

# International Commercial Contracts and the COVID-19 Crisis

## A brief overview

AUGUSTA  
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### Stay Healthy

Your own health, that of your family and employees is the most important.

### Communicate

Contact your business partners and try to find a mutually satisfactory solution.

### Monitor

Monitor legislation and news regarding COVID-19 related aids, tax exemptions and subsidies through lawyers.

### Take Inventory

Take inventory of your existing business commitments, particularly existing contracts.

## Review existing contracts

Check if your contracts contain *force majeure* clauses: explicitly, or under "delivery duties", "delay" etc. Also, screen general terms and conditions. If the contract is governed by Spanish law: article 1105 of the Spanish Civil Code (CC)

### If the contract contains *force majeure* clauses...

- Has a definition for *force majeure* been agreed upon? Does it include natural disasters, plagues, epidemics, governmental measures?
- How has it been regulated? Renegotiation obligations? Suspension of obligations?
- Analyse whether the existing provisions allow contract termination.

### If contract contains no *force majeure* clause...

- Is the contract subject to the United Nations Convention on Contracts for the International Sale of Goods (CISG)?
- Unless expressly excluded, CISG applies to cross-border contracts for the sale of goods between merchants from, at least, one of the CISG contracting states (if this state's law applies)
- Or if it is governed by Spanish substantive law

### If CISG applies...

- COVID-19 situation in your company may constitute an "impediment beyond the sellers' control" (Art. 79 CISG).
- Consequence: temporary exemption from performance.
- Potential right to terminate or adjust the contract.
- Written notice to the other party is essential: disregard grants the other party a right to compensation for the damages suffered from the delay in its communication.

### If CISG does not apply...

- Applicability of other conventions or special rules?
- Possible existence of a "temporary supervened impossibility" situation (art. 1182 CC), provided that...
- ... appropriate measures have been adopted (home office, disinfection, isolation of infected workforce, ...).
- Consequence: agreed obligations to do and to give are suspended (not applicable to payment, which should be analysed in light of the *rebus sic stantibus* doctrine).

## Contracts currently being negotiated

### Do not rely on *force majeure* wording

*Force majeure* relies on unforeseeability. COVID-19 is now real and foreseeable.

### Consider postponing new contracts

You can work with a term sheet or a binding letter of intent and finalise details later.

### If you must enter into a new contract right now:

#### Avoid...

- Fixed delivery dates
- Late performance penalties
- Any fixed performance requiring you to visit premises outside of your own company's premises
- Obligations to provide insurance if there is any doubt that COVID-19 related risks are covered
- Assuming that "back to normal" will come soon.

#### Consider using...

- Force majeure wording expressly mentioning COVID-19 and clarifying that any further development worsening the situation and leading to your inability to produce/ perform after day X constitutes a force majeure event
- Wording mentioning COVID-19 and a commitment of both parties to adjust the contract and negotiate new delivery dates if necessary
- Seller-friendly INCOTERMS® clauses (e.g. EXW) if you have to ship goods, or clarify that you will reasonably try to perform if the delivery/transport is possible
- Clauses allowing for the adjustment of delivery dates or renegotiation or include a reservation of a right of withdrawal because of COVID-19 issues.