

Members of the RYA community are likely to have entered a range of contracts before the COVID-19 pandemic. From charter agreements, RYA courses to contracts for services the effect of the current situation is being felt across the boating community. The position is developing daily, with unprecedented government involvement. The purpose of this Guidance is to provide a helpful starting point but you may need to seek independent legal advice.

### THE CONTRACT

If the contract you have entered is unlikely to be performed, the first step is to establish the contractual terms govern that govern the relationship. Terms may take the form of a formal written agreement, signed by the parties, or set of standard terms and conditions provided by one party to the other, or not unusually (and not so helpfully) a string of emails or conversations (often scantily) agreeing the parties respective responsibilities.

### Breach of Contract

If one party has promised to do something under the contract, and is unable to do so, it is likely to be a breach of contract. If a breach of contract can be established, the innocent party may be able to claim damages from the breaching party.

Whether there has been a breach of contract will depend on the specific terms of the particular contract, and the circumstances giving rise to the breach. By way of example in the current climate, should a business be prevented from opening and so be unable to meet its contractual obligations it may be in breach of contract. Alternatively, if the customer is discouraged (or prevented) from traveling to the business to take advantage of the service, the customer may be regarded as in breach of contract.

### Force Majeure clauses

A force majeure clause may excuse one or both parties from performance of their contractual obligations following the occurrence of certain events. Such clauses are, of course, coming under particular scrutiny right now. Whether or not a contracting party might be able to rely on a *force majeure* clause as a consequence of the ongoing and significant disruption caused by Covid-19 will depend on three things:

- the attitude of the contracting parties;
- the specific drafting of the clause; and
- as a last resort, the determination of the courts.

Force majeure clauses vary in style an effect, and so it is important to review their effect carefully on a case by case basis. In reviewing their effect there are two things to consider:

- a) Does the event fall within the clause?

Many force majeure clauses list certain things that will be considered a force majeure event e.g. fire, flood, earthquake, and terrorism. Some may also include a specific reference to pandemics or disease, in which case COVID-19 is likely to be covered, others may include reference to “acts of God” or “events outside the parties’ reasonable control” which it may be argued are sufficient to cover the reasons for the non-performance. The precise drafting, the circumstances of the non-performance and the intentions of the parties at the time of entering into the contract will all be relevant.

Some *force majeure* clauses require the defaulting party to have been “prevented” from performing the contract, in which case it will be necessary to show that performance was either physically or legally impossible. It will not be sufficient to show that performance had simply become unprofitable.

b) What does the clause say will happen once it has been triggered?

Assuming COVID-19 falls within the relevant force majeure clause, the effect of that clause should be considered. Some force majeure clauses enable the contract to be ended, or impact on the value of any damages payable while others result in an extension of time for performance, and so the effect of the effect of the specific clause needs to be considered.

If it appears that a force majeure clause may be of assistance, the party seeking to rely on it should ensure they follow other contractual provisions, such as how to give notice, to the letter to ensure that any rights they may have are not lost.

## **Frustration**

The doctrine of frustration may be of assistance if there is no effective force majeure clause. The doctrine requires the occurrence of an event that is not the fault of either party, which occurred after the formation of the contract, and which makes it physically or commercially impossible to perform the contract.

The consequences of frustration are that the contract automatically comes to an end and the parties are no longer bound to perform their obligations. As a result of such extreme consequences, the threshold for establishing frustration is much higher than for force majeure clauses, and hence it is generally difficult, and costly to prove, and is rarely relied upon. However the effect of governments around the world passing emergency legislation to restrict trading or potentially movement is unprecedented and so it is not known if that may give rise to frustration claims.

## **The commercial realities**

The COVID-19 situation is affecting both businesses and consumers in equal measure, and while it may be possible to establish you are legally correct, doing so is no guarantee the business will be in a position to make any payments which may be due, or even that the court system will be in a position to process claims should litigation become necessary.

As a consequence early dialogue is suggested in the hope a mutually agreeable solution can be found. It is recommended that any subsequent agreement is properly recorded.

## **Insurance**

For certain types of transactions, for instance a charter holiday, it is possible that you may have taken out insurance which provides cover in the current situation. It is recommended that you review any insurance policies to see if you are covered.

## **Credit Card protection**

If you have paid for the goods or services by credit card, your credit card provider may be able to help, as many credit cards provide guarantees or refunds. You should contact your credit card provider in the first instance to discuss the options.

## **Government**

Finally, recent weeks have seen unprecedented government involvement in day to day life, in part in an effort to preserve the economy. It is possible that the UK Government may enact legislation that specifically deals with contractual issues arising as a result of COVID-19.

Further government intervention cannot be ruled out and so it remains vital to monitor developments which may conceivably touch on contractual relations or the potential remedies available to parties.

If you have any queries, questions or comments on the information contained in this leaflet, kindly contact the Legal Team on 023 8060 4223 or [legal@rya.org.uk](mailto:legal@rya.org.uk).

## **RYA Responsibility Statement:**

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