as convention centers. At the very least, the indemnification clause should include language stipulating that the association shall not be responsible for indemnifying the vendor if the damage or injury results from the negligence or misconduct of the vendor. Typically, if a vendor includes such language, it will often add "gross" and "willful" to "negligence" and "misconduct," respectively.

Example 2:

ASSOCIATION agrees to indemnify, defend and hold harmless VENDOR from any claims, costs, expenses, damages, obligations or losses (including attorneys' fees), including but not limited to bodily injury to or death of any person or damage to or destruction of any property that is caused by any act or omission of ASSOCIATION contracted employees or subcontracted contractors through ASSOCIATION, unless caused by the gross negligence or willful misconduct of VENDOR.

As a compromise to not having a bilateral indemnification clause, it is very important to have gross and willful removed. With these modifiers the vendor must have essentially acted

intentionally, the practical implication of which is that more of the risk is shifted back to the association (i.e., much of the risk that was mitigated for an act caused by the vendor is negated).

As an additional compromise to the bilateral indemnification clause, try to get indemnity for a specific issue (i.e., a copyright violation).[4]

Limitation of Liability (excluding violations of privacy/misuse of data)

Service providers are likely to include "limitation of liability" clauses in their agreements. These clauses are typically broad-sweeping and difficult to negotiate out of contracts. If contracting with a service provider who will use or will have access to private data belonging to the association or the association's members, consider adding language that excludes a violation of the privacy or confidentiality and security of data provisions.

Example 1:

Limitation of Liability. In no event shall either party be liable to the other under any provision of this Agreement for damages in excess of the fees payable hereunder or for any indirect, consequential, incidental or special damages, whether in contract or tort, and including, but not limited to, loss of use, loss of data or information, however caused, lost profits or other economic loss, business interruption, cost of cover, or failure of the Program to perform in any way. This section (Section 7 "Limitation of Liability") does not apply to a VENDOR violation of Section 4 "Privacy and Security of Data."

Protection of data is becoming even more important as new privacy regulations go into effect in several states. It is good practice for associations to be fully aware of how parties they contract with protect and use association data.

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Two other issues NEWH believe are impactful are CANCELLATION and ATTRITION.