



The impact of Covid-19 on contracts for the sale of goods

RICK CANAVAN, MODULE CONVENOR COMMERCIAL LAW

TRANSCRIPT

Hi my name is Rick Canavan and I am the module convenor for Commercial law. Welcome to the second of the Commercial Law Blog posts for the 2019/20 academic year.

The Impact of the COVID-19 Pandemic on Sales of Goods Contracts.

The global outbreak of COVID-19 at the start of 2020 has changed, in just a few short weeks, the way many of us live, for the time being at least. It will surely hasten longer term changes too. As much of the world locks down, or shields against the virus, the streets have emptied, and the skies have fallen silent. Shops, businesses and factories have closed. The economic impact of this global slowdown in production and consumption will no doubt be significant and felt for years to come.

All of that production and consumption would be the product of many contracts between suppliers, dealers, brokers, wholesalers and retailers. A whole network of dealings. But if goods cannot be transported, are half finished, or simply cannot be made, or picked or finished, this will clearly have an impact.

In commercial sales of goods contracts, goods held up at factories, international transport disruption, delays at borders and inspection points, perishing goods, agricultural goods that cannot be harvested make contracts difficult to perform on time, difficult to perform at all, often the buyer and seller are in a position where there is nothing that either can do and they are caught in an entirely unforeseen situation.

In consumer sales, buyers may have purchased goods that they have a right to return but are unable to do so. A seller may be resisting offering refunds or may be unable to do so, or perhaps unwilling to supply the goods agreed at all.

This presentation will consider how the law responds to this unprecedented situation, if indeed it has any response at all.

For commercial contractors the question will usually be one of either a force majeure clause or, in the absence of a force majeure clause, the common law rules on frustration and their statutory remedies, which you will have encountered when studying Contract Law.

Parties generally use force majeure clauses as they provide greater certainty – the parties can set out in exactly what circumstances performance will become effectively impossible in the context of the agreement and when it will therefore be excused. That is not to say that disputes do not occur in relation to force majeure clauses, of course they do, but they tend to be questions of interpretation. One question many traders will have to face is whether or not the force majeure clauses they have included deal with pandemic, all pandemics or the disruption caused by them – some traders will simply never have foreseen such a risk. Therefore their terms make no reference to it. The common law of frustration seeks to determine whether or not, in the absence of the fault of either party, the contract is no longer capable of performance in a way that the parties had intended it to be.

The difficulty is the common law of frustration can when compared to a force majeure clause can be very uncertain in its application.

The Sale of Goods Act provides little assistance in the current situation – all roads lead to either a force majeure clause or common law frustration, unless there is a s.7 issue. A buyer may initially seek a claim against a seller for non-delivery under s.51 but the seller could then turn to either force majeure clause or frustration to argue that the obligation to deliver was excused. Similarly, a seller may consider pursuing a buyer under s.49 for non-payment but of course this only applies where the property has passed, leaving only s.50 as the remedy. But the seller is in the same position as the buyer – if performance is excused, they cannot bring an action, at least not on that basis.

Parties to commercial contract therefore are largely left to fend for themselves, the law by and large does not protect them but that is only to be expected. The Sale of Goods Act, after all, very often provides only a fall back in the absence of an expression of contrary intention by the parties.

Is the position better for consumer buyers? Consumer buyers of course will buy with the benefit of the protection of the Consumer Rights Act and a raft of other legislation that is outside of the scope of this module. However, consumer contracts could still feature force majeure clauses. However, such a term would have to satisfy the CRA's concept of fairness and any attempt to excuse performance on a flimsy pretext may fail in this regard. A trader may also be unable to rely on a force majeure clause where that clause is not clearly worded, it has been suggested than even labelling it 'force majeure clause' may threaten its enforceability.

Consumers may also find it easier to exit from a contract where the seller cannot deliver the goods. S.28 requires that unless the parties have agreed otherwise, the seller must deliver the goods and deliver them without undue delay, meaning a period of no more than 30 days under s.28(3). If a trader refuses to deliver the goods on time or their delivery is essential, or the trader has been told it is essential, the buyer is free to treat the contract at an end and claim a refund under s.38(6). Alternatively, they may allow the seller additional time to perform under s.38(7). In either case, if the seller fails, the buyer can refuse to accept late delivery and the seller must repay any money paid without delay under s.38(9) and 38(10)(b).

In addition, the Competition and Markets Authority has launched a COVID-19 task force to ensure that consumer rights are recognised and upheld throughout the crisis and to ensure that the public are able raise concerns about their abuse. To date, the CMA has taken action against firms that have refused to offer refunds to consumers and has written to a sellers of personal protection equipment expressing concerns about their approach to pricing.

Overall therefore, we see a slightly more favourable position for consumers, as opposed to commercial buyers and sellers. In many cases where the consumer or commercial buyer or seller the reality maybe somewhat different and of course in situations where a seller or buyer has become insolvent the reality may be an unpalatable one.

Thank you for listening and I hope this podcast has been useful.