

COVID19: Impact on contracts in the publishing sector

The dramatic impact of COVID-19 has been apparent across all business sectors, disrupting our working practices and requiring a rethink in relation to certain commercial relationships.

With the most intense period of disruption hopefully nearing its end, and the publishing industry looking to find the new 'normal', this article considers the legal options for companies seeking to reshape their current commercial obligations, and how to ensure contracts are validly executed whilst social distancing.

Meeting your contractual obligations

Given the inevitable practical complications of remote working and the current health impact on workforces, it may be that certain contractual obligations can no longer be met by one or more parties – this could lead, or may already have led, to cancellation or delay in publication schedules, authors struggling to meet delivery deadlines, or supply chain issues. We have set out a number of options available to companies to tackle any such issues head-on.

'Force majeure' and 'frustration'

Breaking a contract where there is no legal right or agreement between the parties to do so, can be costly for a company if the counter-party takes legal action. There has been much discussion in the legal world about the concepts of 'force majeure' and 'frustration' in light of the COVID-19 outbreak. These could temporarily suspend or terminate a contract because of an event outside of the parties' control.

A '**force majeure**' clause 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. Just because a force majeure clause exists in your contract does not, however, mean that it can be relied on, and will require proper consideration and interpretation of the contract and the relevant circumstances.

If your contract does not contain a force majeure clause, 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.

The above legal concepts may be useful in relation to key contracts or where a counter-party does not agree to an amendment, although 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. What is more, such options are more likely to be pursued in industries, such as live events, where delays and non-performance have a more permanent impact; in the publishing world, the desire to maintain long-standing relationships may make both sides more amenable to the simpler route of adjusting performance deadlines.

Whilst discussions may well be an important part of mitigating the effect of the virus and related restrictions, and dealing with the practical implications, it is important to look at what notification and

dispute resolution mechanisms exist under your contracts, and to be mindful of the possible need to protect your position in case a dispute does arise.

Amending contracts

For most contracts in the industry, parties are likely to look to at amending the contract to avoid a breach – this may apply to employee or consultant contracts as well as day-to-day commercial contracts. 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 to the contract will need to agree to any amendments although occasionally the contract may provide for unilateral variations or, where there are multiple parties, for a certain number of those parties to agree. Whatever the threshold is for variation, then this must be followed to ensure the variation is effective. Similarly contracts often provide that any variation will need to be in writing and signed by the relevant parties.

In addition to the formalities set out in the contract, there are some legal formalities to be complied with including the requirement for the amendment to either be backed up by consideration, or contained in a document executed as a deed.

Payment delays

In the current climate, payment delays can be even more concerning than usual for businesses and individuals alike. In the event that you are on the receiving end of such a delay, you will first need to consider whether your counter-party is in breach of contract. This would involve considering when the payment become due and payable and whether the counter-party has any right (contractual or otherwise) to delay the payment.

If the relevant counterparty is in breach of contract, you may be entitled to terminate the contract or issue a claim for payment of the debt. If the debt is not disputed, another option may be to serve a statutory demand, which is a precursor to insolvency proceedings, and can apply pressure on a debtor to make payment. However, such actions should not be taken rashly and, more often than not and certainly in the current climate, seeking to re-negotiate and amend the contract may lead to a quicker and more favourable outcome for all parties concerned, particularly if it is a long-term contract and you wish to retain good relations.

Whichever course of action you choose, it is important to not take any steps that could constitute an anticipatory or repudiatory breach of the contract, or an accidental waiver of your contractual rights (as we explore below), and we recommend seeking legal advice as to how to ensure these do not arise.

Waiving specific rights

Alternatively if one party is simply giving up a contractual right (whether permanently or temporarily) then the most appropriate solution may be a waiver. A waiver does not need any consideration to be given by the party giving up their contractual right, nor does it need to be recorded in writing.

A waiver can take effect from the conduct of the waiving party, particularly where there is not a “no waiver” provision in the contract. This also means that if you do not want to agree to a waiver and wish to preserve your contractual rights under the contract, you should be careful not to make a statement

or engage in conduct objectively indicating an intention to give up, or a promise not to, enforce such rights, and expressly reserve your position (preferably in writing) in any discussions.

Electronic signing – ensuring new contracts are legally enforceable

For any new contracts, the physical signing process can be more complicated where directors and employees are working remotely. Over the last year, The Law Commission has provided increased guidance in relation to electronic signing, particularly in the context of a deed. Directors and other authorised signatories should ensure such guidance is followed carefully to ensure that deeds, and other contracts, are validly executed and, therefore, legally enforceable.

What constitutes ‘signing’ an electronic document?

Technically, this can include anything that a signatory does to an electronic document that demonstrates an “authenticating intention”, including ticking a box or applying an electronic signature. However, for evidential purposes, a distinguishable signature is preferable (such as an electronic representation of a handwritten signature) or, even better, the use of a secure electronic signature application such as DocuSign.

How can a document be ‘witnessed’ electronically?

Documents that need to be signed as a deed – such as an amendment to a commercial contract for which no consideration is being provided – require witnesses for each signatory.

The same requirements apply for witnessing electronic deeds as they do for paper deeds. The witness should be physically present and witness the signature of the party. They should then attest to this witnessing by applying their own electronic signature to the electronic document.

The law is not clear as to whether a party in isolation or social distancing can witness and attest a deed remotely (e.g. via Skype) and The Law Commission has concluded that legislative reform would be required in order to be confident that ‘remote’ witnessing fulfils the execution requirements of a deed. Therefore, this is not recommended and if at all possible an alternative method of witnessing should be used.

Companies should choose an alternative method of execution, such as execution by two directors or a director and a company secretary. For individual signatories, witnessing from afar (but not remotely) may be possible. Witnessing by family members is not usual or preferred practice but technically possible – although, as it is not usual, you should ensure that the other parties are aware of this.

Further information

For further legal advice on the contractual issues detailed above or other contractual issues that have arisen in light of COVID19, please contact Emily Miles, Zoey Forbes or Georgina Long at **Harbottle & Lewis LLP**, a leading UK-based law firm for the publishing industry and technology, media and entertainment sectors (<https://www.harbottle.com/>).