

INDUSTRY INSIGHTS

業界透視

ARBITRATION

Force Majeure: a New Analysis Post Local Enactment of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”)

As supply chains continue to be disrupted by COVID-19 related events, *force majeure* clauses which may have the effect of excusing parties from performing their obligations are coming into sharp focus. As the Sale of Goods (United Nations Convention) Ordinance (Cap. 641) which implements the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) takes effect in the third quarter of 2022, Article 79 of the CISG which provides for force majeure events introduce changes to the legal analysis of unforeseen events under Hong Kong law.

Article 79 will apply where (1) the sale of goods contract is between entities whose places of business are in different contracting states, and (2) where the contract is governed by Hong Kong law whether by express provision of the contract or by application of rules of private international law.

Force Majeure under CISG

Under Article 79, a party may be exempted from liability in damages for non-performance for the period in which the impediment preventing performance persists. The burden is on the non-performing party to establish that: (1) an impediment beyond the party's control, (2) the party could not reasonably be expected to have taken the impediment into account at the time the contract was

concluded, and (3) the party cannot have reasonably avoided the impediment.

Impediment beyond a party's control

Natural disasters, epidemics, acts of war and state interventions preventing performance (such as export/import/trade bans) are recognised categories of impediments under Article 79 (Schlechtriem & Schwenger's Commentary on the UN Convention on the International Sale of Goods (4th Ed.), Art. 79, paras 17-18). For example:

1. a change of domestic law which rendered obtaining corn export license in Ukraine impossible was considered a *force majeure* event under Article 79 (International Commercial Arbitration Court at the Ukrainian Chambers of Commerce and Industry);
2. In *Hilaturas Miel SL v Republic of Iraq* (SD NY, 20 August 2008, CISG-online 1777, 573 F Supp 2d 781), the Iraqi war in 2003 and the removal of United Nations personnel from Iraq rendered the compliance with the payment precondition (the inspection and payment assurance of United Nations personnel) impossible. The New York District Court held this to be an impediment beyond the seller's control under Article 79.

The causation test is the “*but for*” test.

Notice requirement

A party seeking to rely on Article 79 must serve a notice to the other party within a reasonable time.

What constitutes a reasonable time depends on the circumstances. A

party is expected to give notice swiftly especially in a situation where time is of the essence for the other party to take steps to avoid/alleviate the consequences of non-performance. Absent such circumstances, a period of 14 days after the party becoming aware of the impediment is usually sufficient (Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration at p. 343).

The content of the notice is critical. Article 79(4) requires notification of the impediment and its effect on the party's ability to perform. It is good practice to describe the nature, gravity and duration of impediment to enable the other party to determine what (if any) action it should take to mitigate loss (Schlechtriem & Schwenger's Commentary on the UN Convention on the International Sale of Goods, Art. 79, para 45). The non-performing party would be liable for damages unless and until a valid notice is delivered.

Effect

If a party successfully invokes Article 79, it exempts the party from paying damages for such period as the impediment persists. However, it does not preclude the other party from seeking other remedies, such as terminating/avoiding the contract and/or reducing the contract price.

Alternative to Article 79

In practice, it is possible for parties agree on an alternative *force majeure* clause and opt to deviate from Article 79.

One frequently adopted *force majeure*



clause is the International Chambers of Commerce 2003 Force Majeure Clause. It makes interesting contrast with Article 79 in that, the burden of proof of the ICC Clause is somewhat shifted to the advantage of the non-performing party – once it is shown that the impediment in question falls within a fixed list of events (i.e. war, act of authority, act of good, epidemics and labour disturbance), it is presumed that the failure to perform was caused by an impediment beyond the party's reasonable control and contemplation.

With the local implementation of the CISG, practitioners should take care to analyse Article 79 and/or any alternative *force majeure* clauses and in particular comply with the notice requirements in substance and form to take full advantage of the mechanism.

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仲裁

不可抗力：新一次在本地制定成文法實施《聯合國國際貨物銷售合同公約》（「《銷售公約》」）之後的分析

由於供應鏈持續因事的中斷的起因與2019冠狀病毒病有關，有可能免除訴訟方履行責任的不可抗力條款，現

在備受關注，成為矚目焦點。《貨物銷售（聯合國公約）條例》（第641章）（「《條例》」）旨在實施《聯合國國際貨物銷售合同公約》（「《公約》」），2022年第三季度生效，《條例》生效之後，《公約》第七十九條，這一條為不可抗力事件作出了規定，會改變香港法例下對未能預見事件的法律分析。

第七十九條將適用於兩種情況(1)貨物銷售合同是由營業地在不同締約國的實體之間所訂立，及(2)合同受香港法律管限，不論是合同明文規定，還是因為國際私法規則適用而受管限。

《公約》下的不可抗力

按照第七十九條，在履行義務的障礙持續存在期間，不履行義務的當事人可獲免除支付損害賠償的法律責任。不履行義務的當事人有責任證明：(1)有某種非當事人所能控制的障礙，(2)沒有理由預期當事人在訂立合同時已經顧及那障礙，及(3)沒有理由當事人能夠避開那障礙。

非一方當事人所能控制的障礙

按照第七十九條，妨礙履行義務的天災、流行病、戰爭行為和國家干預（例如出口／入口／貿易禁令）是公認的障礙（Schlechtriem & Schwenzer's Commentary on the UN Convention on the International Sale of Goods（第四版），第七十九條，第17-18段）。例如：

1. 烏克蘭修訂國內法，使出口商不

可能取得穀物出口證，這被視為第七十九條下的不可抗力事件（烏克蘭工商會國際商事仲裁庭）；

2. 在 *In Hilaturas Miel SL v Republic of Iraq* 一案 (SD NY, 20 August 2008, CISG-online 1777, 573 F Supp 2d 781)，2003年的伊拉克戰爭和聯合國人員撤離伊拉克，使得「付款」不可能是一個可以接受的先決條件（聯合國人員的巡查和付款保證）。紐約地方法院裁定，按照第七十九條，這是某種並非賣方所能控制的障礙。

因果驗證標準（causation test）就是「*but for*」驗證標準。

通知的規定

尋求以第七十九條為依據的當事人，必須在一段合理時間內向另一方當事人送達通知。

什麼構成「一段合理時間」視乎情況而定。預期當事人會馬上發出通知，特別是在另一當事人需要爭取時間採取步驟，盡快避免／減輕不履行義務的後果的時候。如果不是這樣的情況，以當事人開始察覺到障礙後14天為限，時間通常足夠（Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration 第343頁）。

通知的內容極為重要。第79(4)條要求不履行義務的一方，必須將障礙及其對他履行義務能力的影響通知另一方。理想的做法是，描述障礙的性質、嚴重程度及持續時間，讓另一方能夠決定自己應採取什麼行動（如有的話）以減輕損失（Schlechtriem & Schwenzer's Commentary on the UN Convention on the International Sale of Goods，第七十九條，第45段）。不履行義務的一方須承擔支付損害賠償的法律責任，直到有效的通知已經送遞為止。

影響

如果一方當事人成功援用第七十九條，在障礙持續存在期間，該當事人獲免除支付損害賠償的責任。然而，這不阻止另一方當事人尋求其他補救