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RISK AND BUSINESS

Import Tariffs and Force Majeure: Does Your Contract Forsee the Unforeseeable?

Pandemic-Era Hot Topic Returns as Construction Materials Costs Surge

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On April 2, dubbed “Liberation Day” by President Donald Trump, the United States announced sweeping international tariffs. Since then, the Trump administration’s tariff rollout has been volatile.

The first implementation took effect April 5, a 10 percent baseline tariff on all trading partners. A more aggressive round followed at midnight on April 8, targeting countries with larger trade deficits. Those tariffs

reached as high as 104 percent, with an average of around 29 percent.

Then on April 9, the administration reversed course and reduced to 10 percent for most countries for ninety days, while levies on Chinese goods rose to 145 percent – a decision many speculate was made due to concerns in the bond market, itself sensitive to volatility.

Foreign and domestic policy implications aside, the rollout has left many contemplating its commercial implications, particularly deals that have already been signed and negotiated.

What Is ‘Force Majeure’

Lawyers negotiate contract provisions to meet foreseeable risks that may affect the parties’ course of dealing and performance of a contract. But not all risks are foreseeable, and lawyers may – and in most cases, must – address unforeseen contractual risks beyond the parties’ control.

Fortunately, there are tools for this. But recent tariff impositions raise a new question: Does your contract address and allocate risk for tariff-related cost increases?

The “force majeure” clause is a standard contract provision that may allow a party to avoid contractual liability if circumstances or unforeseen events beyond the parties’ control make performance impossible or impracticable. Typically, this provision protects parties against events such as natural disasters, civil unrest, war, or acts of God.

But the scope of the catchall provision is often unclear.

As a recent example, in the wake of the COVID-19 outbreak, many parties scrambled to find contractual escape routes excusing their

performance obligations. Did COVID-19 qualify as “governmental action” vis-à-vis government-mandated quarantine measures?

Such questions led to intense scrutiny of force majeure clauses, extensive disputes and litigation.

Ultimately, “public health emergencies” became a widely adopted force majeure contingency, still in current use.

Although recent tariff impositions have renewed focus on whether a force majeure provision covers market cost increases, courts have previously declined to grant relief to burdened parties under similar scenarios.

Solar Panel Case Instructive

One example is the 2015 case of *Kyocera Corp. v. Hemlock Semiconductor*, where the Michigan Court of Appeals considered whether a force majeure clause excused one party from performance under a take-or-pay contract due to market conditions caused by government actions.

Kyocera, a Japanese solar panel manufacturer, had a 10-year supply contract with Hemlock Semiconductor, a Michigan polysilicon manufacturer. Amid “large-scale dumping” by Chinese companies, which were selling products below production cost to gain market

Continued on Page 2

share, the price of polysilicon – a critical component used in solar panels – dropped dramatically, forcing numerous manufacturers out of business.

In response, the United States implemented anti-subsidy and anti-dumping import tariffs. After the parties failed to renegotiate pricing, Kyocera claimed it was excused from its purchase obligation under the contract's force majeure clause.

The court rejected Kyocera's force majeure argument, holding that economic hardship and unprofitability alone – including from tariffs – do not trigger force majeure protections unless expressly enumerated in the clause.

The court reasoned that take-or-pay con-

tracts fundamentally allocate the risk of market price increases to the seller (Hemlock) and a fall in prices to the buyer (Kyocera). Kyocera was thus held to its obligation to purchase the polysilicon at the higher, contractually agreed-to price, despite its premium over the market price.

Newly imposed tariffs on Chinese goods raise questions similar to those at issue in Kyocera, where government-imposed tariffs followed a steep drop in polysilicon prices caused by foreign dumping.

While it remains to be seen whether Trump's tariffs will lead to similar economic disruptions in commercial transactions, Kyocera serves as a cautionary tale. Without clearly defined contingencies, courts will be reluctant to accept com-

mercial frustration as a blanket remedy for aggrieved parties who, in hindsight, desire a more protective force majeure provision.

Kyocera and other similar cases clarify that changing market prices are an inherent risk in fixed-price contracts. Parties should carefully assess the impact of newly imposed tariffs and negotiate force majeure clauses that expressly cover specific, enumerated contingencies, including serious economic impracticality. Without such provisions, parties are not likely to fare well in court. ◀

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