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How To Address Tariff-Related Risks In Commercial Contracts

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Faced with ongoing tariff uncertainty, companies in the U.S. and abroad are grappling with the business consequences of existing and forthcoming trade duties. Exacerbating the uncertainty, companies' commercial agreements may not clearly prescribe which party bears the risks and consequences of tariff-related fallout.

These uncertainties have left companies scrambling to understand whether, and to what extent, any force majeure clauses in their agreements may apply, and whether common-law defenses — including impossibility, impracticability and frustration of purpose — may excuse performance.

To aid those efforts, we address the state of the law governing these defenses and force majeure clauses in the tariff context. We conclude with key takeaways for companies drafting or revising commercial agreements to address tariff-related risks.

Importance of Specific Contract Language

In the handful of cases that address the applicability of common-law defenses like impossibility, impracticability and frustration of purpose in the tariff context, these doctrines have had mixed success.

Common-law defenses are most likely to succeed when (1) the party invoking the defense had no advance notice of the tariff, (2) the tariff precluded performance outright, (3) the tariff-related consequences wholly defeated the purpose of the contract, and (4) the counterparty accepted the risk that a tariff could be imposed but refused to perform when that risk materialized.

But these defenses are likely to fail when a party has implicit or explicit notice that the tariff was possible, a party accepts the risk of the tariff, or the purpose of the agreement was not wholly defeated. This underscores the importance of clearly prescribing how, and to which party, tariff-related risks are allocated.

Case Law Addresssing Tariffs, Common-Law Defenses and Force Majeure

The central takeaway from the following opinions from two federal district courts, the U.S. Court of Federal Claims and a Michigan appellate court is the same: Specificity in drafting is key because a party

seeking to excuse performance with a common-law doctrine must meet a very high bar.

Kyocera Corp.

In 2015, in Kyocera Corp. v. Hemlock Semiconductor LLC, a Michigan court of appeal addressed whether a force majeure clause excused Kyocera, a Japanese solar panel manufacturer, from performing its contract with Hemlock, a Michigan-based manufacturer of polysilicon.[2]

The parties' take-or-pay agreement required Kyocera to buy a specified quantity of polysilicon annually from Hemlock, or pay the full price even if it purchased less.

Kyocera asserted that illegal subsidies provided by the Chinese government to Chinese solar panel manufacturers caused prices to plummet, rendering the take-or-pay contract unprofitable. Kyocera argued that the Chinese subsidies, as well as the ensuing anti-subsidy and anti-dumping import tariffs imposed by the U.S., constituted force majeure events that excused its duty to purchase polysilicon from Hemlock.

According to the decision, the relevant contract language provided: "Neither Buyer nor Seller shall be liable for delays or failures in performance ... that arise out of or result from causes beyond such party's control, including without limitation ... acts of the Government."[4] Nonetheless, the force majeure clause did not help Kyocera.

First, the court stressed that force majeure clauses are generally narrowly construed and must identify the event causing nonperformance. The court reasoned that the clause in the parties' contract did not identify market manipulation, nor did any act of the government directly cause Kyocera's nonperformance.

Second, the court concluded that market manipulation was a foreseeable risk.[5]

Third, the court emphasized that excusing nonperformance because the contracts were unprofitable would defeat the purpose of the take-or-pay arrangement, which allocated the risk of market fluctuations.

The Kyocera decision underscores that attempts to invoke force majeure clauses are likely to fail unless the clause specifies either the relevant risk, when the event is foreseeable or when the risk has been assumed by the party seeking to invoke it.

Shelter Forest

In 2020, in Shelter Forest International Acquisition Inc. v. COSCO Shipping (USA) Inc., the U.S. District Court for the District of Oregon addressed whether tariffs imposed by the U.S. on Chinese exports relieved Shelter Forest of its contractual obligation to import a specified quantity of shipping containers from China under a fixed-price agreement. [6]

The 2018 agreement required Shelter Forest to ship 5,000 containers on COSCO vessels at a specified freight rate. COSCO asserted counterclaims for breach of this minimum quantity provision.

Shelter Forest responded that the doctrine of impossibility and a force majeure clause excused its performance of the minimum quantity provision. Shelter Forest asserted that tariffs imposed by the U.S.

on Chinese lumber products in late 2017 — as well as additional, planned tariffs by the U.S. on a broader set of goods — precluded Shelter Forest's performance and constituted an unforeseeable, supervening event.

Shelter Forest argued that, while a broader trade war between the U.S. and China was foreseeable, these specific tariffs were not foreseeable.

The court disagreed, explaining that impossibility is only available when unexpected difficulties or expenses impose hardships "so extreme that a practical impossibility exists," and when those exigencies are "outside any reasonable contemplation of the parties."[7] The court stated that mere market shifts or the financial inability to perform were insufficient to invoke the defense.[8]

The court found that the tariffs were reasonably foreseeable at the time the contract was consummated.

The court also stressed that Shelter Forest elected to enter into the agreement notwithstanding the ongoing trade war. The court analogized the tariffs to mere market fluctuations, which do not relieve a party of its contractual obligations.

Moreover, the court found that Shelter Forest expressly assumed the risk by virtue of the parties' fixed-price contract.

Lastly, the court stressed that Shelter Forest continued shipping after the tariffs were implemented — strong evidence the tariffs did not wholly preclude performance.

The court also rejected Shelter Forest's invocation of the force majeure clause in the contract, noting that the clause covered "acts of god, strikes, embargoes, or events similarly beyond the knowledge or control of either party," excluding "commercial contingencies, for example changing markets ... business declines, etc." The court concluded that tariffs constituted market changes resulting from government policies and thus fit within the exclusion.

The court also noted that Shelter Forest did not bargain for language expressly addressing tariffs, even though tariffs were in place when the contract was signed and additional tariffs were foreseeable.

Shelter Forest reinforces the limited utility of generic force majeure clauses, and the importance of clearly and explicitly addressing tariff risks.

TPL

In TPL Inc. v. U.S., the U.S. Court of Federal Claims addressed arguments by TPL, a government contractor, that the impossibility and impracticability defenses excused its performance of a 1994 contract with the Army to dispose of ammunition.

TPL argued that, when tariffs imposed by the U.S. government on foreign pyrotechnic companies in the 1990s were lifted, domestic pyrotechnic manufacturers went bankrupt. The resulting evaporation of potential domestic buyers left TPL with no means of disposing of the ammunition received from the government, rendering contract performance impossible and impracticable.

The court's 2014 opinion rejected TPL's impossibility defense, explaining that impossibility is only a

defense to performance of a contract with the federal government when the party invoking the doctrine establishes that no other contractor could perform the task.

The court likewise rejected TPL's impracticability defense, explaining that performance of a contract with the government is impracticable only when, due to unforeseen events, the cost of performance would be excessive and unreasonable.

TPL Inc. reinforces that commercial impracticability requires proof of an unforeseeable risk that makes the cost of performance impossible, that mere market fluctuations are insufficient and that common-law defenses are unavailable when the parties allocate market risks in advance.

Murphy Marine

Finally, in Murphy Marine Services Inc. v. Dole Fresh Fruit Co., the U.S. District Court for the District of Delaware's 2022 decision addressed whether certain fees, or so-called tariffs, levied by a newly privatized port excused Murphy's performance of its contractual obligations to Dole.[14] While this case involved tariffs imposed by a private party rather than a sovereign entity, the court's discussion of the impracticability defense provides useful guidance.

Under the parties' agreement, Murphy was required to unload Dole's ships at the port. When tariffs made unloading more expensive, Murphy requested assurances from Dole that it would cover the new levies, which Dole provided. Murphy then paid the tariffs and completed unloading.

After Dole allegedly breached its promise to cover the tariffs, Murphy sued, asserting claims for promissory estoppel and fraud, and arguing that, but for Dole's promise to pay, Murphy would have invoked the doctrine of impracticability.

Murphy argued that the port's privatization and new fees were unforeseeable. Murphy further argued that the fees' magnitude rendered performance impracticable, and that it continued performing only after Dole provided assurance it would cover the fees.

The court credited Murphy's impossibility defense and denied Dole's motion to dismiss.

First, the court concluded that the tariff was not reasonably foreseeable when the parties entered into their contract because, at that time, the port was run by the state and there "were no equivalent private fees to allocate, so the parties likely did not think about it." [15]

Second, the court concluded that the fees imposed "undermined a basic assumption of the agreement." Under the contract, Dole paid Murphy a markup on its labor bill, plus a management fee. That payment structure "was premised on Murphy's making a profit over its costs." Due to the tariff, however, Murphy "would lose money on the deal," and Dole conceded that "Murphy could not keep operating that way." [16]

Third, the court found that Murphy never agreed to perform despite the impracticability. Rather, it continued performing "only because Dole said it would cover the fees." [17]

Murphy serves as a useful blueprint for successfully invoking the impracticability defense. Impracticability is more likely to succeed when (1) the tariff is not reasonably foreseeable, (2) the contract presupposes no tariff will be imposed, and (3) the tariff would upend a basic premise of the

contract and preclude performance.

Takeaways

These cases demonstrate the importance of clear and specific contractual language allocating tariff-related risks. Consider whether to include tariff-related risks in force majeure provisions, particularly given that common-law defenses like impossibility or impracticability are unlikely to be successful if the tariff was foreseeable, or the contract otherwise allocated tariff or market-related risks.

Companies negotiating or reviewing commercial agreements in today's fluid trade environment should consider:

- Clearly allocating tariff-related risks with specific contractual terms;
- Clearly prescribing associated consequences if tariff-related risks materialize;
- Avoiding catch-all clauses that lack specificity — generic force majeure clauses that fail specifically to address tariffs likely won't be sufficient to excuse performance; and
- Evaluating or reevaluating existing agreements in light of the current trade environment, and potentially revising those contracts to specifically allocate tariff-related risks

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[1] Shelter Forest Int'l Acquisition Inc. v. COSCO Shipping (USA) Inc., 475 F. Supp. 3d 1171 (D. Or. 2020); TPL Inc. v. United States, 118 Fed. Cl. 434, 440 (2014); Murphy Marine Servs. Inc. v. Dole Fresh Fruit Co., 2022 WL 610755, at *1 (D. Del. Jan. 13, 2022); Kyocera Corp. v. Hemlock Semiconductor LLC, 313 Mich. App. 437, 886 N.W.2d 445 (2015).

[2] Kyocera Corp. v. Hemlock Semiconductor LLC, 313 Mich. App. 437, 886 N.W.2d 445 (2015).

[3] Id. at 448.

[4] Id. at 449.

[5] Id. 453.

[6] Shelter Forest Int'l Acquisition Inc. v. COSCO Shipping (USA) Inc., 475 F. Supp. 3d 1171 (D. Or. 2020).

[7] Id. at 1186.

[8] Id.

[9] Id.

[10] Id.

[11] TPL Inc. v. United States, 118 Fed. Cl. 434, 440 (2014).

[12] Id. at 442.

[13] Id. at 443.

[14] Murphy Marine Servs. Inc. v. Dole Fresh Fruit Co., 2022 WL 610755, at *1 (D. Del. Jan. 13, 2022).

[15] Id. at 2.

[16] Id.

[17] Id.