



International Law Section: Force Majeure in the Time of COVID-19

November 12, 2020

6:00 p.m. – 8:30 p.m.

**CT Bar Association
Webinar**

CT Bar Institute, Inc.

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Table of Contents

Lawyers' Principles of Professionalism	3
Agenda	6
Faculty Biography	7
The Business Lawyer's International Toolbox: Force Majeure Excuses for Contract Non-Performance – In an Age of Pandemic	8

LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer's conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

**THE BUSINESS LAWYER'S INTERNATIONAL TOOLBOX: FORCE MAJEURE
EXCUSES FOR CONTRACT NON-PERFORMANCE – IN AN AGE OF PANDEMIC**

**Thomas J. Welsh
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Nippon Steel Trading Americas, Inc.
and
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**Connecticut Bar Association
International Law Section**

**November 12, 2020
1 Hour Presentation**

A. INTRODUCTION

1. Scope of Discussion
2. Why Connecticut Business Lawyers Should Care About International Transactions

B. COMMON LAW OVERVIEW

C. UCC ARTICLE 2 OVERVIEW

D. CISG OVERVIEW

E. LAW OF (A FEW) OTHER NATIONS

F. FORCE MAJEURE CLAUSES – Discussion and Examples

Thomas J. Welsh



Mr. Welsh is currently General Counsel for Nippon Steel Trading and of counsel to Updike, Kelly & Spellacy. Prior to joining Updike, Kelly & Spellacy in 2016, Mr. Welsh was a founder and principal of Brown & Welsh, P.C., a general business law practice located in Meriden, Connecticut. Mr. Welsh focuses his practice on business law, including commercial law and bankruptcy matters, commercial real estate matters, commercial lending and domestic and foreign purchase and sale of goods transactions. He also represents businesses in the negotiation and drafting of business agreements, including the acquisition and sale of business assets, with a concentration in matters involving technology and construction of complex equipment. He also serves as an arbitrator of business disputes for the American Arbitration

Association and is the former Chair of an American Bar Association Joint Task Force on Alternative Dispute Resolution in Commercial Finance Transactions.

He received his J.D. from the University of Connecticut School of Law in 1980 and his B.S., magna cum laude, in Physics from the University of Connecticut in 1975. Prior to enrolling in law school, Mr. Welsh studied as a graduate student in the PhD program of the Department of Physics at the Massachusetts Institute of Technology and was awarded a research assistantship in neutron diffraction with Nobel laureate Dr. Clifford D. Shull.

He is admitted to practice in Connecticut, New York, in the Federal District, District of Connecticut and before the United States Court of Appeals for the Second Circuit.

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A. INTRODUCTION

1. **Scope of Discussion**: A review for business lawyers of the major concepts and provisions of private international law (common law and Uniform Commercial Code (“UCC”) in the United States) and the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) relating to excused non-performance of contract obligations and *force majeure* clauses. This discussion is in the context of major upheavals in business expectations and the economic impact of government responses to the COVID-19 novel virus pandemic circling the globe.
2. **Why Connecticut Business Lawyers Should Care About International Transactions**:
 - **2018 International Trade Statistics**: CT Trade was 25th out of 50 in Exports - \$17.4 Billion and 27th in Imports \$19.85 Billion¹
 - **Top 10 Export Countries**: France, Germany, Canada, United Kingdom, Mexico, China, Netherlands Japan, Singapore, and South Korea.
 - **Jobs**: In 2016 65,000 jobs were supported by CT international trade.
 - **International Trade is Essential**: Examples²:
 - China controls 80% of Pharma Raw Materials
 - China Controls 97% of Antibiotics
 - Last U.S. Penicillin Plant Closed in 2004

¹ www.Globalede/msu.edu/states/connecticut/tradestats also U.S. Trade Representative we site: <https://ustr.gov/countries-regions/united-states>

² Tracy, FORCE MAJEURE AND COVID-19: INTERNATIONAL ISSUES, Materials for American Bar Association Webinar, April 27, 2020

B. COMMON LAW OVERVIEW

- **Early Exceptions to Sanctity of Contract** -- In all legal systems impossibility, force majeure and other principles have become grounds for exceptions to the rule of sanctity of contract (*pacta sunt servanda*). These have extended back to classic Roman law principle of *impossibilium nulla est obligatio* – or no obligation to do impossible things.³
- ***Taylor v. Caldwell*, 122 Eng. Rep. 309 (Q.B. 1863)** Generally considered the source of the doctrine of excuse for physical impossibility. [Linking excuse to earlier doctrines of impossibility due to government action or personal services due to death.]⁴ Under the early common law performance was absolute unless and only to the extent qualified by the promisor. Early liberalization of the rule developed to deal with situations involving the destruction of the subject matter of the contract if it involves no fault on the part of the promisor.⁵
- **Restatement (Second) of Contracts §261 - Discharge by Supervening Impracticability (1981)**⁶

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Elements of Impracticability:

- Occurrence of an unexpected contingency.
- Risk of that unexpected occurrence not allocated to one party by agreement or custom.

³ CISG Advisory Opinion No. 20, HARDSHIP UNDER THE CISG, Comment 0.2, 5 February, 2020. For an excellent review of the cases and principles of Connecticut law on these issues see Hellman, Kaelin, Birney, COVID-19 AND THE CONTRACT ISSUES THAT ARISE, April 17, 2020, the written materials for a Connecticut Bar Association webinar on this topic (ECB200417) available on the CBA website at <https://ctbar.mycrowdwisdom.com/diweb/catalog/item/sid/103340425>

⁴ Sheldon Halperon, APPLICATION OF THE DOCTRINE OF COMMERCIAL IMPRACTICABILITY: SEARCHING FOR "THE WISDOM OF SOLOMON", 135 Pa. L. Rev. 1123 (June, 1987) at 1131, note 34.

⁵ See Robert Sommer, COMMERCIAL IMPRACTICABILITY – AN OVERVIEW, 13 Duquesne L. Rev., 521, at 521, citing Williston, A TREATISE ON THE LAW OF CONTRACTS §1931 (rev. ed. 1938).

⁶ The excuse of commercial impracticability appeared initially in the Restatement (First) of Contracts §457 (1932) where the term 'impossibility' is defined to mean "... not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss." This concept was not embraced by courts but ultimately was incorporated into UCC Article 2. See Camero, MISSION IMPRACTICABLE: THE IMPOSSIBILITY OF COMMERCIAL IMPRACTICABILITY, 13 UNH L. Rev., No. 1 (2015) for an excellent overview of the historical development and problems with this definition.

- The occurrence rendered the performance commercially impracticable.
- The event must not have been foreseeable and generally increase in cost alone not a sufficient for ‘impracticability’.

Frustration of Purpose: When the essential purpose of the contract has been thwarted by the occurrence of an unforeseen event.⁷ Elements:

- Event substantially thwarted the principal purpose;
- Nonoccurrence of the event was a basic assumption upon which the contract was made;
- The frustration occurred without the fault of the party; and
- The party didn’t assume a greater obligation.

Possible Consequences of Common Law Excuse:

- Relief from liability for damages due to breach.
- Termination of contract
- Reformation of Contract⁸

C. UCC ARTICLE 2 OVERVIEW

§ 2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller ay have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

⁷ See *Krell v. Henry*, 2 K.B. 740 (C.A. 1903) (lease of premises to view coronation which was cancelled).

⁸ Not favored – see Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. Rev. 1 (1984) which discusses and criticizes the case of *Aluminum Corporation of America v. Essex Group Inc.*, 499 F. Supp. 53, 29 UCC Rep. Serv. 1 (W.D. Pa., 1980) where the court revised the agreement to provide alternative price terms if felt were more appropriate.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Elements:

- Performance has been made impracticable⁹;
- Due to the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made¹⁰; or
- Due to compliance in good faith with any foreign or domestic governmental regulation or order¹¹; and
- Where the seller has not assumed the risk of unknown contingency¹².

⁹ UCC §2-615 uses the term "impracticable" to "expand prior law in states that formerly required that performance be objectively "impossible". White & Summers, *Uniform Commercial Code*, §3-10 6th Ed. This was to "emphasize the drafter's intention that courts look to the commercial setting . . . rather than absolute or scientific (objective) impossibility notions", Robert Sommer, COMMERCIAL IMPRACTICABILITY – AN OVERVIEW, 13 Duquesne L. Rev., 521, at 553. This also reversed the rule in the 1906 Uniform Sales Act that only provided an excuse for absolute impossibility.

¹⁰ Whether the nonoccurrence contingency was a 'basic assumption' of the contract is a matter of fact. See, for example, *Robberson Steel, Inc., v. J.D. Abrams, Inc.*, 582 S.W.2d 558, 27 UCC Rep. Serv. 114 (Tex. Civ. App., 1979) (failure to add schedule from steel supplier in buyer's contract did not excuse seller from performing since not a basic assumption). For a Connecticut case see *Roy v. Stephen Pontiac-Cadillac, Inc.* 15 Conn. App. 101, 543 A.2d 775, 7 UCC Rev. Serv. 2d 1507 (1988) (Inability to order specified product was existing and foreseeable condition so note excused by UCC §2-615)

¹¹ See, for example, *Process Supply Co., Inc. v. Sunstar Foods, Inc.* 27 UCC Rep. Serv. 122 (Dept. of Agric., 1979) later arrival of produce excused under UCC 20-615 due to closed of highways by police order resulting from severe weather conditions in July. Also, *Eastern Airlines Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 19 UCC Rep. Serv. 353 (5th Cir. 1976) [Allowing delay in delivery of aircraft resulting from an informal priority policy of U.S. Government for delivery of aircraft during the Vietnam war.] The party, however, cannot have caused or had a role in causing the government order – see *MG Refining & Marketing, Inc. v. Knight Enterprises, Inc.*, 25 F. Supp. 2d 175, 37 UCC Rep. Serv. 2d 1044 (S.D.N.Y. 1998) (consent by distributor in causing CFTC order caused summary dismissal of defense).

¹² This is intertwined with the determination as to whether the contingency was 'foreseeable'. Note that Official Comment 5 to UCC §2-615 indicates that the excuse should be available in cases where a specific sole source of supply is contemplated. [A review of the UCC Digest shows most cases deny this excuse for failure to show that a single source of supply was contemplated – see, for example, *Ecology Services, Inc. v. GranTurk Equipment, Inc.*, 443 F. Supp. 2d 756, 60 UCC Rep. Serv. 2d 676 (D. Md. 2006) (specific source of

Notes on UCC Excuse Provisions:¹³

- Increased costs alone does not excuse performance (unless related to some other aspect that alters the essential nature of the performance).¹⁴
- This section states that it applies only to excuse performance by sellers – but note Official Comment 9 – indicating in an example that where a supply contract by a buyer is “in reasonable commercial understanding conditioned on a definite and specific venture or assumption . . . the reason of the present section may well apply and entitle the buyer to the exemption”.
- Also note **UCC Section 2-614**, which allows substituted performance if berthing, loading or unloading facilities or contemplated carrier becomes unavailable ‘commercially reasonable substitute’ must be ‘tendered and accepted’. Also, if contemplated means and manner of payment fails due to government action the seller may withhold delivery unless buyer provides commercially substantial equivalent – but if delivery has occurred the payment in accordance with the government action may discharge the debt (unless the requirement is “discriminatory, oppressive or predatory”).

Conditions of Excuse:

- Under UCC §2-615(b) the Seller must allocate partial production/availability to current and new contracts from ‘regular customers’ and own needs “in any manner that is fair and reasonable”.
- Seller must notify the other party ‘seasonably’ of the delay or non-delivery and any allocation, under UCC §2-615(c).

Consequence of UCC 2-615 Excuse: May be specified by the parties in an agreement¹⁵, but in the absence of such agreement the Code provides an answer in UCC §2-616.

UCC §2-616 – Procedure on Notice Claiming Excuse

- (1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective

truck bodies was contemplated by the parties however, the foreseeability of the steel shortage causing the failure of supply was at issue).]

¹³ For an excellent overview of cases and situations under UCC Article 2 and with the above common law approaches see White & Summers, *Uniform Commercial Code*, §3-10 6th Ed.

¹⁴ Typically costs increases, alone, are not ground for excuse under Official Comment 4 to UCC §2-615. But note that the Comment might allow excuse if the increase was due to “war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like”.

¹⁵ See last sentence of Official Comment 8 to UCC §2-616.

deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2-612), then also as to the whole,

- (a) terminate and thereby discharge any unexecuted portion of the contract; or
 - (b) modify the contract by agreeing to take his available quota in substitution.
- (2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.
- (3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

Casualty to Identified Goods – UCC 2-613:: If the contract identifies goods to the contract when it is made and the goods suffer a casualty without the fault of either party before risk of loss passes to the buyer, the contract is avoided if a total loss or buyer has the option to accept or reject a partial delivery or deteriorated goods with ‘due allowance’ from the contract price – with no other recourse against the seller.

D. CISG OVERVIEW

Article 79 CISG

- (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
- (a) he is exempt under the preceding paragraph; and
 - (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
- (3) The exemption provided by this article has effect for the period during which the impediment exists.
- (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew

or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

See CISG Advisory Opinion No. 20: <http://cisgac.com/opinion-no20-hardship-under-the-cisg/> and discussion therein as follows:

1. The following Rules on hardship apply, unless the contract otherwise provides.
2. The CISG governs cases of hardship.
3. A party is bound to fulfil its obligations even if performance has become more **onerous**, unless there is hardship.
4. There is hardship when a change of circumstances beyond the control of a party makes performance **excessively onerous**, if that party could not reasonably be expected to have taken the change into account or to have avoided or overcome it or its consequences.
5. Such hardship **may arise when the cost of performance has increased** or the value of the performance has diminished.
6. Such hardship may also arise from events occurring before the conclusion of the contract if the parties did not know and could not have been aware of these events.
7. In assessing whether hardship exists the following nonexclusive factors should be taken into account:
 - a. whether the risk of a change of circumstances was assumed by either party;
 - b. whether the contract is of a speculative nature;
 - c. whether and to what extent there have been previous market fluctuations;
 - d. the duration of the contract;
 - e. whether the seller has obtained the goods from its own supplier;
 - f. whether either party has hedged against market changes.
8. The party affected by hardship must give notice to the other party of the circumstances and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party affected knew or ought to have known of the hardship situation, it is liable for damages resulting from such non-receipt.
9. In case of hardship, nothing prevents either party from exercising any right other than to claim damages and require performance of the obligation affected by hardship.
10. The exemption due to hardship has effect for the period during which hardship exists.

11. Under the CISG, the parties have no duty to renegotiate the contract in case of hardship.
12. Under the CISG, a court or arbitral tribunal may not adapt the contract in case of hardship.
13. Under the CISG, a court or arbitral tribunal may not bring the contract to an end in case of hardship.

Notes on Impediments to Performance (Force Majeure) – CISG Article 79:

- a. Parties are not liable for failure due to “impediment beyond his control” and which could not reasonably be expected to have been taken into account in the contract or avoided (i.e. a foreseeability test) – CISG Article 79(1)¹⁶
- b. Substituted performance may be required or the requirement of inability to avoid the consequences may not be satisfied.¹⁷
- c. This provision can cover subcontractors (although not material suppliers) – CISG Article 79(2)
- d. The exemption only lasts as long as the condition exists – CISG Article 79(3). The party must give notice within a reasonable time – CISG Article 79(4)
- e. **NOTE-** UCC Article 2 uses the concept of “impracticability” of performance under UCC §2-615 but limited to sellers. Can also argue under UCC §2-615 that failure of suppliers and other third parties not ‘subcontractors’ might be included. Therefore, UCC Article 2 may have a broader defense.

Possible Consequences of CISG Excuse:

- Relief from liability for damages due to breach.
- Termination of contract
- Reformation of Contract¹⁸

¹⁶ Note the case of *Raw Materials, Inc. v. Manfred Frberich GmbH & Co., KG*, 53 UCC Rep. Serv. 2d 878 (N.D. Ill., 2004) where the court used cases decided under UCC §2-615 to construe CISG Article 79 and whether the freezing over of St. Petersburg port early in November was foreseeable.

¹⁷ See, for example, *Macromex SRL v. Globex Intern. Inc.*, 65 UCC Rep. Serv. 2d 1033, (S.D. N.Y., 2008), judgment aff’d, 330 Fed. Appx. 241, 69 UCC Rep. Serv. 2d 349 (2d Cir. 2009) (import of chickens into another Romanian port required to avoid import restriction at the specified port – using UCC §2-614 to impose requirement to use alternative “facilities”).

¹⁸ Note the discussion of “hardship” and the potential for a court or other tribunal to ‘adapt’ the contract under the “UNCITRAL Principles” in the discussion of the ICC Model Hardship Clause in Section F and the final footnote of this paper.

E. LAW OF (A FEW) OTHER NATIONS

Most other nations and trading partners of the United States have adopted similar local laws relating to standards for excused performance by contract parties, even in the absence of a specific *force majeure* clause in a contract, including the following:

Japan: Force majeure clauses that define the specific risk at issue and its effect on performance are typically given effect and will preclude revision by a court. In the absence of such an agreement or no remedy is provided for the event that has occurred Japanese law recognizes doctrines of impossibility (*rikou hunou*) (objective impossibility), exemption not attributable to the breaching party (*saimusha no seme ni kisubeki jiyuu ni yoranai saimu furikou*) and significant circumstantial change (*jijou hennkou no housoku*) (significant unexpected change in social circumstances).¹⁹

Peoples Republic of China: In the event that the contract allocates the subject risk (such as a pandemic) and its effect then the contract terms will govern. The PRC General Rules of Civil Law and the Contract Law define “force majeure events” as those events that are unforeseeable, unavoidable and unconquerable, viewed objectively. A party claiming such remedy must timely notify the other party of the force majeure event, provide documents (for example, from the China Counsel for the Promotion of International Trade) certifying the occurrence of such event and take appropriate measures to prevent any increase in the losses sustained. Either party may then terminate the contract or the non-defaulting party may waive all or part of the default.²⁰ China also recognizes a Change of Circumstances principle that allows a court to excuse performance when the event was unforeseeable, not caused by force majeure and not a commercial risk assumed by the parties if requiring performance would be obviously unfair – but requires a court decision to enforce.²¹

India: In the absence of a specific force majeure clause in an agreement, Section 56 of the Indian Contract Act allows a prohibition on payment of damages for impossibility to perform due to an event beyond the reasonable control of the parties.²²

¹⁹ See, for example, paper by Baker McKenzie titled FORCE MAJURE UNDER JAPANESE LAW, March, 19, 2020 at <https://www.bakermckenzie.com/en/insight/publications/2020/03/force-majeure-under-japanese-law#:>.

²⁰ See, Balda, Hartung, Knott, Linzenick and Richman, FORCE MAJURE AND COVID-19: INTERNATIONAL ISSUES, Materials for American Bar Association Webinar, April 27, 2020 (called the “**ABA Webinar Materials**”) and Liu and Bai, CORONAVIRUS IN THE CHINESE LAW CONTEXT: FORCE MAJURE AND MATERIAL ADVERSE CHANGE, March 16, 2020 at <https://www.pillsburylaw.com/en/news-and-insights/coronavirus-in-the-chinese-law-context-force-majeure-and-material-adverse-change.html#> .

²¹ See the ABA Webinar Materials, Id.

²² Id.

Mexico: In general, contractual *force majeure* clauses are upheld for events that are beyond the parties' control which make performance of a contractual obligation impossible. In the absence of a contract provision (or other governing law, such as the CISG), general Mexican law exempts parties from legal liability for events: (a) beyond the control of the party failing to perform; (b) impossible to resist; (c) unforeseeable at the time of contracting; and (d) renders the performance of the obligation impossible – which can be caused by acts of nature, acts of humans or acts of governmental authorities.²³

F. FORCE MAJEURE CLAUSES – Discussion and Examples

Where sophisticated contracting parties have included specific termination, or other, *force majeure* provisions courts tend to be reluctant to stray from the agreement of the parties²⁴. [Note that under the UCC even in the absence of a specific agreement these terms may also be included in a contract by usage of trade, course of dealing and course of performance under UCC §1-303. Also, Comment 8 to UCC §2-615 indicates that terms excusing performance must be express and reasonably specific.²⁵] In considering these clauses the parties must determine: (a) whether the force majeure clause covers the event in question; (b) whether the event excuses the particular obligation at issue; and (c) whether the event was the proximate cause of the delay or nonperformance. A number of court cases are currently pending in federal and state courts alleging COVID-19 related excuses for non-performance which are collected in a recent article²⁶ and most of which are still pending on the date of this paper.

Application of a *force majeure* clause to the COVID-19 pandemic (or other similar regional or epidemics) may be included expressly in a list of events constituting

²³ White & Case Publication, FORCE MAJEURE OF COVID-19 UNDER MEXICAN LAW?, March 26, 2020 at <https://www.whitecase.com/publications/alert/force-majeure-covid-19-under-mexican-law>

²⁴ As noted above, the CISG Advisory Opinion No. 20 provides Rules to guide courts and the parties – including that the courts may not 'adapt' the contract or bring it to an end in the event of a hardship. Other authorities, including the UNIDROIT Principles on International Commercial Contracts argue for the ability of courts or arbitrator to adapt the contract to the circumstances. Note, however, that under the UCC courts in the United States have rarely rewritten the agreement of the parties – however, a striking example of a court doing so is the much vilified case of *Aluminum Company of America v. Essex Group, Inc.*, 499 F. Supp. 53, 29 UCC Rep Serv. 1 (W.D. Pa., 1980)

²⁵ See also *Eastern Airlines Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 19 UCC Rep. Serv. 353 (5th Cir. 1976), noting that no specific language is required for parties to expand UCC §2-615, but that exculpatory language in a contract reducing obligations under UCC 2-615 must be stated with particularity and not in general language.

²⁶ Smith, Lefever, Beckerman, Poliner, Gomez and Davis: TOUR De FORCE: WHAT CONSTITUTES AN "ACT OF GOD" AND OTHER DEVELOPMENTS IN FORCE MAJEURE LAW, June 15, 2020, at <https://www.pillsburylaw.com/en/news-and-insights/tour-de-force-what-constitutes-act-of-god-force-majeure-law.html> (updating an earlier article by the same authors titled : TOUR De FORCE: TRACKING THE EVOLUTION OF COVID-19 AS A FORCE EVENT, June 1, 2020

force majeure or may be part of the “act of God” or “events beyond a party’s reasonable control”²⁷. One recent bankruptcy court case has held that a lease’s *force majeure* clause partially excused a restaurant tenant from its rental obligations because of the COVID-19 governmental shutdowns. *In re Hitz Restaurant Group*, 616 B.R. 374, 2020 WL 2924523 (Bankr. N.D. Ill. 2020).

Given the global recognition of increasing likelihood of impacts on trade and business resulting from pandemics and from climate events due to accelerating climate change²⁸, can these future pandemics or events truly be considered ‘unexpected’ or ‘unforeseen’? A properly drafted *force majeure* agreement would appear to be more essential now than ever.

The following clauses are provided for discussion as part of the program:

Sample Clause #1 (Pre-COVID Terms and Conditions of Sale):

(Terms of Sale Contract/Confirmation) Force Majeure: Seller shall not be liable for failure to perform its obligations in the event it is prevented from doing so directly or indirectly by circumstances beyond its reasonable control, including, without limitation, the following: labor disputes or other industrial disturbances; fire, flood or other type of calamity or any act of God: war or other hostilities; domestic or foreign governmental acts, orders or regulations; failure or delay of the supplier or manufacturer to produce the goods or to make delivery thereof: or failures or delays in delivery due to common carriers and/or the availability of transportation or loading facilities. In such event, Seller may, at its sole option, perform its obligation or perform the unfulfilled portion thereof within a reasonable time after the removal of the cause preventing or delaying its performance, or Seller may, unconditionally and without any liability, rescind this agreement or the unfulfilled portion thereof.

If, as a result of the occurrence of any of the above events, Seller deems it necessary or expedient it may, in its sole option, store and insure the goods for Buyer’s account.

Sample Clause #2 (Pre-COVID Terms and Conditions of Purchase):

²⁷ See, e.g., *Herter v. Mullen*, 159 N.Y. 28, 37 (1899) (“The disability of a party to do the particular thing, or to perform the contract by reason of sickness is held to be a disability by the act of God.”); *Love v. Barnesville Mfg. Co.*, 19 Del. 152, 50 A. 536, 537 (Del. Super. Ct. 1901) (“The defendant would not be liable for damages caused solely by the act of God, such as an epidemic of sickness in the defendant’s factory.”) cited in Smith, Lefever, Beckerman, Poliner, Gomez and Davis: TOUR De FORCE: WHAT CONSTITUTES AN “ACT OF GOD” AND OTHER DEVELOPMENTS IN FORCE MAJUERE LAW, June 15, 2020, Id.

²⁸ See, for example,: (a) *THE WORLD ECONOMIC FORUM GLOBAL RISK REPORT 2020* – http://www3.weforum.org/docs/WEF_Global_Risk_Report_2020.pdf; and (b) the European Parliament Research Service report titled *ECONOMIC IMPACT OF EPIDEMICS AND PANDEMICS*, February, 2020- [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646195/EPRS_BRI\(2020\)646195_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646195/EPRS_BRI(2020)646195_EN.pdf)

(Purchase Order Terms and Conditions) Excusable Delay – Option to Terminate

(a) Seller shall not be responsible for nor be deemed to be in default as a result of delays in the shipment of delivery or the Goods due to causes beyond Seller's control and not as a result of its fault or negligence, including, but not limited to wars, strikes, fires, floods, natural disasters, any executive or legislative act of any governmental authority affecting the Goods or the delivery of the Goods, or acts of God, (Such delays are referred to herein as "Excusable Delays"); provided, however, that the existence of any such cause shall not excuse Seller for the resulting delay unless Seller shall have given Buyer written notice of a claimed Excusable Delay within 10 days after Seller has actual notice that such occurrence will result in a delay in delivery. In the event of an occurrence of an event constituting an Excusable Delay, Buyer shall, upon receipt of written request from Seller, extend the time of shipment and delivery until such event has been eliminated; however, if delivery will exceed thirty (30) days beyond the delivery date contained in this Contract, Buyer shall have the option, upon written notices to Seller, to cancel that portion of this Contract relative to the undelivered Goods. Upon such cancellation of this contract, in whole or in part, Seller shall immediately return to Buyer any and all sums of money paid by Buyer for any undelivered Goods together with interest thereon at the rate of six percent(6%) per annum from the date which money was received by Seller.

(b) If Buyer is unable to accept the Goods due to causes beyond Buyer's control and not as a result of its failure or negligence, including, but not limited to, the occurrence of any event that would constitute an Excusable Delay under paragraph 2(a) above. Buyer may, upon written notice to Seller, request Seller to stop or postpone the shipment of Goods or reject or refuse to accept all or any part of the undelivered Goods.

Sample Clause #3: Optional Termination

Force Majeure: If either party is unable to perform any obligation under this Agreement or Sales Contracts hereunder as a result of an event or occurrence beyond the reasonable control of the affected party and without such party's fault or negligence and which could not have been reasonably expected taking into account such event or occurrence or their impact on the performance of this Agreement at the time of the conclusion of this Agreement as well as which could not have reasonably been avoided or overcome, including, without limitation, acts of God, amendment, repeal, or enactment of applicable laws (including, without limitation, imposition of any embargos or quotas or any significant increase in duties, tariffs or other adverse import or export regulations relating to the Products, if any), dispositions or compulsory execution proceedings by public authorities, labor disputes including strikes, disruptions to transportation, wars, civil wars, riots, terrorism, epidemics, or other force majeure events, then any delay or failure to perform hereunder that results from such event or occurrence shall be excused for

so long as such event or occurrence continues. The affected party shall give immediate written notification of such delay or failure, and the parties shall discuss whether to terminate or amend this Agreement or Sales Contracts hereunder in whole or in part. Notwithstanding the foregoing, if the performance of this Agreement is wholly suspended for a period of one (1) month, the party not claiming the benefit of this provision may terminate this Agreement or any Individual Agreements hereunder in whole or in part by providing the other party with written notice.

Sample Clause #4: Reduction in Quantity, No Termination

Force Majeure. Delivery or receipt of any Product which is delayed or prevented by “force majeure” affecting either Supplier or Buyer shall not impose liability on either party. “Force majeure” is any unforeseeable event beyond the reasonable control of the affected party such as, but not limited to, acts of God, wars, civil commotion, fire, storm, flood, earthquake, pandemic or epidemic, explosion, strikes, lockouts, acts, regulations or other requirements of the federal, state, territorial or local governments, including without limitation, acts, regulations or other requirements making it unlawful or commercially impracticable to package beverages in metal cans, or procure raw material supplies, or any cause, whether of the same or different nature, beyond the reasonable control of the party affected. The party affected by any such event of force majeure shall promptly advise the other of the extent and probable duration and coordinate efforts to minimize the impact of force majeure on both parties. For clarity, force majeure does not apply to payment for Products or scrap shipped prior to the effective date of force majeure under this Letter Agreement.

The parties recognize that Buyer must have Product to continue to operate its can plants in the event Supplier is prevented by force majeure events or events preventing Supplier from delivering Product to Buyer. Therefore, Supplier and Buyer agree that in the event Supplier does not make deliveries of Product to Buyer by reason of force majeure events or other events, Buyer shall be entitled to purchase Product from others in amounts which Buyer believes in good faith is needed to minimize or avoid disruption of Buyer’s production and sales of cans. Buyer’s purchases of Product from others shall not constitute a breach of this Agreement by Buyer, and Buyer shall be released from its obligation to purchase such quantities from Supplier under this Agreement. Any such volume purchased from others shall be applied to the total volume purchased from Supplier for the purposes of qualifying for any rebates or meeting any minimum purchase requirements. Supplier and Buyer further agree that in the event Buyer is unable to take deliveries of Product by reason of force majeure events or other events, Supplier shall be entitled to sell Product to others in amounts equal to amounts not taken by Buyer. Supplier’s sale of Product to others shall not constitute a breach of this Agreement by Supplier, and Supplier shall be released from its obligation to sell such quantities to Buyer under this Agreement. Any such volume sold to others shall not be applied to the total volume purchased from Supplier for the

purposes of qualifying for any rebates, but will be applied to meeting any minimum purchase requirements.

ICC MODEL FORCE MAJEURE CLAUSES 2020 (Long and Short Form):
<https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf> : The Introductory Note and Commentary for the 2020 version is available at: <https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf>

ICC FORCE MAJEURE CLAUSE (“Clause”) (SHORT FORM)

This Short Form is a reduced version of the Long Form, which is limited to some essential provisions. It is intended for users who wish to incorporate in their contract a balanced and well-drafted standard clause covering the most important issues, which can arise in this context. Users must be aware that this Short Form, by its very nature, has a limited scope and does not necessarily cover all issues, which may be relevant in the specific business context. When this is the case, parties should draft a specific clause on the basis of the ICC Long Form.

1. “Force Majeure” means the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves: [a] that such impediment is beyond its reasonable control; and [b] that it could not reasonably have been foreseen at the time of the conclusion of the contract; and [c] that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.

2. In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause: (i) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation; (ii) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy; (iii) currency and trade restriction, embargo, sanction; (iv) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation; (v) plague, epidemic, natural disaster or extreme natural event; (vi) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy; (vii) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

3. A party successfully invoking this Clause is relieved from its duty to perform its obligations under the contract and from any liability in damages or from any other contractual remedy for breach of contract, from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay. If notice thereof is not given without delay, the relief is effective from the time at

which notice thereof reaches the other party. Where the effect of the impediment or event invoked is temporary, the above consequences shall apply only as long as the impediment invoked impedes performance by the affected party. Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days.

ICC MODEL HARDSHIP CLAUSE 2020: Note also the ICC Hardship Clause referenced after the ICC Model Long Form Force Majeure Clause. This clause allows the parties to agree on the consequences if performance of the contract is possible, but it found to have become ‘excessively onerous’ due to an unexpected event beyond its reasonable control and could not have been avoided. This is to allow the parties to determine the consequences of such a finding, since there may be different consequences depending upon differing national laws (and the UNIDROIT Principles on International Commercial Contracts)²⁹. Three (3) options are provided – (a) allowing the invoking party to terminate the agreement but not allowing a court or arbitrator to ‘adapt’ the contract without consent of the other party; (b) allowing either party to request a court or arbitrator to adapt the contract ‘with a view to restoring its equilibrium’ or to terminate the contract as appropriate to the tribunal; or (c) allowing either party to request a court or arbitrator to declare the contract terminated.

²⁹ Note that the UNIDROIT Principles of International Commercial Contracts (2016) (the “**UNIDROIT Principles**”) defines a ‘hardship’ in Art. 6.2.2 as an occurrence that disturbs the ‘equilibrium’ of the transaction and in Art. 6.2.3 allows an aggrieved party to, among other remedies, request a court to ‘adapt’ the contract to the new circumstances. Force majeure is dealt with in Art. 7.1.7 of the UNIDROIT Principles in generally in the same manner as the CISG.