

APAM – WIRE #5 | Summary

Clauses for Concern in COVID-19

Tuesday 31 March 2020 2pm AEDT

Hosted by **Suzanne Derry** (Arts Law) with Panellists: **Jeremy Blackshaw** (MinterEllison), **Tristan Meecham** and **Bec Reid** (All The Queen's Men), **Juanita Pope** (Justice Connect) and **Danielle Kellie** (Senior Producer, Circa), joined by **Catherine Jones** and **Fraser Orford** from APAM.

Welcome & Acknowledgment of Country

Catherine Jones: The APAM Wire series provides a range of perspectives from the international market alongside discussions of creative practice and in-market experience.

I would like to acknowledge the custodians of the nations this digital platform reaches and extend this acknowledgment to First Nations people with us today and elders past, present and emerging.

Today we will be chatting about contractual obligations in the arts sector in the extraordinary context of COVID-19, where often neither party can deliver what they intended. Outside of variation and termination, Force Majeure and Acts of God clauses may come into effect in the coming weeks.

Introductions

Welcome by **Suzanne Derry (SD)** and introductions of panellists:

- **Bec Reid (BR)** – independent artist and creative partnership (All The Queens Men)
- **Tristan Meecham (TM)** – independent artist and creative partnership (All The Queens Men)
- **Danielle Kellie (DK)** – Senior Producer, Circa
- **Jeremy Blackshaw (JB)** – International Managing Partner, MinterEllison
- **Juanita Pope (JP)** – Head of Not-for-profit Law, Justice Connect

WIRE #5: Clauses for Concern in COVID-19

The following are pre-prepared questions that Suzanne Derry directed to the panellists. Their responses are recorded below.

- 1. Let's start with our artists and arts organisations and individuals – can you speak to how the pandemic has impacted your organisations? Danielle you've got vast experience in the international space can you speak to this first and then and Bec/Tristan – confirm how this has played out in your practice as artists?*

DK: Discusses the immediate impact of COVID-19 on Circa. We had an international tour on France, faced with a 24-hour timeframe to get a touring company out of Europe and home to Australia. We were ten days ahead as we had 'international heads-up', ahead of Australia. Circa's business is 'people coming together to watch people touch each other'. Impossible to undertake during social distancing measures. With 70-80% of Circa's revenue being its box office, we experienced an 39% drop in income immediately. We'd been lucky that February had been very busy and profitable, and had a windfall with EUR-AUD currency conversion. Trying to budget for an extended period with no income. We've been able to keep 40 core staff. We've been trying to address: how do we keep operating so we are stronger on the other side?

BR: We were in the UK fourteen days ago for what should have been four months, working on various projects. We have lost 90% of the year's income. Pre-pandemic restrictions, we'd been planning up to \$250k in turnover, working with about a hundred associate artists and thousands of community members. Focusing on all the relationships with partners and presenters around the world, working with All The Queens Men (ATQM) board to stay proactive and 'back ourselves as artists'. Our biggest currency is our relationships with our communities and artists, so we need to maintain this moving out of the current situation.

TM: ATQM is two indie artists, so we lost immediate performance work and producing work. Relationships formed 5-6 years ago were only now resulting in practice outcomes, so we're trying to rebalance that.

- 2. We're looking at a discussion about a number of legal issues that flow on from covid-19 including contractual issues – Juanita can you explain what a contract is?*

JP: A legally binding promise; an agreement between parties. A contract has four requirements:

1. Offer; other party accepts offer
2. Consideration: exchange between the parties, if there is an exchange, usually of money – something in return for something else
3. Terms of that exchange are certain and provide clarity. Who is promising what to whom. The timing. What everyone is going to do.
4. The parties meant for their agreement to be legally binding.

If these requirements are met, you have a legally binding agreement between those parties.

Contract can be written, oral (verbal), a series of emails, inferred by parties' actions. Contracts are all around us, e.g. subscribing to Netflix, auspice agreements, venue hire, employment contracts, etc.

What is *not* a contract: an MOU (memorandum of understanding) – usually an “agreement to agree” which is not legally-binding because there’s no intention to create a legal relationship.

3. Some of the participants today may have specific concerns about written contracts, and others may have nothing in writing. What generally happens when something prevents a party – or both parties – from doing the things they say they will in an agreement? Juanita

JP: First you need to clarify who are the parties – only the parties to the agreement can enforce the contract. Recommend that you do an audit of all contracts you’ve entered into: who they’re with, what’s been offered.

If a party is unable to do the things they promised to do in the contract, that party may be in breach of contract. A breach of contract can mean the other (non-breaching) party has a right to terminate the agreement, and/or to claim compensation for loss they’ve suffered as a result of the breach. However these are fairly serious outcomes and in the context of COVID-19 a better course of action will usually be to engage with the other party to try to agree on a variation of the terms of the contract.

A breach of contract means one or other party is unable to deliver as promised. Termination is the right of either party to end the contract. In this case, the party who’s ‘lost’ can seek compensation.

Variation is the mutual agreement of both parties to vary the contract’s terms.

4. What is a force majeure? What does it do in a contract? Jeremy

JB: Force majeure translates from French as ‘superior force’, but legally it means a chance occurrence, or unavoidable event outside the control of the contracted parties, which frees one or both of the parties, from liability or obligations where events beyond their control cause disruptions.

War, strike, plague, ‘Acts of God’ (e.g. extreme weather events). Things beyond the control of the parties. It frees one or both parties from fulfilling obligations set out in the contract. It is defined in the contract itself, so will very much depend on what the parties agree will be a FM event.

The definition of Force Majeure does not include instances of negligence or actions by either party intended to disrupt the contract.

5. What is the doctrine of frustration, and how does this play out given the current situation? Jeremy

JB: It’s more formal than the frustration of being stuck inside!

Legally speaking, if there has been a ‘frustrating event’, the contract can be terminated because the contract is incapable of being performed by either or both parties.

Important distinction: Force Majeure means suspension of contract, Doctrine of Frustration means contract is terminated. Legally speaking DoF is a ‘higher hurdle to clear’ than FM. The frustrating event must be something that means the contract has been completely superseded.

6. Artists on the panel – do you have lived experiences of these renegotiations which you would like to share – what has been confirmed/learnt? Bec what is your experience of this space? Danielle – what have you learnt? And Tristan you've mentioned the challenges in 'unproducing' a show – please expand on this.

BR: International partnership: it's preferable to negotiate contract variation, the key to success is transparency in communications.

TM: Clauses we are interested in, are a scaffold approach. 50% delivered at beginning of project. Then 50% at the end. Looking at the time frame: relationships, community development that takes months of planning. The 'unproducing' of work. We are still working a significant amount of time to ensure we are responding to organisations and managing relationships. It's a lot of pressure.

Also, we're negotiating with those who have a waged income, so a lot of independent producers are aware of the balance between managing their artists and their producing partners/venues/etc. There's a real imbalance.

DK: I concur with BR's comment around transparency. Huge discrepancies between the worlds, nations thinking of when this may end. Planning the next two months to 2021, negotiating is very difficult. How do you negotiate when you don't know if you can actually travel to the performance venue? We're talking to future partners, when still focusing on what's happening right now.

'Deposit' clauses are becoming more important (where presenters pay a deposit amount on signing'. Many international presenters particularly in the USA are rejecting them. In these cases we negotiate a 'Termination for convenience' clause: if someone else can offer an engagement and will pay a deposit, we're free to terminate the earlier agreement (where there was no deposit paid).

7. Many in the arts will be attempting to renegotiate terms with the other party to their contracts – what are some tips for people when doing this? Juanita

JP: Read the contract – get help if there's anything in it that you don't understand. Arts Law is a great resource, as is Justice Connect. It's really important to understand your rights and obligations.

Bear in mind the ecosystem of contracts and obligations. One contract (e.g. between an artistic company and a presenter) has implications for other contracts (e.g. the artistic company and the individual artists it hires).

Make sure you document your negotiations and agreed changes to the agreement in writing.

8. What are some of the international/legal (jurisdictional) considerations that are relevant when looking at this issue, and interpreting agreements which are perhaps based on other jurisdictions?

JB: Check whether the contract states which jurisdiction has been chosen as the governing law. For example: which Australian state or territory, or which country. If it doesn't specify jurisdiction, the likely interpretation is that the jurisdiction is the one in which the performance was to have taken place. Governing law is

important, as many legal concepts differ between jurisdictions. Commonwealth countries take a relatively similar approach. This differs a bit to common law countries (the European approach). The USA is harder to predict.

9. Most challenging aspects, things that have been taken away from you as a result of COVID-19?

BR: Keeping the artist front and centre. Protecting that, staying generous and supportive.

TM: It's an opportunity to come together and share, with this level of transparency.

DK: Maintaining creative practice for ourselves and the sector. The hardest thing is not having a crystal ball and not knowing what is happening.

JP: Transitioning the workforce to working from home, while significantly ramping up our assistance to the community during this time. We're proud of coming together in online forum, both for us as a team working to empower the sector to understand the law – that's great – but also for the broader not-for-profit sector to come together has been heartening.

JB: The ability to communicate with all of our stakeholders, and how quickly things are changing – how do we best communicate the changes to clients?

Questions from Zoom participants

1. What if the VIC State Government initiates a lockdown (or state of emergency) which means you can't rehearse/tour/work, and your activity (and contract) is based in another state/territory (or international location)? And that state (location) is not under lock down or same level of emergency.

JB: Check which law applies. Look at terms of contract, including the jurisdiction. If nothing is in the contract, look at the doctrine of frustration.

2. What position are artists in to request that an organisation (like a venue) consider alternative presentation of an event? For example, is a contract still frustrated if there's an option to perform online, or do an audio concert? Or is this too radically different?

JB: It would firstly be determined by the contract. We are in extraordinary times, so you would expect contract counter-parties would be happy to sit down and explore other medias to undertake the performance. That's a classic situation where you would sit down with the other side to substitute with another mode, as long as you are maintaining creative integrity.

SD: To what extent is there an appetite to convert things to online content, as opposed to postponing. Danielle?

DK: We have people who want content for free, or partners who have used content online without expecting to pay.

As one presenter mentioned, 'Touching is the new smoking', so we need to explore different scenarios.

*3. Is there any issue in agreements where which party cancels first?
Termination issue?*

JP: Depends on terms of contract. Keep the communications open to preserve the relationship.

4. We have been told that the 1908 Bio Technical Securities Act means that a pandemic isn't covered under Force Majeure. Does this just apply to insurance, or beyond that into binding contracts – or does it depend on the wording of the contract as indicated?

JB: Check the contract. If Force Majeure clause includes pandemic in the definition, you're fine.

Thanks & Close

Further Links /Contacts

If you have any further questions for Suzanne Derry or the Arts Law team please don't hesitate to contact them at artslaw@artslaw.com.au. Alternatively, you can submit your query via the Arts Law form:

www.artslaw.com.au/services/legal-query-form/

Justice Connect's Not-for-profit Law team provides legal help to community organisations nationally. Its website (nfplaw.org.au) has 300+ free self-help tools on legal issues from set up to wind up. Legal training is also available. Eligible groups including arts organisations working with marginalised communities can apply for free legal advice at:

www.nfplaw.org.au/advice

Also, Bec Reid from All The Queen's Men, has kindly offered her contact details if any independent artists would like a "chat / download / upload / reload":

bec@becreid.net.au