



DAVIS & GILBERT LLP

>> COVID-19 ALERT

Commercial Production Changes in Light of COVID-19

THE BOTTOM LINE

>> As we continue to move forward, and hopefully see a light at the end of the tunnel, we may come full circle to a situation where a "standard" contractual approach to events beyond a party's control, where a pandemic-related circumstance may or may not qualify, is the default and the preferred approach. However, as we find ourselves at, or even just approaching, the "peak" of the crisis, a holistic, informed and transparent contractual and practical approach will be key to mitigating risk overall.

How is commercial production holding up staring into the grim face of the COVID-19 global pandemic, which continues to expand and evolve by the day?

In the world of advertising and production, in a matter of a few short weeks, agencies, marketers and their production companies have cycled through what feels like a lifetime of protective choices: from the late February agency account meetings where potential, seemingly distant coronavirus concerns were raised for the first time; to the early March all-hands-on-deck negotiations with clients and vendors once it became clear productions could be poorly attended or worse, thrown into serious jeopardy; to the realization just a few days later that, no matter what, productions scheduled for the spring and even the summer simply would not happen.

Against the backdrop of the cancellation or significant postponement of major tent pole events that are major sponsorship vehicles for advertisers, such as NCAA and NBA tournaments and, most recently, the 2020 Tokyo Olympics, all involved parties have had to scramble to identify the most informed and reasonable path forward at any given moment in time.

In late February, most agencies, advertisers and production companies concerned about the coronavirus were voicing just that sentiment — "concern" or "fear." At a time when a true state or local shutdown prohibiting an upcoming production seemed like an unthinkable scenario, decisions were thrown into limbo: to cancel, to pre-emptively postpone or to forge ahead and 'wait and see'?

FORCE MAJEURE CLAUSES

"Force majeure," a boilerplate contractual provision intended to excuse a party's performance due to factors outside that party's reasonable control, was suddenly thrust into the limelight and evaluated in every relevant agency-client, production or vendor contract — if the clause even existed. While the analysis of such a clause is necessarily fact-specific, at the time, it was more likely than a cancellation or postponement of an event due to "concern" or "fear" around the coronavirus would not necessarily qualify as a force majeure scenario (i.e. a circumstance literally preventing a party's performance when a party would otherwise willingly proceed with performance).

Further, even if a force majeure clause happened to be drafted broadly enough to cover an imminent threat to the safety of the public, it likely was not drafted to address the exact allocation of costs or responsibilities of the parties in the event of such a scenario. To make matters worse, it quickly became clear that, in general, costs resulting from

ENTERTAINMENT, MEDIA & SPORTS

>>ALERT

a coronavirus-related cancellation would not be insurable under a typical agency or production company wrap policy. As one insurance broker put it, “they don’t insure fear.”

COST EVALUATION

As such, at the outset, communication between all involved parties regarding costs quickly became paramount — involving an immediate review of balances and financial controls, and an honest and detailed evaluation of the schedule of cost ramifications involved in every potential scenario — from cancellation, to postponement, to proceeding with the production in a modified (e.g. virtual) form — to align on a reasonable and fair course of action.

Now, as the pandemic worsens and all parties grasp the gravity of the situation, the need to be proactive, pre-emptive and non-adversarial is even more crucial, especially as courts, with their doors closed, are unlikely to look favorably on parties that did not attempt to resolve their disputes and establish contractual measures for allocating risk. This is increasingly important as we evaluate where we are today and where we may be in several months, and as we learn more about the potential seasonality of the virus, and which public distancing measures work and how long their effects are going to take.

As of the date of this writing — with stringent travel restrictions, nationwide lockdowns and government bans

on gatherings and events in place — cancellations by any affected party due to coronavirus-related situations are certainly more likely to fall squarely within the situation that a boilerplate force majeure clause would contemplate. To cement this interpretation with respect to anything coronavirus-related in the future, industry organizations such as Association of Independent Commercial Producers (AICP) are issuing their own guidelines to protect production companies going forward.

EVALUATING THE OPTIONS

While every situation is fact-specific, the amount an agency or client may be responsible for (and likely uninsurable) under a standard production contract adhering to industry guidelines may depend on which party invokes the clause and cancels. As such, while the four corners of the contract are certainly important, transparent communication among all parties is paramount when evaluating whether to proceed with one of the following options for productions already scheduled or impacted:

Cancel/Do Not Proceed with the Production

It is critical to conduct a careful review of the applicable agreements with production vendors, as well as between the agency and its client, to determine the contractual allocation of responsibility in the event of a cancellation by any affected party.

Relevant clauses will include:

- » Termination provisions;
- » Provisions allowing for modification, suspension or cancellation to scopes of work;
- » Agency responsibility for third-party vendors;
- » Production company responsibility for key elements of the production (e.g. talent or directors); and
- » Payment terms.

A holistic review of the contracts that goes beyond the “force majeure” clause is key, especially based on the situation, a party may or may not be able to rely upon it (and even if it can be invoked, it may not be clear regarding the consequences of invocation).

Proceed with a Rescheduled Date

While postponing a production may seem like the most prudent course of action, the analysis should not stop there. What may be a “force majeure” situation today may not be one in four months when restrictions are potentially relaxed; or conversely, a seasonal virus resulting in a “wave 2” lockdown could throw even a winter reschedule into jeopardy.

Items to consider will include:

- » Reviewing and negotiating any appropriate addenda (AICP or

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>>ALERT

otherwise, as well as anything between an agency and its client) to set forth a roadmap for the allocation of costs;

- » “Drop dead” cancellation dates;
- » Third-party payment dates;
- » Sequential liability terms;
- » The definition of (or carve-outs to) a force majeure event; and
- » Any rescheduled date.

All involved parties will also need to consider the potential for additional insurance coverage, and whether that coverage would be impacted by any perceived negligence in proceeding with a shoot.

Agencies and advertisers forging ahead may want to consider addressing potential risks to talent, both contractually via an appropriate waiver, as well as with respect to following health advisory guidelines at any rescheduled shoot.

As always, open lines of communication between all involved parties will be of paramount importance.

Proceed with the Production in Modified Form

Many players in the industry have quickly pivoted their campaigns to the digital world. Talent is becoming self-produced influencers broadcasting from home; live events are being converted to virtual interactive experiences; footage is being

repurposed for brand public service announcements (PSAs) regarding coronavirus. All parties will need to have a transparent discussion about costs and incremental fees involved in such a pivot, as well as closely reviewing the contract to determine permitted modifications to scope and alternative methods of performance that may be permitted.

FUTURE PLANNING

As this fluid situation continues to evolve, agencies, marketers and production companies are also strategizing their approach for new productions that are being planned, especially as going forward, it is unlikely that any party to a contract can argue that a future pandemic, lockdown or crisis situation was not “foreseeable.”

Preparing for an uncertain future when planning productions may include:

- » Revisiting insurance coverage;
- » Building flexibility into purchase orders (POs), statements of work (SOWs) and vendor estimates to account for coronavirus-related delays;
- » Fleshing out termination and consequences of termination provisions; and
- » Building out concrete vendor payment and refund terms, as well as production fees, to account for cancellation by each party in any given scenario.

In developing a contractual approach, it will be especially important to both revisit and think beyond the force majeure clause (potentially addressing coronavirus-related issues transparently rather than folding it into a boilerplate provision) and also look to contractual provisions that explicitly address the allocation of responsibility (or lack thereof) for supplier performance or non-performance as a baseline layer of protection.

FOR MORE INFORMATION

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