

## Commercial Production Coronavirus Tripartite Addendum Guidance Note

### **Purpose of issuing revised Guidance notes. (to be used in conjunction with revised Tripartite Addendum (TPA))**

The initial TPA was developed and issued in June of this year. It has been widely used and well received. This set of revised guidance notes are being issued in conjunction with an updated version of the TPA. Having listened to member feedback there were four elements that we have sought to improve and/or clarify.

1. The document is a Tripartite Addendum. The question asked, “an Addendum to what?” with the accompanying statement, “we do not wish to be parties to the PIBS agreement between the agency and production company”. Additional wording in paragraph three of the Introduction states clearly where the contractual relationship does not exist. What it doesn’t explicitly say is the TPA is an Addendum for the advertiser to their existing agency agreement with their agency, whether that is a purchase order, or a more formal contract or agreement.

Delay, postponement, relocation or cancellation due to Covid-19 is not an insurable risk but is it a known risk. The TPA recognises this and therefore Covid-19 is not a Force Majeure event. The TPA seeks to manage and define the risks, mitigate where reasonably possible and define clearly the responsibility of the parties. Recognising these are guidance notes, not drafted by a lawyer, the reason this is an Addendum not a new Agreement is; if this were a new Agreement then it would need to be a much larger document with numerous legal clauses including jurisdiction, liability, warranties, etc. As an Addendum it only need deal with the Covid related issues.

2. Level of liability. Liability was always intended to be limited within the TPA. This has been more clearly stated for cancellation. There may be costs that need to be replicated following delay, postponement, cancellation, etc. however where this occurs you will be immediately informed and it should form part of the risk and mitigation document, or at the minimum come from a discussion prompted by those documents.
3. Lack of clarity as to likely costs of delay, postponement or cancellation. Clearly each case is different, however the inclusion of Schedule 1 should provide clarity or at the minimum a starting point from which to develop a discussion. Factors such as talent, location, etc. are unique to each shoot and the implication of a Covid-19 event may be a significant cost. As a result, it may be possible for your agency to negotiate a standalone agreement that may result in a different percentage.

Some elements of production are tied to union agreements, for example, some film crews. Where this is the case there is no room to amend cancellation or deferment timing and agreed associated percentage costs. It is quite possible that the nearer to the shoot date the Covid event takes place, the greater the chance of paying over fees that will not be credited at a later date. For example, if a film crew costs 100, and 75% becomes payable due to their contractual terms, then upon restart the cost for the crew will be another 100, not 25. Finding an additional 75 is effectively ‘new money’ for the production shoot.

4. Agencies have been inconsistent in their use of the risk and mitigation documents. It now states in the introduction that these need to be completed and submitted to their client. It is possible you will receive the TPA before the risk and mitigation documents, however the agency should provide you with them in time to you review,

discuss and seek mitigation as appropriate. If they fail to do so please ensure you put this in writing to the agency.

The revised TPA seek to clarify and strengthen wording related to these events. Please remember

- a) The TPA is not designed as a 'one size fits all' document. In conjunction with the IPA and APA we developed this document to work 'out of the box'. This is not a contradiction, having nothing in place leaves the advertiser totally exposed. Signing v2 of the TPA without amending provides greater security and defines responsibilities and liability. If there are other provisions you negotiate with your agency then this document should be amended. Please note, if you negotiate with your agency, they in turn will negotiate with the production company, and all three parties will need to agree and sign for it to be a fully executed TPA
- b) Please ensure you have the TPA reviewed by your organisation's legal representative. You are under no obligation to use this document.
- c) As the advertiser wishes to have the advertisement shot and produced, neither the agency or production company will accept any financial risk should the production be effected by a Covid related event, directly or indirectly, or even by Government instruction such as a lockdown with minimal notice. However the agency and production company are bound through the TPA to work in an agreed manner that reduces the risk through mitigation and follows agreed guidelines for production. Failure to adhere to this will move some or all liability away from the advertiser.
- d) The TPA is a use once per occasion document. If you are shooting two TVC's then two TPA's need to be signed with associated documentation. Do not aggregate a number of shoots, or campaigns under one document for ease.
- e) Review the risk and mitigation documents provided by the agency. This will represent their opinion of risk and mitigation, you should ask questions and bring your own opinions to the discussion. If, for example, the location is high risk and the agency see it as critical but have not provided mitigation if it were closed, you should consider asking for revised costing on a different venue, venue cancellation fees, notice of cancellation etc.

The following text is a copy of the original guidance notes. There should be no contradiction between the above additions and the original below. There will be duplication but the revised text sets out to add greater clarity and protection for the advertiser.

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### **Introduction**

Currently there is no insurance available to cover production in the event of disruption, delay, or cancellation due to Covid-19. Unmanaged this leaves the advertiser carrying the risk. The purpose of the tripartite addendum, jointly prepared by IPA, ISBA and the APA, is to make clear the responsibility of each party. It seeks to minimise the risk by clearly stating the responsibility, liability of costs and terms under which production is commenced.

The terms of the addendum will apply if it becomes necessary to relocate, delay, postpone, make material changes to, or cancel the Production. Clause 2 deals with relocation, delay, postponement, or material changes. Clause 3 deals solely with cancellation. These clauses are repetitive, but clause 3 has slightly different costs provisions and Agency obligations.

The key points are:

### **When should the Addendum be signed?**

Before signing The Addendum it should be discussed with your Agency. They in turn should discuss with the production company to ensure all parties understand their respective liability before production commences.

As the advertiser, before signing, ensure you have had the opportunity to review the risk assessment and mitigation plan. These need to be understood and meet your needs and willingness to accept risk. Using these documents the advertiser needs to align with their agency on red, amber, green issues and where necessary have the agency focus on managing commercial risk with the production company and other third parties. The advertiser may request their agency seek to build in cancellation criteria and fee payment structures into their agreements with, for example, talent, director and/or location fees, as part of the agency's commercial risk mitigation requirements

Responsibility should be clearly understood before the addendum is signed.

Please ensure that you use the original version as your starting point. If in doubt, visit the ISBA website.

### **Clauses 2c & 3c**

Clauses 2b and 3b say that the Client will pay the costs of the Production Company and the other costs of the Agency. However, the Agency and Production Company need to follow the points in clauses 2c and 3c (as appropriate). In particular:

- the Client will not have to pay the costs if the Agency or Production Company (as relevant) are able to claim those costs on their insurance;
- the Agency and Production Company need to try to avoid or otherwise mitigate the costs where possible so that the Client's financial exposure is minimized;
- the Agency needs to keep the Client informed of any potential costs. That includes the costs of the Production Company; and
- the Agency needs to provide the Client with all relevant invoices and substantiating documentation, including those of the Production Company. (And 3c(iv) says that, in the case of a cancellation, the Agency will also have to provide the Client with any creative deliverables too.)

### **Clause 4**

Obliges the Agency to pay the funds received from the Client in respect of the Production Company's costs to the Production Company.

### **Clause 5**

This sets out the obligations with which both the Agency and Production Company must comply in order to minimise the risk of any disruptions, and therefore costs being incurred.

*5a requires both to "take particular care in recommending content ideas, choosing production locations and sets, preparing contingency plans and anticipating possible problems with shoots so as to try to mitigate any Covid-19 related problems as far as is reasonably practicable."*

The IPA has created two risk checklists for use between the Agency and the Client which should assist with this process. Reference copies are available on the ISBA website. The initial development of these documents will take place between the Production company

and the Agency. Then the Agency and Client will review and agree before the commitment to production is made.

**5b & 5c** require both to comply with the APA's Covid 19 Shooting Guidelines and with all relevant government guidance, so the Client should have comfort that the Agency and Production Company will be doing what they can to minimize risk.

**Clause 6**

If either the Agency or Production Company believe, at any stage, that a disruption is likely, the Agency needs to notify the Client. The parties must then do what they can to try to avoid the problem affecting the production.

Useful links:

Most current version of the tripartite agreement

<https://www.isba.org.uk/media/2570/tripartite-production-covid-addendum-update-250920.pdf>

Risk checklist

[https://www.isba.org.uk/media/2467/agency-covid-19-production-risk-overview\\_v11-master.pdf](https://www.isba.org.uk/media/2467/agency-covid-19-production-risk-overview_v11-master.pdf)

Current APA guidelines - <https://www.a-p-a.net/2020/06/news/16117/>