

COVID-19: Force Majeure, suspension and termination under the Terms of Trade and Union Collective Agreements**Force Majeure clauses**Introduction

A force majeure clause may excuse a party's performance of a contract if an unforeseen event outside the party's control prevents the party from performing its contractual obligations. However, a party invoking a force majeure clause faces at least five hurdles.

1. Because a court or arbitrator will typically only enforce a force majeure clause to the extent it specifically identifies the event that prevents performance, the party invoking force majeure must show that the event at issue falls within the scope of the force majeure clause. Not all force majeure clauses specifically identify the disease as an event of force majeure.
2. The party may have to show that the precise event preventing full performance under the agreement was unforeseeable in light of the contract at issue and that the risk of the triggering event could not have been allocated in the contract.
3. The party may have to demonstrate that it could have performed but for the triggering event. In other words, a party isn't excused from performance by a force majeure when it otherwise was unable to perform.
4. The party must show that, despite the event in question, its failure to perform could not have been avoided or overcome through alternative means.
5. The party invoking force majeure must show that it complied with any notice requirements set forth in the controlling contract.

Force Majeure and the Novel Coronavirus

As the novel coronavirus continues to sweep the globe, the inability to perform contracts has led to the suspension of production. Does the outbreak of the novel coronavirus constitute force majeure and relieve a party's failure to perform?

It depends:

- *Does the force majeure clause at issue specifically reference **diseases**, epidemics or quarantines as triggering events?* If so, the chances of enforcement are greater.
- *Did the outbreak of the novel coronavirus cause the party's inability to perform?* If a party would not have been able to perform even in the absence of the outbreak, it is unlikely that the party will be able to rely on force majeure as an excuse.
- *Is the party able to avoid or overcome the effects of the novel coronavirus through alternative means?* The ability to mitigate the effects of the novel coronavirus through alternative means cuts against the application of force majeure as a valid defence.

Did the party comply with any notice requirements? Even if all other elements establishing a force majeure defence are met, it is unlikely that a court or arbitrator will excuse a party's **failure to timely notice that a force majeure event has been triggered.**

Terms of Trade

Please note that this is a summary of the provisions, please refer to the relevant agreement for further detail

Broadcaster	Clause	Force Majeure wording	Options
	Clause 21.1	<p>"If the production of the Programme is prevented hindered or delayed by any cause not within the control of the Producer..."</p>	<p><u>Suspension</u></p> <ul style="list-style-type: none"> • Either party can provide written notice to suspend. • During suspension - parties shall consult with each other and use their best endeavours to limit expenditure on the production. <p><u>Termination</u></p> <ul style="list-style-type: none"> • After a period of 4 consecutive weeks or 6 weeks in any period of 8 consecutive weeks, either party can give notice to terminate. <p><u>Overages</u></p> <p>The Producer is responsible for any and all overspend.</p>
	Clause 25	<p>"... any cause preventing either party from performing any or all of its obligations which arises from or is attributable to acts, events, omissions or accidents beyond the control of the party so prevented including, to the extent that these are beyond such control, nuclear accident or acts of God, war or terrorist activity, riot, civil commotion, fire, flood or storm, except that:</p> <p>25.1.1 neither lack of funds nor a default or misconduct by any third party employed or engaged as an agent or independent contractor by the party claiming Force Majeure shall be a cause beyond the reasonable control of that party unless caused by events or circumstances which are themselves Force Majeure;</p> <p>25.1.2 mere shortage of labour, materials, equipment or supplies shall not constitute Force Majeure unless caused by events or circumstances which are themselves Force Majeure;</p> <p>25.1.3 strikes, lock-outs or other industrial disputes involving only the work force of the party so prevented or of any of its sub-contractors or suppliers shall not constitute Force Majeure.</p>	<p><u>Suspension</u></p> <ul style="list-style-type: none"> • Either party can provide written notice to suspend obligations whilst parties meet to discuss in good faith, how to resolve or alleviate the effects of the Force Majeure event. <p><u>Termination</u></p> <ul style="list-style-type: none"> • Where suspension of the producer's obligations lasts longer than 28 days, ITV can terminate agreement by serving notice in line with below: • Licence fee - ITV shall have no obligation to pay to the producer such proportion of the Licence Fee (and where applicable, the Producer Repeat Fees and Extension Fee) which has become due for payment at the date of termination. • Fees paid for exploitation of Rights – the producer has to repay the proportion of such sums (if any) that have already been paid by ITV to the producer prior to the date of termination.
	Clause 26.1	<p>"In the event that the Producer is unable to complete or continue production of the Programme in accordance with the terms of this Agreement and such inability results from an event or circumstances outside the Producer's control (other than industrial action taken only against the Producer, its servants, agents or taken only against the Producer in relation to the Programme"</p> <p>**Please note that the provision above is in the current version of Channel 5's Commissioning Agreement. Pact is currently in discussion with Channel 5 about amendments to the long form agreement thus the provision above may be subject to change**</p>	<p><u>Suspension</u></p> <ul style="list-style-type: none"> • Either party can serve notice in writing to the other to suspend performance of its obligations under the agreement from the date of such notice until the cause of such inability is removed. • During such suspension: <ul style="list-style-type: none"> ○ the parties shall take all practicable and appropriate steps to minimise and mitigate all costs and expenses in connection with the Programme. ○ Channel 5's obligation as to payment of monies to Producer shall apply in respect of contractual obligations of the Producer which Producer demonstrates to Channel 5 have been properly incurred and which Producer cannot properly avoid or delay and which have been previously approved by Channel 5, or which are in accordance with Pact's standard set of agreements. <p><u>Termination</u></p> <ul style="list-style-type: none"> • Each party has the right on notice in writing to the other to terminate the agreement if suspension continues for more than four weeks. • Upon and from such termination, Producer shall have no further obligation to produce and deliver the Programme, save to the extent of delivery of all physical materials and properties created, produced or acquired in connection with monies that are as at the date of termination due to Producer and which are required to pay the reasonable costs associated with the termination of any contracts entered into by the Producer and approved by Channel 5, or which are in accordance with Pact's standard set of agreements.

	<p>Clause 16(a)</p>	<p><i>"...if either party hereto is unable to observe or perform any obligation under this Agreement..."</i> <i>"...an event or circumstance outside that party's control and is not due to any lack of reasonable prudence or foresight..."</i></p>	<p><u>Suspension</u></p> <ul style="list-style-type: none"> • Either party can notify the other party to suspend their obligations. • Parties shall meet (without prejudice to their rights and obligations) to resolve in good faith any problems encountered by either party. <p><u>Termination</u></p> <ul style="list-style-type: none"> • Channel 4 can terminate in the event of breach by the Producer. • No relevant termination provisions included in the commissioning agreement for the Producer. <p><u>Overages</u></p> <p>Programmes contracted on a Budget Cost basis: On becoming aware of any circumstances which may lead to costs exceeding the sum(s) allocated in the Budget, either party must notify the other party.</p> <p>The Producer shall then;</p> <ul style="list-style-type: none"> - submit to Channel 4 a statement of costs, revised budget, etc (see Clause 5 of the General Terms for details) - comply with all reasonable instructions of C4 related to the reduction of expenses; - make no further payments out of the production account or incur further financial obligations without Channel 4's consent; and - apply an underspend in another budgeted area, bank interest earned on the production account, any general contingency (if appropriate), and finally the production fee in reduction of the excess Budgeted Cost of production. <p>Programme(s) contracted on a Fixed Price basis:</p> <ul style="list-style-type: none"> • Channel 4 would not expect to increase the Licence Fee save in circumstances where the relevant Commissioning Editor has made changes to the Editorial Specification in the course of production. • (Any applicable agreed overspend shall be recouped by Channel 4 from gross receipt prior to net receipt sharing).
	<p>The position is dependent on the negotiated agreements with producers. Producers should review force majeure provisions, termination and suspension clauses and open dialogue with Sky about obligations related to insurance, rescheduling costs, delivery and exploitation rights.</p>		

Please note that this is a summary of the provisions, please refer to the relevant agreement for further detail

Union	Agreement(s)	Force majeure wording/relevant clause	Options
	Pact/Equity TV Agreement 2019	<p>Clause T45 <i>"...production is prevented or interrupted or stopped by reason of any cause beyond the control of the Producer"</i></p>	<p>A force majeure needs to be established on each respective production in order to exercise these options. The producer must inform Pact and Equity of any decision to invoke a force majeure on each respective production.</p> <p>1. Suspend the production</p> <p><u>Duration of 3 weeks</u></p> <ul style="list-style-type: none"> The artists' engagement is suspended for 3 weeks. During this 3-week period, no fees are payable to the artists. To retain artists on first call after the 3-week suspension period, the producer must notify the artist before 3-week suspension expires. If the producer retains the artist on first call in accordance with above, the guaranteed period needs to be extended by the period of suspension. If the producer does not notify the artist to remain on first call, then the artist can be retained on second call. <p><u>Duration of 3 weeks or more</u></p> <ul style="list-style-type: none"> First call - producer must pay the artist first call payments for each week of suspension. During suspension, artist must consult the producer regarding availability if should the artist wishes to accept other work. Second call – subject to artist's availability, producer must pay retainer on £103 (minimum) for each 7-day period (or part of) which is payable until production can resume. <p>2. Cancel production The artists' engagements can be terminated by giving 5 days written notice and paying the performance salary that has accrued before cancellation.</p>
	Pact/Equity Supporting Artist Agreement 2020	No force majeure or termination provisions	Discretionary – producers have discretion on how to address the suspension or termination of engagements on a case by case basis.
	WGGB/Pact Agreement 2003 (updated 2012)	<p>No force majeure provisions</p> <p>Illness (clause 18) – <i>"account of illness or injury or other mental or physical incapacity"</i></p>	<p>Illness</p> <ul style="list-style-type: none"> No fees are payable if the writer is unable to delivery work within 14 days after the date specified in contract. Termination - written notice of termination can be served if the producer reasonable thinks that the writer will not be able to provide services due to illness.
	Pact/BECTU TV Drama Agreement 2017	<p>Clause 13.1 – <i>"If any cause beyond the control of the Producer shall prevent or stop work on the production or result in interruption or delay (including, but not limited to, fire, casualty, accident, riot or war, act of God, strike, lock out, labour conditions, judicial order or enactment or incapacity or death of any leading artist, the producer, the director or a senior technician)..."</i></p>	<p>Suspension</p> <ul style="list-style-type: none"> Duration of suspension: Producer can suspend immediately in the event of a force majeure event as defined in Clause 13 for the period of the Force Majeure event + further period not exceeding 21 days as may reasonably be required by the Producer to prepare to resume using the Worker's services, or until the engagement is terminated. Effect: only fees accrued up to the date of suspension are payable. No other fees are payable for duration of suspension. <p>Termination</p> <ul style="list-style-type: none"> Producer can terminate engagement immediately from date of Force Majeure event by serving notice in writing within 5 working days of the stoppage and paying only for services already rendered.
	Pact/FAA Agreement 2017	<p>No force majeure provisions</p> <p>Cancellation of calls – Clause 13</p>	<p>Cancellation</p> <ul style="list-style-type: none"> Calls cancelled before 12pm – no payment required. Calls cancelled between 12pm – 5.30pm on the day of the call: 50% of negotiated fee is payable unless cancellation is due to bad weather or any other cause beyond producer's control. This doesn't apply to Shift Calls or Non-performance Calls. Calls cancelled after 5.30pm – full fee is payable. Calls cancelled less than 2 hours before call time due to bad weather/other cause beyond the producer's control – 50% negotiated fee payable. Calls cancelled less than 2 hours before call time (including due to bad/weather other cause beyond the producer's control) – full fee is payable.

 <p>Musicians' Union MU</p>	Collective Agreement between Pact and Musicians Union 2020	No force majeure or termination provisions	These are subject to individual contracts.
 <p>DIRECTORS</p>	DUK Blanket	No force majeure or termination provisions	These are subject to individual contracts.