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# Lobbying and Contractual Provisions as Coping Mechanisms for the New Trump Tariffs

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## **Lobbying the Trump Administration & Congress on Tariffs**



# Advocacy Strategy



**Trump  
Administration**



**Congress**



*“The most beautiful word in the dictionary is ‘tariffs.’”*

— President Trump

# Outreach to the Trump Administration

- It's important to meet with key administration officials to ensure your company/industry has a seat at the table – **It's NOT too late.**
- Establish key relationships in the administration.
  - White House, Department of Commerce, USTR, Treasury.
    - Advocate for your position.
    - Become a trusted resource for the administration.
  - Leverage Congressional influence.



# Role of Congress

- Congress has granted the president significant authority to impose tariffs.
- However, Congress can still influence administration policy through informal and formal processes.
  - Recent Congressional action.
- While the administration continues to oppose an exclusions process, the more the president and key admin. officials hear from Congressional allies, the greater the chance of getting one.
  - Critical to establish/maintain relationships with Members of Congress (Delegation, Committees of jurisdiction, Leadership).
    - Calls, letters of support, meetings with the WH.

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## **Managing Contract Obligations and Legal Risks**



# Force Majeure and Commercial Impracticability as Defenses to Performance

- Both force majeure and commercial impracticability are defenses to performance.
  - If a valid event occurs that makes performance impossible or impracticable, a party is not in breach for failing to perform.
- These doctrines, standing alone, do not provide a mechanism for obtaining price increases.
- **Force Majeure:**
  - A contractual provision that allows a party to suspend or delay performance due to unforeseen events beyond its control, such as natural disasters, labor strikes, government actions, or supply chain disruptions.
  - Many contracts include broad catchall language covering “other circumstances beyond a party’s reasonable control,” which can provide flexibility in negotiations.



# Force Majeure and Commercial Impracticability as Defenses to Performance

- **Commercial Impracticability:**

- Under Article 2 of the Uniform Commercial Code (UCC), performance may be excused when an event occurs that (1) was a basic assumption of the contract and (2) makes performance impracticable.
- Unlike common law impossibility, impracticability does not require that performance be literally impossible, only that it is so excessively burdensome that it would be unreasonable to enforce the contract.
- Intended to deal with unexpected and drastic changes, not unexpected changes to the profitability of a transaction.

# Tariff-Induced Price Increases: Legal Precedents And Challenges

## ■ Key Takeaways from the Case Law:

- Courts have consistently rejected arguments that tariff-related price increases justify nonperformance under force majeure or commercial impracticability.
- Instead, they view cost fluctuations as foreseeable risks that parties assume when entering into fixed-price contracts.
- Since 2018, no cases have successfully invoked these doctrines under the UCC, based on changes to tariff levels.
- Price increases alone rarely constitute commercial impracticability.
  - The only court to accept a price increase argument required a 572% cost increase and a buyer receiving an unjustified windfall.
  - [\*Aluminum Co. of America vs. Essex Group, Inc.\*](#), 499 F. Supp. 53 (W.D. Pa. 1980) (“ALCOA case”).
- Courts typically rule that financial hardship, even due to extreme price increases, does not excuse performance.



Case	Percentage Increase	Outcome
<a href="#"><u>Louisiana Power &amp; Light Co. v. Allegheny Ludlum Industries, Inc.</u></a> , 517 F. Supp. 1319 (E.D. L.A. 1981)	24% increase nickel; 185% increase carbon ferrochrome; 21%, increase labor	<b>Denied</b> (simply being deprived of anticipated profits does not establish commercial impracticability)
<a href="#"><u>Publicker Industries, Inc. v. Union Carbide Corp.</u></a> , 1975 U.S. Dist. LEXIS 14305 (E.D. Penn. 1975)	86% increase ethylene	<b>Denied</b> (86% increase did not establish force majeure or commercial impracticability)
<a href="#"><u>TECO Coal Corp. v. Orlando Utilities Comm'n</u></a> , No. 6:07-CV-444-KKC, 2010 WL 8750622 (E.D. Ky. Sept. 17, 2010)	42% increase coal	<b>Denied</b> (42% increase did not establish commercial impracticability)
<a href="#"><u>Novelis Corp. v. Anheuser-Busch, Inc.</u></a> , No. 1:06-CV-2257, 2007 WL 9822634 (N.D. Ohio Feb. 28, 2007)	32% increase aluminum	<b>Denied</b> (32% increase did not establish commercial impracticability)
<a href="#"><u>Exelon Generation Co., LLC v. General Atomics Techs. Corp.</u></a> , 559 F. Supp.2d 892 (N.D. Ill. 2008)	30% increase uranium	<b>Denied</b> (30% increase did not establish commercial impracticability)
<a href="#"><u>Roth Steel Products v. Sharon Steel Corp.</u></a> , 705 F.2d 134 (6th Cir. 1983)	15% increase steel	<b>Denied</b> (15% increase did not establish commercial impracticability)
<a href="#"><u>Lawrance v. Elmore Bean Warehouse</u></a> , 108 Idaho 892 (Idaho Ct. App. 1985)	40% increase pinto bean seeds	<b>Denied</b> (40% increase did not establish commercial impracticability)
<a href="#"><u>Cosden Oil &amp; Chemical Co. v. Karl O. Helm Aktiengesellschaft</u></a> , 736 F.2d 1064 (5th Cir. 1984)	45% increase polystyrene	<b>Denied</b> (45% increase did not establish force majeure)
<a href="#"><u>Tilcon New York, Inc. v. Morris Cnty. Co-op. Pricing Council</u></a> , No. A-5453-10T3, 2014 WL 839122 (N.J. Super. Ct. App. Div. Mar. 5, 2014)	135% increase asphalt cement	<b>Denied</b> (135% increase did not establish commercial impracticability)
<a href="#"><u>Upsher-Smith Labs. v. Mylan Labs.</u></a> , 944 F. Supp. 1411 (D. Minn 1996)	40% increase raw materials	<b>Denied</b> (40% increase did not establish commercial impracticability)
<a href="#"><u>Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.</u></a> , 508 F.2d 283 (7th Cir. 1974)	61% granular potash; 67% increase coarse potash	<b>Denied</b> (61% and 67% increase did not establish commercial impracticability)
<a href="#"><u>Langham-Hill Petroleum, Inc. v. Southern Fuels Co.</u></a> , 813 F.2d 1327 (4th Cir. 1987)	56% increase oil	<b>Denied</b> (56% increase did not establish force majeure)

# Government Emergency Actions and Force Majeure

- Courts rarely excuse performance based on government actions unless they fundamentally alter contractual obligations.
- Regulatory changes, tariffs, sanctions, or emergency orders that increase costs are generally considered foreseeable risks.
  - [American Trading & Production Corp. v. Shell International Marine Ltd.](#): A 33% increase in costs due to the Suez Canal closure did not excuse performance.
  - [BAE Indus., Inc. v. Agrati – Medina, LLC](#): A supplier's claim of commercial impracticability due to COVID-19-related steel price hikes was rejected because its contract excluded price changes from force majeure.
  - [Rohm & Haas Co. v. Crompton Corp.](#): Increased compliance costs due to EPA regulations were deemed foreseeable and did not justify nonperformance.
  - [Siemens Energy, Inc. v. Petroleos de Venezuela, S.A.](#): The imposition of U.S. economic sanctions, which blocked payment to a Specially Designated National without a specific license from OFAC (which it would not give), did not make debt repayment “objectively impossible.”



# Contractual Provisions Impacting Tariff Responsibility

- Many supply contracts do not explicitly mention tariffs.
- In the absence of a provision governing the payment of tariffs, who is responsible for payment may be governed by other provisions:
  - **“Change in Law” Clause:**
    - More common in the construction industry.
    - Typically permit a party to revisit costs or time to complete a project in the event that a law is enacted that impacts pricing or timing for deliverables.
  - **Hardship Clause:**
    - Contemplates that a change in circumstances or an economic hardship may allow a party to terminate the contract.
    - Typically, a lot of subjectivity and room for dispute as to whether or not an event triggers this right.

# Contractual Provisions Impacting Tariff Responsibility

- **Pricing Provisions:** Fixed-price contracts typically assign cost risk to the seller; if tariffs increase costs, suppliers cannot unilaterally demand price adjustments unless the contract allows for cost-sharing mechanisms.
- **Taxes:** A tariff is a tax. It is important to consider what the tax provisions of the contract provide.
- **Incoterms:** Define which party is responsible for tariffs, duties, and transportation costs, making Incoterms a useful starting point for tariff responsibility. **Examples:**

## **EXW (Ex Works):**

Buyer bears all costs, including tariffs.

## **DDP (Delivered Duty Paid):**

Seller assumes all import duties and tariffs.



# Pricing Disputes

- How can these disputes escalate?
  - Informal requests for price increases
  - Formal B2B discussions
  - Escalation and demands
  - Stop-ship threats
  - TROs/preliminary injunctions
  - Payment under protest or negotiation of new pay terms
  - Long-term resourcing



# Pricing Disputes: Injunctions

- Four elements necessary to obtain injunctive relief:
  1. Likelihood of success on the merits
  2. Irreparable harm
  3. Balance of the harms
  4. Public policy/interest
- Majority of commercial/supply chain disputes turn on the first and second elements.
  - Although in case trends, you will see judges will give weight to elements three and four to obtain desired outcome.





# Pricing Disputes: Injunctions

- Is a pricing dispute/stop-ship situation “irreparable harm?” Maybe.

Buyer's View	Seller's View	Court's View
Major disruption; immediate losses; damage to reputation	Remedy to pay under protest means it is not “irreparable”	???

# Strengthening Future Supply Chain Contracts to Address Tariffs

- **Explicitly Specify Which Party is the Importer of Record:** Because the importer of record is required to take care of all importing arrangements, including the payment of customs duties, including this provision effectively dictates which party will pay any tariffs.
- **Explicitly Allocate Tariff Costs:** Contracts also can specify which party bears responsibility for tariff-related costs, avoiding ambiguity. Note that it is permissible for parties to share or shift tariff costs behind the scenes, such that one party is responsible for initially paying the tariffs but will receive a partial or total reimbursement from the counterparty.



# Strengthening Future Supply Chain Contracts to Address Tariffs

- **Mandate Tariff-Triggered Price Renegotiations:** These types of provisions include a requirement for renegotiation upon a specific tariff-triggered event.
  - Example: *If new tariffs, duties, or similar government-imposed charges are introduced after contract execution, the parties will renegotiate pricing in good faith to reflect the impact of such charges.*
- **Include Price Adjustment Rights in the Quotation or Quote Updates:** This type of provision is designed to preserve flexibility to reflect unexpected changes in tariffs and thus avoids the problem of force majeure or commercial impracticability clauses not being triggered by even sharp changes to tariff levels.
  - Example: *Supplier reserves the right to adjust prices to reflect the impact of any tariffs, duties, or similar governmental charges imposed after the date of this proposal. These adjustments will be calculated to ensure fair allocation of the increased costs. Supplier will provide advance notice of any such adjustments along with documentation supporting the changes.*

# Supply Chain Integrity

- **Do not lose sight of supply chain integrity risks.**
  - Issue both for existing and especially new suppliers.
  - 1000x increase in detentions relating to supply chain integrity, especially UFLPA.
  - Vetting of new and secondary suppliers needs to take supply chain integrity concerns into account.
  - Supply chain mapping, sub-supplier identification, flow-down conditions, focus on Chinese parts and components/UFLPA — all are related issues that can't be ignored while focusing on tariffs.



# Speaker



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