

COVID-19: Force majeure & frustration under English law

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The dramatic impact of COVID-19 across the publishing industry may mean that certain contractual obligations can no longer be met by one or more parties. For example, publishers may be cancelling or delaying publications, authors struggling to meet delivery deadlines, and suppliers failing to meet orders in the required timeframe. As a result, there has been much discussion about the legal concepts of 'force majeure' and 'frustration' and the extent to which these can excuse a party's non-performance in the context of the COVID-19 outbreak.

'Force majeure' is an entirely contractual remedy. It is a contractual clause that spells out what happens if a party cannot perform its contractual obligations because of events outside its control. The clause may set out the types of triggering event, whether the parties are allowed more time to perform their obligations, who pays any increased costs, and whether there is a right to terminate the contract. However, just because a force majeure clause exists in your contract does not mean you can rely on it and careful consideration of the clause will be required.

If your contract does not contain a force majeure clause, then other laws may apply, for example the English law doctrine of frustration may apply, although the bar to establish that a contract has been frustrated is high. Frustration occurs where it is impossible for a party to perform a fundamental obligation under a contract, due to an unforeseen event, or where a fundamental obligation is rendered radically different. When a contract is frustrated, neither party has to comply with future obligations.

In both cases, detailed legal analysis of the contractual wording and the purpose of the contract will be required to determine if such concepts will apply in each circumstance. Furthermore, the desire to maintain a long-standing relationship may mean the parties are amenable to agreeing an amendment to the contract instead. The basic requirement for varying any contract is to look at the underlying contract and see what it says about how changes can be made. In most cases, all the parties will need to agree to the amendments and the agreed changes will need to be recorded in a written agreement signed by all the parties.

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