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The Covid-19 pandemic has left many sellers of goods unable to complete contractual obligations, or has significantly delayed their ability to do so. Many state and local government shutdowns of "non-essential" businesses, and restrictions on the importation of various vessels, slowed finished products and raw materials that certain companies need to produce goods for their customers.

While a number of sellers may turn to force majeure clauses or argue that the Covid-19 pandemic made performance "impossible" under common law principles, sellers of "goods"—essentially anything moveable, including food products and crops—may find additional help under Section 2-615 of the Uniform Commercial Code if government regulations or certain market conditions affected their ability to perform.

This article provides guidance on how sellers can use the often-forgotten excuse of commercial impracticability under UCC Section 2-615, and includes a brief overview of the typical contractual and common law excuses to provide a proper juxtaposition of Section 2-615.

Force Majeure Clauses and Common Law Impossibility

In distinguishing commercial impracticability as applied in Section 2-615, it is helpful to provide a brief overview of the more common doctrines that sellers use to excuse performance in unexcepted events: force majeure clauses and the common-law doctrine of impossibility.

Force Majeure Clauses

Force majeure, French for a "superior force," is an apt name for contractual clauses that allow a party, or the parties, to avoid certain obligations because of unexpected events. There are not standard force majeure clauses; rather, each force majeure clause is specific to the contract. In other words, force majeure clauses allow the contracting parties to allocate risks based on situations where performance would become different because of certain expected or unexpected events.

When force majeure clauses do not allocate risks for specific events, but rather contain broad language, some courts require evidence that the specific event that causes the disruption was not an event that was foreseeable by the parties at the time they contracted. This requirement, however, does not apply when a force majeure clause does mention the specific claimed event of force majeure. Thus, the general thought as to breadth of force majeure clauses is: The longer the list of specific events, the broader the clause.

Common Law Impossibility

Various states' common law recognize the doctrine of impossibility. Confusingly, in some jurisdictions, Texas for example, this doctrine is also called impracticability because it is often derived from Restatement (Second) of Contracts §§ 261, 264, 266 (1981), which use the term "impracticable" and "impracticability." This doctrine allows excuse for certain unforeseeable events; however, the applicability of this doctrine has become less certain as force majeure clauses have become more common. One area in which impossibility still has force is when a government enacts a law that makes performance of the contract illegal. To use the impossibility excuse under these circumstances, the newly enacted law needs to have been unforeseeable.

UCC Section 2-615: Commercial Impracticability

Section 2-615 of the UCC, which most states have enacted by statute, allows sellers to limit their obligations if it becomes "commercially impracticable" to comply with them. Section 2615(1) provides two areas under which a party can claim an excuse: "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."

Official Comments 1 and 3 to Section 2-615 explain that Section 2-615 is meant to be a lower standard than common law impossibility or frustration of purpose as it excuses sellers when performance is "commercially impracticable," not merely impracticable, which is used to "call attention to the commercial character of the criterion chosen by this Article."

Sections 2-615 Limitations and Requirements

Section 2-615 has a number of limitations and requirements before it will excuse a seller's performance:

- It does not excuse performance simply because it becomes more expensive. Official Comment 4 notes that a "collapse in the market" or "increased cost" by themselves is not a justification for applying Section 2-615. Instead, the change in cost or the market must be due to "some unforeseen contingency which alters the essential nature of the performance."
- If the contract spells out the event on which the seller is relying as an excuse, i.e., specifically allocating risk to one party, then the event won't work as an excuse under Section 2-615. See Official Comment 8.
- Section 2-615 has various requirements for how the seller should perform if not fully impacted, i.e., the seller can still supply some of its wares. Official Comment 11 makes clear that the seller must fulfill its obligation to the extent circumstances permit. Thus, Section 2-615(2) requires sellers to allocate their goods, although it leaves the proper allocation somewhat to the seller's discretion limited by some general good faith guidelines in the comments.

In addition, Section 2-615's Official Comments contain other guidance on how a seller should approach allocation (Official Comment 11); a shortage of raw materials (Official Comment 4); and excuses based on a failure of an exclusive source of supply (Official Comment 5).

- As with most requirements in the UCC, a seller must provide reasonable and timely notice to the buyer of the seller's anticipated nonperformance or partial performance. If the seller is providing partial performance, then it must also provide an estimate as to what the partial performance will be. A seller's failure to provide reasonable notice to a buyer will likely prevent the seller from successfully relying on Section 2-615 as an excuse.

Section 2-615 and the Pandemic

While Section 2-615 doesn't provide a get-out-of-jail-free card for all sellers, those sellers impacted by the Covid-19 pandemic, including by local and state regulations, will have a good argument that their performance is excused, suspended, or curtailed. They could benefit from a standard that (depending on the jurisdiction) may be lower than common law impossibility, and potentially easier than their force majeure clause—assuming their contracts even have one.

It's easy to see how this is the case. At the outset of their agreement, most contracting parties probably did not contemplate that a global pandemic that brought commerce screeching to a halt would occur. Thus, there is a good argument that the Covid-19 pandemic qualifies as an "unforeseen contingency which alters the essential nature of the performance." Uniform Commercial Code § 2-615 cmt. 4 (1951).

In addition, Section 2-615 would excuse sellers because of the countless local, state, and federal regulations (some of which were later ruled invalid) that may have stopped sellers from performing under their contracts. Under Section 2-615, sellers need not worry whether the regulation was actually valid. Instead, all a seller must show is that it complied with the regulations in good faith.

Section 2-615 and Buyers

But what about buyers? Do they get a break under the UCC? Under the plain language of Section 2-615, the answer is: no. While Section 2-615's Official Comment 9 notes that there could be some circumstances in which the reasoning of the section applies to buyers, aside from that reference, it's more likely that buyers will have to live with their contractual and common law remedies incorporated in the UCC through Section 1-103. That section confirms that the UCC does not displace "the principles of law and equity" unless expressly provided for by statute. Therefore, a buyer of goods still can raise common law impossibility or other doctrines if impacted by the Covid-19 pandemic.

Even if buyers cannot take advantage of Section 2-615, they should still be aware of its limitations. As discussed above, while Section 2-615 can be a powerful excuse for sellers impacted by the pandemic, it has limitations. This is especially true where a contract has already specifically allocated risks. In addition, to the extent a seller can take advantage of Section 2-

615's protections, buyers should ensure that sellers abide by Section 2-615's obligations, including the requirements of notice, good faith, estimates, and apportionment.

Conclusion

Organization is critical to any arbitration preparation, but it's even more critical in the virtual setting. Being organized throughout–from the preliminary hearing until the final hearing–will minimize the logistical issues associated with remote exchanges between the parties. The following organizational techniques will be useful:

In sum, as a result of the Covid-19 pandemic, sellers of goods impacted by various governmental orders should consider invoking Section 2-615's protections. In doing so, they must be cognizant of Section 2-615's applicability, requirements, and limitations. At the same time, buyers of goods should be aware of Section 2-615's scope in negotiating the performance of a deficient seller who seeks refuge under Section 2-615.