By William Hibbert & Harrison Denner

Contracts, cancellations and COVID-19

Henderson Chambers barristers William Hibbert and Harrison Denner discuss the implications for consumer rights and trading law when contracts are cancelled

The COVID-19 pandemic is having an enormous and rapidly evolving impact on the daily lives of the vast majority of individuals and businesses. In particular, businesses have been forced to close by legislation, or the dearth of customers, or difficulties in obtaining supplies. Even if businesses are still functioning, they are often struggling or unable to fulfil their contractual obligations in the manner initially intended. At times, they may be unable to fulfil their original contractual obligations at all.

What can the consumer do about the trader that cannot perform a contract and cancels it, or alters performance because of COVID-19? Does the consumer still have his or her rights to claim damages or the return of any advance payment? Equally, can the consumer be held by the trader to performance of the contract if the circumstances arising from COVID-19 mean the consumer no longer wants to proceed? This article gives some guidance on the tricky issues that arise.

The first step is to look at the contract and familiarise yourself with legal terms usually only thought about by law students studying their first year of contract law, or city lawyers dealing with major commercial contracts.

The first such term is *force majeure*. Does the contract contain a *force majeure* clause? It is the sort of clause that the consumer will usually barely glance at, if it is noticed at all in the small print. It may also be given as a ground for cancellation within a cancellation clause.

Force majeure clauses typically suspend one or both parties' contractual performance obligations, or allow for an altered performance, or no performance at all, on the occurrence of events outside the parties' control.

In English law this is a relatively (in lawyers' terms) new concept, different from the older concept of 'Act of God' (an exceptional, unanticipated natural event – the effects of COVID-19 on contracts may be said to be caused by non-natural governmental action rather than the natural event of the illness itself).

In 1915 we find a High Court Judge in a case dealing with delays in a ship building contract saying rather sniffily: "The words '*force majeure*' are not words which we generally find in an English contract. They are taken from the *Code Napoléon*, and they were inserted by this Roumanian gentleman or his advisers, who were no doubt familiar with their use on the Continent.

"I have had the evidence of a Belgian lawyer as to their meaning, and he said that the words are understood on the Continent to mean "causes you cannot prevent and for which you are not responsible."

The judge went on to find that *force majeure* does not cover delays caused by the bad weather in Sunderland, workers' attendance at football matches, or shipbuilders attending the shipyard manager's funeral.

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The present case

Is COVID-19 a *force majeure* event? There is no statutory definition of a *force majeure* event and so the parties to the contract can theoretically define such an event in whichever way they see fit. However, the following points will assist when assessing whether COVID-19 is covered by a force majeure clause.

A clause that simply refers to *force majeure* without more is unlikely to be effective to allow a party to avoid proper performance of the contract. A clause that simply stated that the "usual '*force majeure*' clauses shall apply" has been held to be void for uncertainty.

- Does the clause expressly refer to pandemics? If so, plainly COVID-19 is a *force majeure* event under that contract.
- Does the clause expressly refer to terms that could cover COVID-19 and the circumstances surrounding it? For example, terms such as "health emergencies" and "national emergencies" may be sufficient, as may "Government action or interference" or similar.
- Does the clause expressly enumerate certain events that will constitute *force majeure* events? If so, and if pandemics or health emergencies etc. are not expressly listed, the question is whether the list is indicative or exhaustive. If the former, COVID-19 may still constitute a *force majeure* event; if the latter, it is unlikely to do so.
- Does the clause require that performance must be rendered impossible or simply hindered? If the former, COVID-19 alone is less likely to constitute a *force majeure* event. A distinction can for example be drawn between contracts for the delivery of goods and contracts for attendance at a sporting, music or theatrical event: deliveries of goods are, albeit with difficulties and delays, generally proceeding while, by contrast, all sporting, musical and theatrical venues are closed. Therefore, while it might be said that deliveries are hindered, the provision of a sporting, music or theatrical event is impossible. It is important to assess the precise nature of the Government restrictions in force and how they impact on performance of the contract.
- Does the clause require any specific action by the party whose contractual performance is prevented/hindered? It may be that the clause requires the relevant party to give a certain amount of notice to the other party before it can be relied on. More generally, a party must show that it has used reasonable endeavours to prevent, or at least mitigate, the effects of the *force majeure* event.

For contracts between businesses, *force majeure* clauses will need to satisfy the requirement of reasonableness contained in section 3(2) of the Unfair Contract Terms Act 1977. For contracts between businesses and consumers the Consumer Rights Act 2015 will apply and the *force majeure* clause, like any cancellation clause, will need to satisfy the requirements of fairness (section 62) and transparency (section 68). For example, is the term inappropriately excluding or limiting the consumer's rights in the event of the trader's total or partial non-performance (see paragraph 2 of Schedule 2 of the Act, which lists terms likely to be considered unfair)? Is the language used ▸▸

plainly intelligible to a consumer? Simply using the term "*force majeure*", without more of an explanation of what it means, is unlikely to satisfy this test.

If COVID-19 is a *force majeure* event in the clause, what follows? Again, the analysis begins with the contract; it may expressly state the consequences of a *force majeure* event. This may involve permitting some form of delayed obligation: suspending the obligation for x days after the conclusion of the event, or to the earliest date reasonably practicable. It may involve some form of renegotiation, for instance of the price, and it could include the right to terminate the contract altogether, for example if a party's inability to perform its contractual obligations continues for a longer period of time.

Burden of proof

Importantly, the wrongful invocation of a *force majeure* clause to try and give a different or no performance will render that party in breach of contract and thereby liable in damages. The burden of proof lies on the party seeking to rely on the clause to prove both that the clause covers the event in question, and that its non-performance was due to that event.

COVID-19 may also mean that the consumer is unwilling to go ahead with the contract even though the trader is still intending to perform. When it comes to the consumer relying on a *force majeure* clause to avoid performance of his or her obligations, it must be remembered that typically the consumer's only obligation is to make payment. Given that payment is unlikely to be made "impossible" as a result of COVID-19, most *force majeure* clauses cannot be relied on by the consumer to avoid payment or recover payment in such situations.

If the trader triggers the clause, one issue will be whether the consumer can get back any advance payment. This will depend on what the clause says. *Force majeure* clauses are about the agreed allocation of risk and if the clause makes no provision for payment or repayment, in principle costs will lie where they fall. If the clause allows for alternative or delayed performance, it may fairly allow the trader to hold onto the advance payment or to offer a voucher to be used in the future but if it makes no provision for payment or repayment, the parties will have to look to insurance for compensation (if they have any). However, in a consumer transaction this may well make the clause unfair under the Consumer Rights Act and therefore not binding on the consumer at all.

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Frustrating times

In many contracts there will be no *force majeure* clause, or the clause may not be binding because it is unfair under the Consumer Rights Act; in that case the doctrine of 'frustration' becomes relevant and may provide an alternative, and better, protection for the consumer.

A contract is 'frustrated' when the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

Typically, the mere fact that it has become more difficult, more burdensome or more expensive for a party to perform its contractual obligations will not enable that party to avail itself of the doctrine of frustration. Again, there is also likely to be a distinction to be drawn between contracts for the delivery of goods and contracts for services, such as building works, transport, hotel stays or sporting, musical or theatrical events. The former would naturally seem to more likely fall within the category of obligations that are merely more difficult to fulfil, whereas whether the latter can be performed at all will depend on any Government restrictions in place at the time of intended performance.

If a contract has been frustrated, it is automatically terminated and the parties are excused from their outstanding obligations and neither party can claim damages for non-performance. However, if either party incurred obligations prior to frustration, they remain bound to perform those. Having said that, consumer contracts are likely to be governed by the Law Reform (Frustrated Contracts) Act 1943, under which:

- Money paid before the frustrating event can be recovered and money due before the frustrating event, but not actually paid, ceases to be payable (section 1(2));
- Where one party has incurred expense in its performance of the contract, it may be entitled to recover such sums from the other party (section 1(2)); and
- Where a party has received some benefit from the contract before the frustrating event, they may be liable to pay a 'just' sum to the other (section 1(3)).

A consumer who has paid upfront for something that can no longer occur is therefore likely to be in a better position as a result of frustration than *force majeure*. Again, care must be taken before a party invokes frustration as, if this is done incorrectly, that party may be found to have committed a breach of contract and be liable to the other for damages.

> *"COVID-19 may mean that the consumer is unwilling to go ahead with the contract even though the trader is still intending to perform*

Finally, we would draw attention to one particular sort of consumer contract that has special rules applying to it. Under regulation 13 of the Package Travel and Linked Travel Arrangements Regulations 2018, there is a term implied into a package holiday contract that where the organiser is "prevented from performing the contract because of unavoidable and extraordinary circumstances" and gives prompt notice, it "may terminate the package travel contract and provide the traveller with a full refund of any payments made", and is not liable for any additional compensation.

The termination and the giving of the refund go hand-in-hand. Equally, under regulation 12 the traveller is entitled to terminate where, "due to unavoidable and extraordinary circumstances" the performance of the package or the travel arrangements are affected and will receive a full refund (though not compensation) without having to pay a termination fee. Any refund must be paid without undue delay and within 14 days (regulation 14). Any term which seeks to circumvent these statutory provisions is not binding on the traveller (regulation 30), so attempts by the organiser to rely on a *force majeure* clause or any other clause giving less protection to the consumer will be ineffective.

This has not prevented some holiday providers from delaying payment or palming consumers off with vouchers. As is so often the case, getting traders to treat consumers properly can be a frustrating business!

About the authors

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