

Invoking Force Majeure for COVID-19 in International Supply Contracts

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With COVID-19 spreading throughout the world, parties to supply contracts need to understand whether, and under what circumstances, a party's performance can be excused due to COVID-19. **In a previous article**, we examined supply contracts governed by U.S. law and the Uniform Commercial Code. However, for international supply contracts, Article 79 of the UN Convention on the International Sale of Goods ("**CISG**") may govern and determine if, and under what circumstances, a party affected by COVID-19 may be excused from performance.

When Does the CISG Apply?

The CISG is an international treaty, ratified by the United States in 1986, that sets out the rules governing certain international contracts for the sale of goods and the rights and obligations of the parties, similar to the Uniform Commercial Code (UCC) in domestic contracts in the United States. Article 79 of the CISG, which sets forth when a party can be excused from performance, would likely apply in supply contracts that meet each of the following criteria:

- The contract does not contain a force majeure clause, or the force majeure clause does not reference the CISG.
- The parties to the contract are from different countries (called "**Contracting States**"), each of which has adopted the CISG and made it applicable in its choice-of-law rules. The United States, China, European Union countries and most **countries of the world** are Contracting States. Note, that the CISG can sometimes apply to contracts between domestic corporations if their relevant places of business are in different Contracting States.
- The contract is for the sale of goods, such as manufactured goods, raw materials and commodities. But the CISG does not apply to contracts for services only, or to sales of goods bought for personal use, or to sales of ships, aircraft or electricity.
- The contract does not state that the CISG will not apply, even if it does not provide that the CISG applies.

For example, in a supply contract between two parties from different Contracting States that does not contain a force majeure provision and provides that New York law governs, but does not otherwise indicate that the CISG is disclaimed or inapplicable, then the CISG would likely apply. This is because the CISG is also part of the law of New York.

Force Majeure in Article 79 of the CISG

To excuse performance, Article 79 requires the non-performing party to prove: (a) its failure was caused by an "impediment beyond [its] control" that it could not reasonably have taken into account when entering into the contract, and (b) the consequences could not have been avoided or overcome. As applied to the COVID-19 outbreak, therefore, a party would be excused if the COVID-19 outbreak prevented it from manufacturing and delivering the goods and that the party had no way to avoid or overcome that impediment.

Unfortunately, as is the case in most situations, the legal determination may not be so clear cut. For instance, what if the affected supplier was not forced by the government to close its factory, but did so voluntarily? Or what if the party's employees were not struck ill, but were not able or willing to come to work? Or what if the party could have hired other employees or subcontracted the production of the goods to a third party (albeit at a higher price)? In other words,

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under Article 79, how much hardship does the non-performing party need to prove in order to meet the threshold of triggering an "impediment" which it is not able to avoid or overcome?

"Hardship" Threshold Under Article 79

There is not much case law, especially in the United States, interpreting Article 79. In the U.S., supply contracts are more commonly governed by the UCC, which has its own analogous provision in UCC 2-615. That provision sets forth a "commercial impracticability" standard, which could excuse non-performance in a supply contract as a result of COVID-19 if performance by the supplier becomes "commercially impracticable."

In contrast to the language of UCC 2-615, Article 79 is more definite and seems to require that the "impediment" be absolute, and not just one of degree. Indeed, the legislative history of CISG implies that Article 79 is limited to cases involving a greater obstacle to performance than merely "hardship" or "commercial impracticability." Under this line of reasoning, if the COVID-19 outbreak only makes producing goods more difficult or expensive, it would not constitute an impediment.

Nevertheless, the few U.S. and foreign court decisions interpreting Article 79 have tilted in the other direction. At least a couple U.S. courts have held that it is appropriate to use analogous provisions of the UCC in interpreting Article 79, thereby allowing for "commercial impracticability" to be implied in Article 79. Similarly, court decisions in other countries have held that an "impediment" under Article 79 can be created if the unforeseen circumstances significantly and disproportionately increased the burden of performance by a party.

Conclusion

As is typically the case, it is important to review the underlying facts in a particular situation in order to make a legal determination as to whether a party affected by COVID-19 can be excused from performance under Article 79 of the CISG. However, in order to make that legal determination, it must first be determined what law governs: the force majeure provision in the contract, UCC 2-615, Article 79 of the CISG, or some other principle. Please contact the author or your Miller Canfield attorney with further questions.

This information is based on the facts and guidance available at the time of publication, and may be subject to change.