

Industry Analysis

Termination for Convenience in Travel, Hospitality and Entertainment Contracts





Industry Analysis: Termination for Convenience in Travel, Hospitality and Entertainment Commercial Contracts

There is no doubt that the coronavirus pandemic has, as a side effect, brought global economies to a halt—and “business as usual” is not expected to return to normal anytime in the near future. With more signs pointing to a global recession, and the prevalence of infections continuing to grow, governments continue to implement measures to slow the pandemic’s spread. Among these are restrictions on non-essential travel or trips, whether local or long-haul; mandatory closures of non-essential businesses; and social distancing. As a result industries such as airlines, hotels, restaurants, theme parks, ski resorts, rental car companies, movie theaters and travel booking companies have suffered steep declines in business since COVID-19 was declared a pandemic by the World Health Organization. A few notable statistics:

- The International Air Transport Association anticipates that global airline passenger revenues will decline by \$314 billion in 2020, a 55% decrease from 2019
- Hotels in the U.S. alone have already lost more than \$13 billion in room revenue since mid-February, and are projected to lose \$3.5 billion each week the pandemic continues
- The National Restaurant Association estimates losses of at least \$225 billion in the next three months
- Casino companies expect to lose \$39 billion in the next 12 to 18 months
- Car rentals in the U.S. are down 80%
- Ski resorts in the U.S. may incur losses as high as \$2 billion when compared to 2019

In February and March, we used our contract review AI software to identify and analyze force majeure provisions and their effects in commercial contracts. Force majeure language, however, is not always included in contracts. What then? The bar for both the contractual doctrines of frustration and impossibility is high, and they are seldom used. When a party is unable to invoke force majeure under its contracts, or, as is the case with more and more businesses each day, spend must be reduced in order to remain a going concern, another provision to consider is whether the contracts may be terminated without cause, or “for convenience”.



Termination for Convenience

Termination provisions in contracts set forth the circumstances under which contracts may be terminated, including the effects of termination, such as payments and other rights and obligations of the parties. One type of termination clause is known as termination for convenience. Termination for convenience clauses provide that one (or any) of the parties may terminate a contract before the end of the stipulated term with or without cause—that is, for any reason or no reason—without incurring penalties.¹

Companies in industries that have been affected by the coronavirus pandemic, and the recession it has triggered, need to review their key contracts in order to understand their risk exposure. This exercise is not only to determine the potential impacts of the COVID-19 pandemic, but also to assess whether a business is party to any contracts that, due to rapidly changing circumstances, have either become (1) disadvantageous to its survival and thus should be terminated if possible, or (2) at risk of being terminated by counterparties that are relying on termination for convenience clauses. To illustrate how businesses might approach this, we reviewed a sample set of commercial contracts and identified termination for convenience provisions that could ostensibly support early termination.

Kira Insights: Termination for Convenience Provisions in Commercial Contracts

We collected over 300 documents filed on EDGAR between January 1, 2014 and April 13, 2020 by companies in the hotel, airline, restaurant, amusement and recreation, auto rental, and transportation services industries. We imported the agreements into Kira, and then identified and eliminated duplicates and other irrelevant documents using Kira’s workflow tools, creating a sample set of 132 intellectual property agreements, service agreements, equipment/vehicle leases, supply agreements, distribution agreements and joint venture agreements. Using Kira’s built-in “Termination for Convenience” provision model, we were able to automatically identify which agreements included termination for convenience provisions. Within 15 hours, we were able to identify every document containing termination for convenience language, and also determine (1) the overall prevalence of termination for convenience provisions; and (2) the prevalence of termination for convenience provisions by industry.

¹ Examples include the following:

“Any party may terminate this Agreement at any time for any reason by giving at least thirty (30) days’ written notice.”

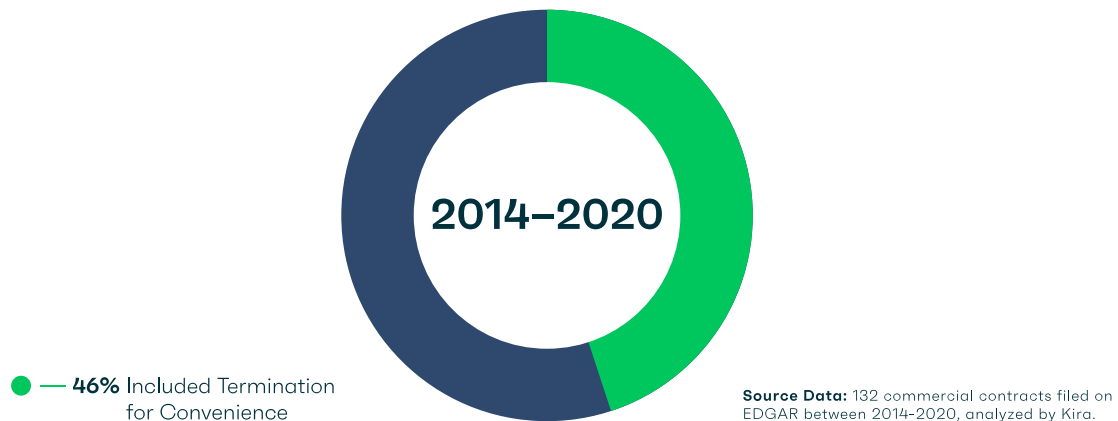
“This Agreement may be terminated by either party for any reason or no reason, whether or not extended beyond the initial term, by giving the other party written notice ninety (90) days in advance.”

“Licensee may terminate its license to use any of the Licensed Trademarks at any time, upon thirty (30) days’ prior written notice of such termination to Licensor.”



Termination for Convenience: Overall Prevalence

We found that fewer than half of the contracts we reviewed included termination for convenience clauses. Of the 132 contracts, 61 of them included termination for convenience language.²



While termination for convenience may provide a solution for businesses seeking to terminate contracts that are no longer in their best interests, many contracts do not provide this flexibility. This makes sense—parties enter into contracts to create certainty in their relationship and commercial dealings with each other. Nevertheless, it may be worth considering and negotiating for termination for convenience language to be included in future contracts if the parties both need the ability to be agile when unexpected circumstances arise. Of course, relative bargaining power will likely determine the outcome. On the other hand, many businesses care deeply about preserving their long term relationships (including because of the financial stability of hard-to-terminate contracts), and this current crisis serves as a good reminder of how worth negotiating against these clauses are. I.e., we suspect counterparties of these travel businesses are currently learning a lasting lesson about how important termination for convenience contract clauses can be.

² This figure includes two contracts that included only language regarding non-renewal notices to be furnished prior to the expiration of the terms of the contract, and four contracts that included both termination for convenience clauses and non-renewal language.

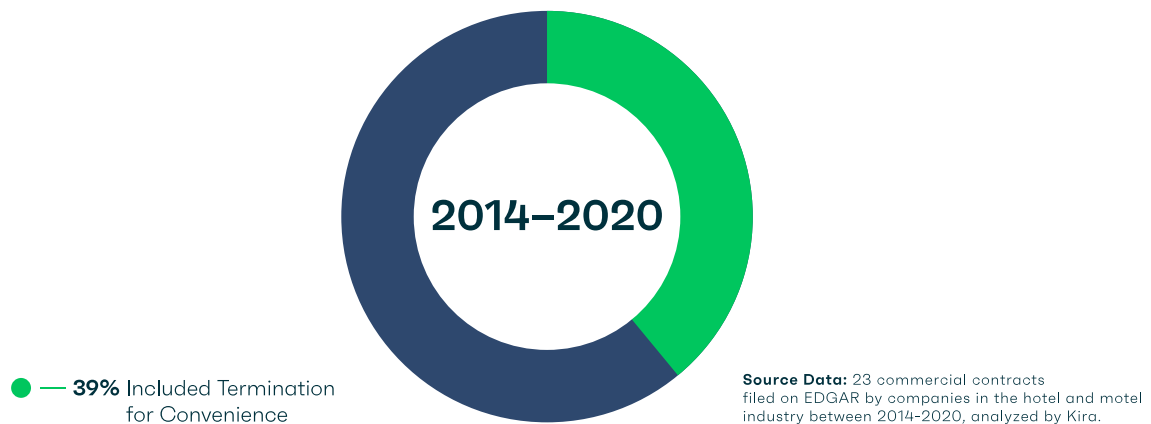


Termination for Convenience: By Industry

After Kira determined which agreements included termination for convenience provisions, we reviewed the results in greater detail to understand the prevalence of the provisions in each of the industries surveyed. As observed below, prevalence ranged from a low of 20% in each of the restaurant and car rental industries, to a high of 73% in each of the amusement and recreation services and water transportation industries. Companies in each of the below industries are indisputably the most severely impacted by the coronavirus pandemic and looming recession. Even so, the ability to terminate contracts while minimizing both exposure to litigation (as may be the case with force majeure declarations), as well as steep penalties, may provide companies with some relief—or at least options—as they develop plans in response to the current crisis. On the other hand, counterparties of companies in the surveyed industries that have contracts with termination for convenience clauses are likely more susceptible to the risk that those contracts could be terminated. That is, if you have meaningful customers in these industries, review your contracts with them for termination for convenience now, so that you can get on a defensive strategy if you must.

Hotels & Motels

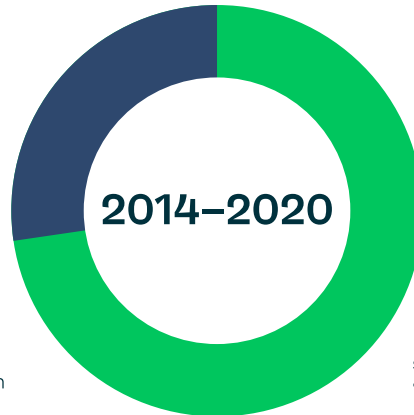
Out of 23 agreements relating to the hotel and motel industry, nine included termination for convenience clauses.





Amusement & Recreation Services

Out of 37 agreements relating to amusement and recreation services, 27 included termination for convenience clauses.

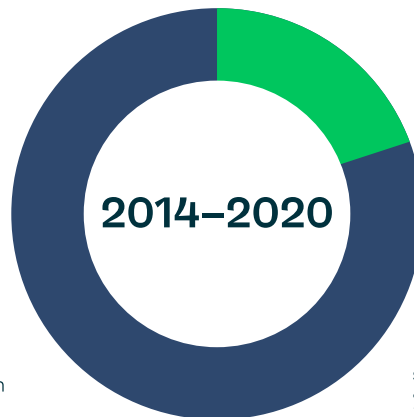


● — 73% Included Termination for Convenience

Source Data: 37 commercial contracts filed on EDGAR by companies in the amusement and recreation services industry between 2014-2020, analyzed by Kira.

Restaurants

Out of 20 agreements relating to the restaurant industry, only four included termination for convenience clauses.



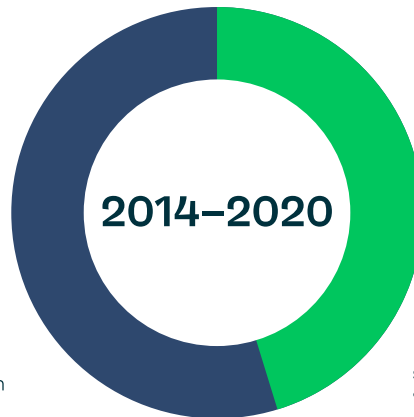
● — 20% Included Termination for Convenience

Source Data: 20 commercial contracts filed on EDGAR by companies in the restaurant industry between 2014-2020, analyzed by Kira.



Airlines

Out of 11 agreements relating to the airline industry, five included termination for convenience clauses.

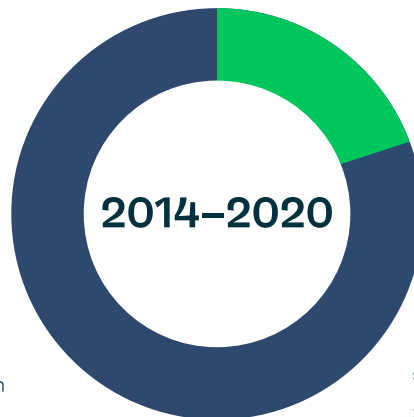


● — 45% Included Termination for Convenience

Source Data: 11 commercial contracts filed on EDGAR by companies in the airline industry between 2014-2020, analyzed by Kira.

Car Rental

Out of 10 agreements relating to the auto rental industry, two included termination for convenience clauses.



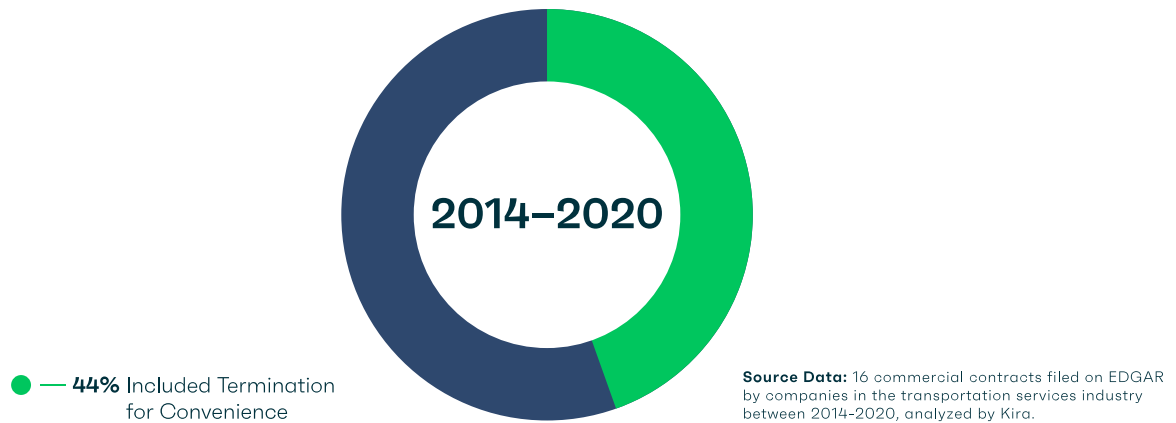
● — 20% Included Termination for Convenience

Source Data: 10 commercial contracts filed on EDGAR by companies in the auto rental industry between 2014-2020, analyzed by Kira.



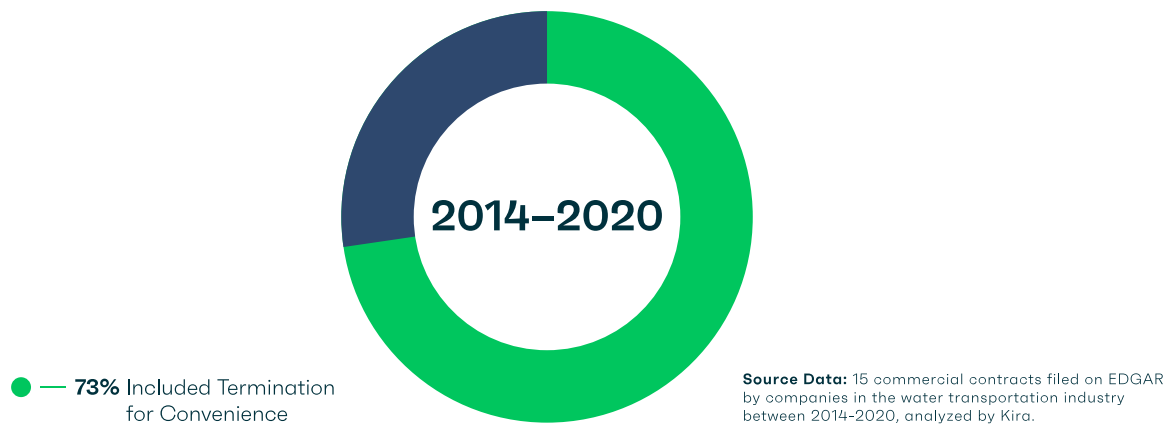
Transportation Services

Out of 16 agreements relating to the transportation services industry, which includes travel booking companies, seven included termination for convenience clauses.



Cruise Lines

Out of 15 agreements relating to water transportation (including cruise lines), eleven included termination for convenience clauses.





Conclusion

Needless to say, the coronavirus pandemic and the uncertainties it has created, means that economies around the world are facing unprecedented challenges. The impacts of the current circumstances are so deep that, regardless of the presence (or absence) of termination for convenience provisions in commercial contracts—or other provisions, for that matter—companies in the travel, hospitality, and entertainment industries continue to face severe adversity in maintaining their operations. That said, companies in these industries that have contracts containing termination for convenience provisions, and that can quickly identify them, will have greater flexibility to shed contracts that have become disadvantageous to them. As a result, they should consider the following approaches:

- **If termination for convenience provisions are included in contracts, consider whether terminating early under that clause might be the best option for the business.** The details of notice requirements (including the timing and potential payments) should be noted. Other factors to consider include the availability of alternatives for the services or products at subject in those contracts, as well as any potential impact on the business's reputation if the decision is made to terminate the contract.
- **If termination for convenience provisions are not available, consider other avenues for modifying existing contract terms with their counterparties.** Other options might include reviewing the effects of termination within contracts to determine if efficient breach could be a viable option.
- **Consider whether termination for convenience should be included in future contracts.** The availability of the provision may enable businesses to remain agile and mitigate risk exposure during unanticipated events. On the other hand, counterparties of businesses in the travel, hospitality, and entertainment industries should be wary of termination for convenience clauses so they can better mitigate losses when unforeseen circumstances occur.

Because the travel, hospitality, and entertainment industries have been hit the hardest by current events, identifying these provisions in their commercial contracts may be even more critical to companies' COVID-19 responses. In these challenging times, Kira can help by quickly and accurately identifying termination for convenience, and other critical contract provisions. For companies that need to shed expenses, time saved is literally money here. The sooner they get termination notices out, the slower money may go out the door. This can be critical when money is not coming in at near the pace it did. Conversely, if you are in a not-overly-impacted sector (like enterprise software) and have major travel, hospitality, and entertainment industry customers, it can be critical to quickly determine how easily they can get out of their contracts with you. This could help your customer success and finance teams proactively move (and revenue model) forward from here.

If you would like to learn more about how machine learning software, such as Kira, can help you instantaneously find termination for convenience provisions in contracts (as well as other essential contract provisions), [click here](#). For additional insights and information about managing the impact of COVID-19, visit our [COVID-19 Resource Center](#).