

cancellation or termination

This information pack is the second in a series produced in association with the Performing Arts Touring Alliance (PATA), Australia's peak body for the national performing arts touring sector.



Summary of Key Points

- A contract may be terminated in a number of different ways.
- A contract is terminated for frustration when an unforeseen external event occurs which makes the performance of the contract radically different to what was contemplated when the contract was entered into. The effect of frustration is that the losses 'lie where they fall' at the time of the frustrating event.
- A party may terminate a contract for anticipatory breach where the other party indicates that they will fail to perform their contractual obligations. However, the consequences of repudiating a contract for anticipatory breach are unclear and often depend on the significance of the anticipatory breach, and whether terminating the contract was a proportionate response.
- Where a party refuses to perform their contractual obligations, the contract may be terminated for breach. This situation can be avoided by parties including terms which allow for discharge or variation of the contract when specified events occur, or fail to occur.

In this information sheet, we set out three different scenarios which may arise in the context of theatre productions to describe:

- the ways in which a contract may be brought to an end;
- the consequences for the parties involved; and
- some tips for achieving better outcomes in similar situations.

Definitions

Presenter is the party purchasing a performance season from a Producer and taking responsibility for its presentation in either the Presenter's own venue or a hired venue. The Presenter markets the season and receives box-office takings.

Producer is the party responsible for assembling the various creative, technical and related resources and licences that combine to make up the production that is sold to the Presenter.

Other Parties who may be involved in the contracting process and therefore relevant to any cancellation or termination process include Tour Co-ordinators, Venues for hire and other suppliers and agents acting on behalf of artists and/or production companies.

Bringing contracts to an end

Contracts may be brought to an end in a number of different ways, including:

- by performance;
- by agreement between the parties;
- by operation of law;
- through frustration; or
- as a result of breach, actual or anticipatory.

Scenario 1: Severe Damage to Venue

A producer and presenter have entered into a contract for the production of several performances at a local theatre. One week before the first performance, the main auditorium of the theatre (the venue) is gutted in an electrical fire which severely damages the theatre.

What is the legal effect of severe damage to a venue?

Severe damage to the venue would likely terminate the contract between the producer and the presenter through frustration. Frustration occurs when an unforeseen external event occurs with the effect of rendering

performance of the contract fundamentally or radically different to that contemplated at the time the contract was entered into.

Examples of frustrating events include:

- destruction of the subject matter or basis of the contract;
- a radical change in the state of affairs essential to performance;
- death or incapacity of a person who is irreplaceable to performance; and
- subsequent illegality.

If the venue was only partially or superficially damaged, it is unlikely that the contract would be terminated. To prove frustration, performance of the contract must have become impossible. Even if the venue was damaged to the extent that it would make the production more inconvenient or costly, this would not be enough to establish frustration. As contractual obligations are assumed voluntarily by parties, Courts are reluctant to allow parties to easily escape liability. For this reason, frustration is often narrowly construed by Courts.

What are the consequences of frustration?

The producer and presenter's contractual obligations are discharged from the point of frustration. This means that the losses incurred by the producer and presenter 'lie where they fall'. However, any rights, duties or liabilities owed when the frustrating event occurred are not affected. For example, if a Presenter failed to make a part payment of a fee to a Producer two weeks prior to the start of a season and the season was cancelled one week prior but the payment had not been made, the Presenter would continue to be liable for the fee due prior to the cancellation.

It is important to note that the position that losses 'lie where they fall' has been modified in several States by the operation of legislation which adjusts the rights and liabilities of the parties on frustration and permits the recovery or apportionment of monies paid prior to the frustrating event.

What steps can the producer and presenter take to avoid losses?

The producer and presenter cannot rely on frustration where the contract:

- allocates risk in the case of a frustrating event;
- requires that parties must perform in any event; or
- includes a *Force Majeure* clause.

Given the uncertainty surrounding the consequences of frustration, it is recommended that *Force Majeure* clauses are used by parties as a means

of allocating risk. For more information as to *Force Majeure* clauses, please see the Information Sheet – *Force Majeure*.

Scenario 2: Failure to Clear Performance Rights

On the eve of opening night, the presenter realises the producer has failed to obtain the necessary intellectual property clearances for the use of the musical score.

What is the effect of failing to obtain intellectual property clearances?

The owner of copyright in literary, dramatic and musical works has the exclusive right to reproduce the work in material form and to publish, adapt, perform and communicate the work to the public. If no intellectual property clearances have been arranged, the performance and adaptation of the musical score may constitute copyright infringement.

Which party is liable for failing to obtain intellectual property clearances under the Copyright Act?

The *Copyright Act* provides that copyright in a performance is infringed by any person who performs a musical score or 'authorises' the performance of a musical score without the consent of the copyright owner. Depending on the particular circumstances of a performance, presenters, performers, producers and the venue could all potentially be liable for copyright infringement. It is therefore in everyone's interest to ensure that appropriate clearances have been obtained.

Which party is liable for failing to obtain intellectual property clearances under the contract?

The parties may apportion responsibility by agreement. It is important to review the agreement to determine who is responsible for obtaining intellectual property clearances for any acts which would amount to intellectual property infringement. For example, the producer may indemnify the artist for intellectual property infringement in the artist engagement agreement or may warrant and agree to obtain intellectual property clearances prior to the performance in the production agreement.

What options are available to the party responsible for obtaining intellectual property clearances for a performance?

Proceed with the performance, irrespective of the consequences

It is not recommended to use the musical score without permission from the copyright owner. There is a range of penalties under the *Copyright Act* including:

- an injunction restraining an infringement of copyright;
- damages as compensation for infringement; and
- criminal liability.

Proceeding without permission of the copyright owner could also result in reputational damage.

Seek to obtain intellectual property clearance for the work

The party responsible should make all reasonable endeavours to contact the copyright owner or collecting society from the time it is discovered that no intellectual property clearance has been obtained to demonstrate good faith.

Substitute the work for another which is licensed or no longer subject to copyright protection

Where possible, a practical solution to avoiding copyright infringement would be finding an alternative musical score not subject to copyright protection.

Withdraw from the performance

A party may choose to withdraw from the performance on the grounds that the party responsible for obtaining intellectual property clearance has engaged in anticipatory breach of the contract.

Anticipatory breach, or repudiation, of a contract occurs where a party to the contract is not 'ready and willing' to perform their obligations under the contract. In this case, the timing of the decision not to proceed with the performance is crucial. A party will not have repudiated the contract until such time as it is impossible for them to obtain the appropriate clearances before opening night.

Whether this scenario will amount to breach of contract will depend on the terms of the agreement and whether the failure means that the party is unable to perform their obligations under the contract. The failure to obtain a licence is not a frustrating event nor is it likely to be considered an event of *force majeure* as it is within the control of the parties to the contract.

Where a party has validly discharged the contract on the basis of repudiation, they will not be liable for damages which are suffered due to the cancellation of the performance.

The consequences of an anticipatory breach will depend on how substantial the breach is and whether it is significant enough to justify a discharge of the contract. Because of these uncertainties in determining loss, parties should try to negotiate an appropriate outcome before seeking to have the contract discharged in its entirety.

Scenario 3: Poor Ticket Sales Leading to Cancellation

The presenter cancels the production at the last minute due to poor ticket sales without reaching agreement with the producer.

What is the legal effect of cancellation?

Assuming there is no clause allowing for termination at will it is likely that the presenter would be in breach of his or her contractual obligations if the production is cancelled on the basis of insufficient ticket sales.

What are the consequences of cancellation?

In this case, the presenter will be liable to all other parties for any losses they have suffered as a result of the production being cancelled. Liability may extend to consequential losses and loss of reputation. It is recommended that the presenter take early steps to improve ticket sales and negotiate with the other parties before deciding to cancel the production.

What steps can presenters and producers take to prevent breaching the contract?

Presenters and producers can pre-empt such disputes by including an express term allowing for discharge or variation of a contract when a specified event occurs, or fails to occur. For example, a term could allow for the production to be cancelled, delayed or moved in the event that a certain percentage of tickets were not sold.

Parties should also ensure they are familiar with the *LPA Ticketing Code of Practice* which deals with cancelled and rescheduled events and the provisions of the *Competition and Consumer Act 2010* which may render unfair contractual terms void.

DISCLAIMER The information contained in this information sheet is intended as general commentary and should not be regarded as a substitute for legal advice. Should you require specific legal advice or assistance in dealing with drafting a contract, please contact TressCox Lawyers directly.

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