

## **What can the contract adjustment mechanism for authors and performers learn from case law on contracts and COVID-19?**

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According to article 20 of Directive 2019/790 on copyright and related rights in the Digital Single Market, EU member states have to implement a contract adjustment mechanism for authors and performers in their domestic legal systems. This contract adjustment mechanism, also referred to as the best-seller clause, entitles authors and performers to renegotiate their contracts with producers and claim additional, appropriate and fair remuneration when the agreed contractual one turns out to be disproportionately low compared to revenues accrued from the exploitation of their works or performances. In other terms, when a significant imbalance between price and revenues is observed, one contractual party can force a modification of the economic terms of their agreements.

Because of the COVID-19 pandemic, the two last years have witnessed an important wave of litigation in the area of contract law across the globe. Different types of plaintiffs have sought to be discharged of their contractual obligations or have tried to amend the content of their contracts. In many of these cases, the pandemic has been described as producing also a significant imbalance between price and revenues. The COVID-19 pandemic has also led to state intervention in many private contracts. In this vein, many regulations have been passed in different jurisdictions entitling a contractual party to claim for a modification of the economic terms of their agreements. When deciding these contractual claims, courts worldwide have had to deal with issues such as unforeseeability, impossibility, change of circumstances or frustration.

This contribution aims to explore to which extent, if any, the enforcement of the contract adjustment mechanism for authors and performers may benefit from the very rich case law on contracts and COVID-19. It is unlikely that this case law will be of utility for a better understanding of adjustment of remuneration in contracts with authors and performers. In this regard, the particularities of copyright contracts and the policy goals underlying the contract adjustment mechanism in article 20 of the DSM Copyright Directive suggest that they cannot be analytically compared with the contractual problems posed by COVID-19. This contribution seeks to unveil the differences between the two fields. For instance, a usual factor that would activate the contract adjustment mechanism –unexpected success- is not unforeseeable: although success in copyright industries is highly unpredictable and uncertain, it can be anticipated by the parties and bargained about in the contract. Also, copyright contracts are highly incomplete because of their relational character: they usually involve a high degree of specific investments by both parties and are also affected by other contractual relationships between them and with other counterparties (such as a competing producer). Also, the contract adjustment mechanism is a one-sided or unilateral remedy since it can only be used by authors and performers whereas general remedies to face the COVID-19 effects on contracts are bilateral.