

## **The Impact Of Coronavirus (COVID-19) On Business: Non-Performance Of Contracts Based Upon Force Majeure, CISG Article 79 And UCC 2-615**

The worldwide coronavirus outbreak, designated as COVID-19 by the World Health Organization, is having an immediate impact on businesses throughout the world. Companies should proactively take steps to minimize the economic impact from COVID-19, including evaluating the necessity for invoking force majeure or defending against possible non-performance of contracts.

### **Excuse Of Performance Based Upon Contractual Force Majeure Provisions**

Evaluation of force majeure provision in contracts is important to assess a party's right to suspend or, in the event of prolonged force majeure, terminate the contract. In common law jurisdictions, force majeure is not a doctrine applied by the courts absent a provision in the applicable agreement. As such, the analysis should be on the language of the force majeure provision and the applicable choice of law.

Force majeure clauses typically excuse nonperformance by a party when an "Act of God" or other extraordinary event prevents a party from performance. Typically, to invoke a force majeure clause as grounds for nonperformance of a contract, the event must have been beyond the party's control and without its fault or negligence. The nonperforming party has the burden of proof.

Whether the business effects from COVID-19 can excuse performance will depend on the language of the particular force majeure clause. Under the law of many states, force majeure is only triggered by the occurrence of an expressly stated contingent event such as "disease," "epidemic," "pandemic," "quarantine," "act of government" or "state of emergency." It is usually not enough for a party asserting the force majeure clause to show that the event made performance merely more difficult or economically burdensome. The party must show that performance of its contractual obligations has been actually prevented by the event. Taking precautionary measures or making a voluntary decision not to perform is not the same as performance being prevented by the event.

### Check List of Action Items When Considering The Impact Of Force Majeure:

- Review contracts to identify specific force majeure rights, remedies, and triggering events.
- Identify notice requirements and event triggering deadlines. Prompt written notice to a counterparty of a triggering event is often required within a short time period. Failure to give timely notice may waive rights.
- Assess and document possible means of alternative performance.
- Assess steps to avoid or reduce disruption to operations.
- Evaluate consequences of a contract breach or default, including collateral issues, loan covenants and SEC reporting requirements.
- Review insurance coverage for business interruption losses.

### **Excuse Of Performance Under CISG Article 79**

International supply contracts may be governed by Article 79 of the UN Convention on the International Sale of Goods (“CISG”), which provides that a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an impediment beyond its control, it could not reasonably be expected to have taken the impediment into account at the time of contracting and could not have avoided or overcome it or its consequences. It frequently applies when:

- The contract is for the sale of goods, such as manufactured goods, raw materials and commodities. However, 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 parties to the contract are from different countries (“Contracting States”). The U.S., China, European Union countries and most countries of the world are Contracting States. The CISG may even apply to contracts between domestic corporations if their relevant places of business are in different Contracting States.

For example, if a party has to shut down manufacturing operations as a result of the COVID-19 outbreak and the local government tells citizens to stay at home, a party may be excused from performance because it had no way to avoid or overcome that

impediment. Article 79 is limited to cases involving a greater obstacle to performance than mere “hardship” or “commercial impracticability.”

### **Excuse Of Performance Under UCC 2-615**

The Uniform Commercial Code provides that if a contract does not contain a force majeure clause and no provision states a party assumed the risk of non-performance, a delay in delivery or non-delivery of goods may not be a breach of contract if delivery of the goods was made impracticable by the occurrence of an event for which the nonoccurrence was a basic assumption on which the contract was made. This excuses performance when performance under the contract is commercially impracticable due to unforeseen circumstances not contemplated by the parties to the contract. For example, it is unlikely that parties to most contracts could have foreseen the commercial impact of COVID-19 shutting down much of the world economy.



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