

# COVID-19 CANCELLATIONS

## KEY QUESTIONS & ANSWERS

*April 2020*



Many SoA members are experiencing significant financial losses following contract cancellations in the wake of the Coronavirus outbreak. In this guide, we look at some key questions to address what authors should do if contracts or engagements are cancelled.

*This is outline guidance only. All cases will vary. Do contact us for free and confidential advice. All our advisers are currently working from home.*

We have huge sympathy for schools, colleges and festival organisers that are having to close and are in some cases facing significant financial difficulties. Nevertheless, authors are also suffering, and you should not assume that because a school is closed, or an event is cancelled, that you are not entitled to be paid.

The key questions to consider are as follows:

### 1. What happens if my contract is cancelled?

If you have a contract in place, the general rule is that you're entitled to be paid on cancellation of the agreement unless any of the following conditions in this guide apply.

You may often feel uncomfortable about asking for payment but note that in some cases the organiser may be able to claim back from insurance policies or the Government, while you may have no recourse to compensation unless you fall within the Government compensation scheme for [employed](#) and [self-employed](#) workers.

If your work can be published or an event organised later and you've been paid part or all your advance or fee already, you should expect to keep it. Do not return money paid to you, even if asked, before taking advice on whether it's appropriate to do so. In many cases, it will not be.

Similarly, if your publication has been delayed or an event postponed, you should still expect to be paid the advance or fee agreed under that contract even if that means that the contract is more expensive for the publisher or event organiser to perform. You should not feel obliged to accept less good terms although, where companies are in financial difficulties, that may in some cases be commercially necessary. Note our further observation under question 8 below about contracts becoming more expensive to perform.

### 2. Do I have a contract?

Your contract may be a formal document signed by both parties. It may be contained in terms and conditions agreed between you at another time or it may also have been agreed in a less formal way, such as in a series of emails or orally in person or by phone.

In all cases, the first thing to do is to find the relevant documents and check what was agreed about terminating or ending it early. In the case of less formally agreed contracts, make sure that you check email exchanges and your notes from telephone conversation and those in person. You should not necessarily assume that you do not have a legally binding contract because you have not signed a formal legal agreement.

### 3. Does my contract contain a termination clause?

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If there are provisions allowing one party to terminate or end the contract on notice with specified payments due in relation to advance periods (e.g. 50% if three months' notice is given), those payments will still apply in many cases. You should contact us to discuss whether such conditions are overridden by a *force majeure* clause or by the legal doctrine known as 'frustration'.

It is also worth noting that your contract may contain a provision dealing with early or automatic termination where a breach of contract goes unremedied for a defined period (e.g. one month). Do make sure that you check all references to termination in your contract and speak to us about whether they apply.

#### 4. What does a *force majeure* clause do and does my contract have one?

A *force majeure* clause allows a party to avoid its obligations under a contract where a specified event outside its control occurs. However, courts in England and Wales will only interpret them strictly and they cannot be used as an excuse to cancel or set aside contracts without good reason.

Publishers, teaching institutions and event organisers contracting with authors are only likely to be able to rely on such provisions if the clause makes specific reference to words like 'disease', 'epidemic' or 'pandemic'. Note that vague phrases like 'acts of God' will not cover Coronavirus. Check your contract for terms such as these.

If a *force majeure* clause includes a phrase like 'any other law or action taken by a government or public authority', it may also be relied upon if the following conditions also applied:

- i. performance of the contract would be **either**:
  - a. legally and practically impossible; **or**
  - b. the clause allows for a lower standard to be applied, such as a party only being 'hindered', 'delayed' or 'prevented' from performing its contractual obligations;
- ii. the party seeking to rely on the clause cannot mitigate its loss by, for example, claiming on its insurance to recover any losses, postponing a publication or event until after the crisis has passed or performing the contract in another way, even if doing so would make the contract commercially costly or loss-making; **and**
- iii. the Coronavirus outbreak was the **only** reason for the party seeking to set it aside and there were no other logistical or financial difficulties causing it to do so.

Where an author has been booked to appear at a literary festival for a fee and the organiser cancels it owing to the Coronavirus and says that no fee is payable due to a *force majeure* clause, our view is that **all** of the following conditions would have to apply for an organiser to rely on a *force majeure* clause to not pay the author

- i. the festival was **either**:

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- a. due to take place during Government restrictions on public gatherings; **or**
  - b. after restrictions had been lifted but the *force majeure* clause nonetheless allowed the organiser to rely on it if they were only 'hindered', 'delayed' or otherwise 'prevented' from organising it; **and**
- ii. the organiser carried no professional insurance and could not organise it at another time of year or deliver part or all of it online; **and further**
  - iii. the organiser would not have cancelled the event in the absence of the Coronavirus.

Authors should be reassured that these conditions represent a high legal bar. In many cases, it will be arguable that contracts should be honoured despite the Coronavirus.

### 5. Is there any other way for a contract to be cancelled?

Even if there is no *force majeure* clause which covers Coronavirus, a contract may still be set aside if it has been 'frustrated'.

Frustration is a complicated legal doctrine and is not easy to prove in practice. There is no definitive set of legal tests to show that a contract has been frustrated. A factual approach is taken by the Courts, considering what was in the minds of the parties at the time they agreed the contract and what has happened since.

For a party to show that a contract has been frustrated, it must show that:

- i. the outbreak occurred **after** the contract was agreed;
- ii. the restrictions imposed by the Government are so fundamental that the contract is now beyond what was reasonably contemplated by the parties at the time; **and**
- iii. performance of the contract would now be impossible, illegal or 'radically different'. Simply showing that the contract has become more expensive or even loss-making following the Coronavirus outbreak will not of itself be enough.

Contracts agreed **after** the Coronavirus had gained popular attention in the media are unlikely to be capable of frustration. Where contracts were agreed beforehand, it may be held that preventative or other steps could have been taken to avoid a contract being impossible or radically different to perform.

### 6. What happens when a contract has been frustrated?

Frustrated contracts are treated as being at an end. This is one of the reasons why frustration represents such a high legal bar to clear. Any money paid to you before the outbreak (less deduction of your reasonable expenses) is recoverable. Any sums payable in future would not be payable.

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Authors should also be aware that the consequences of a publisher, teaching institution or event organiser wrongfully asserting frustration would likely give rise to an anticipatory or repudiatory breach of contract by the publisher, college or organiser. This could mean that an author would have an action not only for recovery of any sums outstanding under the contract but for damages, too.

### **7. I don't have a written contract. Does that mean that I have no rights at all?**

Not necessarily. You may still have a binding contract agreed orally or by conduct, in which case the position remains that you should expect it to be honoured unless it has been frustrated or it isn't a binding contract in law.

### **8. I haven't been paid under a contract, but I'm told that I will be later. Is that lawful?**

You should normally expect to be paid under contracts that have not been frustrated by Coronavirus or that have not been terminated following the correct application of a *force majeure* clause.

Remember, just because a contract is more onerous or costly for a party to perform, it doesn't mean that you should be paid less or not at all. We have noticed that some publishers are saying that royalty payments will be delayed. That is not usually lawful unless your contract allows for late payment in these circumstances.

Do, however, also bear in mind our observation under question 1 above that, where companies are in financial difficulties, insisting on agreed terms in all cases may not be commercially achievable although you can also claim interest on late payments at 8% above the Bank of England base rate under [The Late Payment of Commercial Debts \(Interest\) Act 1998](#) if you are forced to issue legal proceedings.

### **9. I teach alongside my writing on a zero-hours contract and my college has cancelled my classes. What should I do?**

As a rule, you should request to be furloughed under the Government's compensation scheme for employed workers, rather than having your contract revert to zero hours. This allows your teaching institution to claim up to 80% of what you would have paid had you worked all your hours from the Government (capped at £2,500 per month).

The reason why this is so important is that furlough payments are unlikely to be made by the Government to teaching institutions where their teachers continue to work on fewer hours or where their hours revert to zero during the crisis.

### **10. Can I renegotiate my contract or withdraw from it following the outbreak?**

Yes, provided that both parties agree. Whatever the original agreement, you can still come to another arrangement on an amicable basis, which could include renegotiating what you will be paid or withdrawing from a contract. You should not, however, feel under any pressure to do so.

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In deciding whether to insist on other terms or withdraw from a contract, you should be careful not to forego any payments due to you under an existing agreement where you are the party seeking to amend or set it aside. Specifically, you may undermine any right to payment by being the party to demand that a contract is cancelled without the other party's agreement and, if in doubt, you should speak to our team before acting.

### 11. What if I become unwell?

Speak to your agent, publisher, college or event organiser. If you must cancel an existing commitment, it may be that you can negotiate an extension to, or variation of, contractual obligations on an amicable basis. Where this results in you earning less, be sure to keep careful records (more of which below). Do also check any business or health insurance you hold to see if it covers some or all your loss.

### 12. What should I do if an event or contract is cancelled?

Make sure that you keep all written documentation, email exchanges and receipts, together with a clear record of your expenses. You will need these to demonstrate your losses for tax, grants and recovery purposes, if making a claim from a Government scheme. Having done so, [contact us](#) to see what can be done about your contract.

### 13. What's the SoA doing to help?

We're building a list of useful resources in the [Coronavirus section of our website](#). We're also leading by example by paying authors booked to participate SoA events that have been cancelled following the Coronavirus outbreak. We encourage other event organisers to do likewise.

At the time of writing, we're delighted to have raised over £700,000 for our Authors' Emergency Fund offering cash grants of up to £2,000 for authors in need. For more information and details of how to apply, click [here](#). Other organisations, such as Arts Council England, may offer hardship grants in certain circumstances. For more information, click [here](#).

The Government has announced packages to help [employed](#) and [self-employed](#) workers, which may also apply. We're actively lobbying the Government and working with industry colleagues to ensure that these schemes are as comprehensive as possible and that they don't discriminate against authors who are fully or partially self-employed. To read our submission to the House of Commons Treasury Select Committee, which covers many of our emerging concerns, [click here](#). Our dedicated team of advisors is also on hand to help. To get in touch, click [here](#).

### 14. How can I help?

To help us make the case to Government, we need to build an evidence base showing just how much this crisis is affecting authors. Please help us by taking a few minutes to complete our survey [here](#).

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If you would also like to discuss policy and other practical matters for us to raise with Government and industry or if you would like to share your experiences with us confidentially, please also [get in touch](#).

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