

# Contract Termination: Player One, Game Over

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# Our Presenters

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Contracts are an inevitable part of our daily life and today we will discuss practical ways to handle the issues that arise when things go wrong. Contracts may be terminated for many reasons.



**Refusal to Perform**



...at the following address  
2) Failure to perform duties, and 3) Ill-  
...ence.

**Contract Term:**

...is contract will commence on the 1...  
...day of [...], [Yea...]  
...as listed

**Express or Implied Provisions**



**Unsatisfactory Performance**

# Other Reasons Contracts Terminate



**BANKRUPT!**



**Insolvency**

## Breach of a Condition Precedent

- Who breached first?
- Material?
- Did you waive your right?



## Anticipatory Breach

Await? Use remedies at hand? Suspend my own performance?



## Take or Pay Agreements

Mario and Luigi enter into a manufacturing contract. Mario agrees to sell Luigi 100 tons of steel per month for 5 years. After year 1, COVID hits and the cost of steel increases dramatically and Mario can no longer sell 100 tons of steel at the same cost.



## Case Study # 2 – Material Breach

Mario bought acres of land from Luigi. Later, Mario leased the land back to Luigi solely for agricultural purposes.

Unexpectedly, Mario received a notice from the county regarding the improper use of land. Mario sent Luigi a default notice with the opportunity to cure. Luigi claimed that Mario had consented because he knew that Luigi was using the land as a landscape business.

The county was ready to impose a fine of \$250.00 per day. Mario filed an eviction lawsuit against Luigi. Ultimately, Luigi and Mario agreed to terminate the contract.



## Legal Background

- Excuses breach in narrow circumstances
- Does not apply when one party has assumed the risk.
- May apply due to extreme, unreasonable and unforeseeable hardship.
- 3<sup>rd</sup> parties? Acts of God? War? Embargo? Shortages? Virus? Rising interest rates? Intervening illegality? Extreme weather?
- *JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 29 F. 4<sup>th</sup> 118, 123 (2d Cir. 2022).



## Case in Point

- Convention Center Rental
- SARS Covid 19 Outbreak
- Impracticability defined in the contract



# Case Study #4 – Anticipatory Breach

Mario and Luigi are the CEOs of their respective companies which they recently inherited from their parents. They are parties to an exclusive distribution agreement that has been in place for over 40 years. The agreement has no time limitation and no geographic limitation.

Mario believes this is a rotten deal for his company and now that his father is not around, he believes he can unilaterally terminate the long-standing agreement because it is unreasonable, one-sided and unprofitable. Mario proceeds to send a demand letter to Luigi claiming that the agreement is invalid, that it would not survive if challenged in court, and he sends an amended distribution agreement to Luigi.

By a show of hands, how many think Mario will prevail?

We defended Luigi using what is called anticipatory repudiation of contract. Mario wanted more than the exclusive agreement called for and he coupled that with the threat of not providing services. This created an immediate cause of action for breach of contract.

What were Luigi's options?



# Practical tips when terminating a contract



- *Act promptly*
- *Cure period*
- *Venue*
- *Fee shifting*
- *Renegotiate?*
- *Dispute resolution clause*
- *Mitigation*
- *Notice requirements*

Any Questions?



# Global Coverage

Abu Dhabi  
Atlanta  
Beijing  
Berlin  
Birmingham  
Böblingen  
Bratislava  
Brussels  
Cincinnati  
Cleveland  
Columbus  
Dallas  
Denver  
Dubai  
Dublin  
Frankfurt  
Hong Kong  
Houston  
Leeds  
London  
Los Angeles

Madrid  
Manchester  
Miami  
Milan  
New Jersey  
New York  
Palo Alto  
Paris  
Perth  
Phoenix  
Prague  
San Francisco  
Santo Domingo  
Shanghai  
Singapore  
Sydney  
Tampa  
Tokyo  
Warsaw  
Washington DC

Africa  
Brazil  
Caribbean/Central America  
India  
Israel  
Mexico

■ Office locations  
■ Regional desks and strategic alliances

