

GUIDANCE NOTE

COVID-19 AND CONTRACT DELIVERY



What does this guidance note cover?

The COVID-19 outbreak may make it more difficult for the University, its partners and its suppliers to deliver services agreed under a contract. Under normal circumstances, this could mean that one of the parties could find itself in breach of contract and liable to pay damages to the other party.

However, the COVID-19 outbreak may mean that the party which cannot deliver avoids breaching the contract, either because there is a **force majeure** clause in the contract, which excuses the affected party from performing its obligations or because the contract is **frustrated**, a legal principle which enables all contractual obligations to be immediately brought to an end if the contract can no longer be delivered.

This guidance note explains how to work out if these apply to your contract. The same principles apply regardless of whether the University is delivering services, or buying them in.



What do I need to do?

Are you or your supplier likely to no longer be able to deliver under a contract because of the COVID-19 outbreak? If so:

- Locate the terms of your contract
- Check what you or your supplier are committed to deliver. In practical terms, does the COVID-19 outbreak mean you can't deliver what's been committed?

If **yes** - refer to **Section 2** below.

- Does the contract have a **force majeure** clause which applies here?
- Have you taken reasonable steps to avoid non performance?
- Have you followed any procedural requirements set out in the contract?

If **no** - refer to **Section 3** below.

- Discuss with Legal Services whether it is possible that the contract could have been **frustrated** (**Section 3** below)

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1. What is a *force majeure* clause?

A *force majeure* clause allows for a contract to be terminated or adapted in the event of circumstances beyond the reasonable control of the contracting parties. It excuses one or both parties from performing their obligations in whole or in part and will mean that party is not in breach of contract.

2. How do I work out if my contract has a *force majeure* clause?

Find the signed copy of your contract and read through it. Many contracts, but not all, have a *force majeure* clause in them.

Hints:

- The clauses are often labelled "*Force Majeure*" so are easy to spot.
- If not, find out if there is a clause which refers to "*circumstances beyond [a party's] reasonable control*" or similar. The clause might list various events, such as epidemics, war, terrorism, strike, epidemics, acts of government, plagues, act of god etc.
- The clause will often (but not always) be towards the end of the contract.

Example clause:

Neither party shall be in breach of this agreement nor liable for delay in performing, or failure to perform, any of its obligations under this agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control. In such circumstances [the time for performance shall be extended by a period equivalent to the period during which performance of the obligation has been delayed or failed to be performed. If the period of delay or non-performance continues for four (4) weeks, the party not affected may terminate this agreement by giving seven (7) days' written notice to the affected party.

If your contract has a *force majeure* clause, keep reading. If not, skip to **Section 3** below.

2A. My contract has a *force majeure* clause. What do I do now?

Read the clause to work out if it protects you during the COVID-19 outbreak:

(i) Does it apply in this situation?

A *force majeure* clause will not necessarily apply to the COVID-19 pandemic, so you need to look at the wording carefully. If it references a "**pandemic**" or "**epidemic**", or "**circumstances beyond your reasonable control**" it is likely to apply. If it lists individual specific events, consider whether these reasonably cover a pandemic situation.

(ii) Does it cover my / my

In some contracts, performance may need to be impossible to trigger a *force majeure* clause. Even if performance is too expensive or difficult, this might not be sufficient. Again, read the wording carefully. If the *force majeure* event must ...

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supplier's inability to deliver?

- **“Prevent”** delivery, this is a very high bar. It must be physically and legally impossible to deliver.
- **“Hinder”** delivery, this is a lower bar. It must be substantially more difficult, but not impossible, to deliver.
- **“Delay”** delivery, this is a lower bar again. Delivery on time must be made more difficult by the pandemic.

2B. My contract has a *force majeure* clause which applies here. What next?

- **Check that all reasonable steps have been taken to avoid or mitigate the impact of COVID-19 events or its consequences.** E.g. if a supplier cannot deliver because of staff shortages, were there other labour sources they could have accessed even if they were more expensive? Do not assume that increased costs will automatically excuse non-performance.
- **Follow any procedural requirements listed in the *force majeure* clause.** E.g.
 - How long the affected party is excused from its obligations
 - Whether the affected party might need to notify the other
 - What steps need to be taken to mitigate the impact of the event
 - Whether you can end the contract.
- **Keep documentary records of your decision-making** - why performance wasn't possible; any steps taken to mitigate loss, any notices served.

3. My contract doesn't have a *force majeure* clause. Is there anything else that I can do?

If there is no *force majeure* clause in the contract, it is possible that a contract has been **frustrated**. This means that there is an unforeseen event outside the control of the parties which has made it impossible to perform (even though there are no clauses in the contract which cover this scenario). **The bar to rely on frustration is very high and should only be used as a last resort.** You will need to seek support from Legal Services if you think you may want to argue that your contract has been frustrated. The fact that there is a pandemic may not be considered as unforeseen, given that there have been epidemics in recent years. However, the extent and scope of the government lockdown from time to time may be relevant and we would need to consider the factual position on each occasion.

Further Help

If you need further support on any of the issues raised in this guidance note, please contact procurement@york.ac.uk in relation to supplier contract issues and legal@york.ac.uk for all other queries.