IMPACT OF TARIFFS ON COMMERCIAL CONTRACTUAL PERFORMANCE: CAN TARIFFS BE A FORCE MAJEURE EVENT?

Date: 28 April 2025

US Litigation and Dispute Resolution Alert

By: Marla Tun Reschly, Thomas G. Allen, Daniel D. McClurg

The Trump administration has adopted an aggressive trade policy, announcing a number of actions that will significantly impact global commerce. Most notably, President Donald Trump's tariffs—and the retaliatory tariffs imposed by other nations—are already impacting suppliers' and buyers' ability to perform under commercial contracts. Tariffs may impact contracting parties in a variety of ways, including increasing the cost of performance. They can also cause supply chain disruptions, which, in turn, affect a party's ability to perform under a contract, regardless of cost.

Contractual force majeure clauses may serve as a basis for relief when deals turn bad due to significant changes in trade regulations, including tariffs. Whether a force majeure clause operates to excuse a party's performance will primarily depend upon the language of the contract. The law varies from jurisdiction to jurisdiction and country to country. For instance, some civil law jurisdictions have codified what constitutes a force majeure event.

This alert addresses the subject from a US common law perspective.

FORCE MAJEURE CLAUSES GENERALLY

Many commercial contracts contain “force majeure” provisions, which are designed to excuse nonperformance or delayed performance of contractual obligations for extraordinary, uncontrollable events that negatively impact a party's ability to fulfill those obligations.[1] In other words, force majeure provisions allocate the risk of events outside of the control of the parties that impact performance under a contract.[2] There is no implied force majeure, meaning that a party can only invoke force majeure if the contract includes a force majeure provision.

While the language of force majeure clauses vary considerably, most clauses contain a list of events that will constitute a force majeure event, such as labor strikes, natural disasters, wars, or freight embargoes. Force majeure clauses often contain a “catchall,” such as “or other similar causes beyond the control of such party.”

TARIFFS AS A FORCE MAJEURE EVENT

The applicability of a force majeure clause to tariffs depends on the specific language in the contract.[3] Force majeure clauses are “narrowly construed” and will only excuse a party's nonperformance if the event alleged to have prevented performance is “specifically identified” in the parties' contract.[4] For instance, parties seeking to invoke force majeure clauses to excuse performance based on the COVID-19 pandemic were generally unsuccessful absent specific contractual language that contemplated disease, pandemics, or governmental action

©2005-2026 K&L Gates LLP. All Rights Reserved.

as a basis for excused performance. The requirement that the event must be expressly identified in the force majeure clause in order to excuse performance is "especially true where the event relied upon to avoid performance is a market fluctuation."[5] This narrow construction also applies to a "catchall" in a force majeure clause, cabining the meaning to "things of the same kind or nature as the particular matters mentioned."[6]

A force majeure clause may excuse performance based on new or increased tariffs if it specifically identifies tariffs, governmental action, increased costs, or words to similar effect as a force majeure event. Absent a specific reference to tariffs, governmental action, or price or cost increases, it is unlikely that a party's failure to perform under a contract will be excused.[7] Moreover, certain force majeure clauses may specifically exclude price increases—such as those caused by new or increased tariffs—as a contingency.[8]

EFFECT OF A FORCE MAJEURE EVENT ON PERFORMANCE

Even where new or increased tariffs can rightfully be deemed a force majeure event, performance is not necessarily excused.

If tariffs are within the scope of a force majeure clause, the question then becomes whether the tariffs affected the party's ability to perform in the way required by the clause. Force majeure clauses often require a party to show that performance has become physically or legally impossible as a result of the event, not merely difficult or unprofitable. Where a contract requires impossibility, a change in market conditions due to tariffs is unlikely to be a force majeure event. Though tariffs will undoubtedly render performance under certain contracts more costly, a party may face challenges establishing that performance has been rendered *impossible*.[9] This impossibility standard may be satisfied, however, where supply chain disruptions due to tariffs prevent a party from performing under a contract, regardless of cost.

On the other hand, clauses may have less stringent requirements (e.g., that the event renders performance "impracticable" or that performance was "hindered").

INVOKING A FORCE MAJEURE CLAUSE

Even where a force majeure clause may otherwise afford relief, a party's failure to follow the mechanics for invoking the clause—for instance, by not complying with notice requirements—could prevent reliance on it.

Moreover, force majeure clauses often require that the party impacted by the force majeure event take reasonable steps to prevent or mitigate the effects of the event. Even if not expressly stated, such a requirement may be implied.[10]

TAKEAWAYS

Changes to tariffs can increase cost, risk, and uncertainty for companies trading in goods across borders or relying on international supply chains. In this rapidly evolving tariff landscape, impacted companies will want to take the following actions:

- Monitor President Trump's executive orders issuing tariffs and his statements regarding future tariffs and trade policies to determine if your contract will be affected.

©2005-2026 K&L Gates LLP. All Rights Reserved.

- Review contractual language and assess how tariffs may impact existing and future contractual obligations.
- Assess whether relief may be available based upon the terms of the contract or under applicable law.
- Proactively discuss the impact of tariffs with contractual counterparties before disputes arise.
- Consider whether the terms of existing contracts should be renegotiated or amended to take into account tariff volatility.
- In new contracts, expressly allocate the risk of tariffs and address whether changes to tariffs amount to a force majeure event.

Where appropriate, companies should seek legal advice as to whether existing contractual terms provide relief from unexpected customs expense. As a global firm with offices in the United States, Europe, Asia, and beyond, our lawyers are well-positioned to provide that advice.

FOOTNOTES

[1] Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 319 (2d. Cir. 1985) (noting that the purpose of a force majeure clause is "to relieve a party from its contractual duties when its performance has been prevented by a force beyond its contract or when the purpose of the contract has been frustrated").

[2] N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co., 799 F.2d 265, 275 (7th Cir. 1986) (finding that a force majeure clause was "not intended to buffer a party against the normal risks of a contract").

[3] *In re* Old Carco LLC, 452 B.R. 100, 119 (Bankr. S.D.N.Y. 2011) ("[W]hile courts will not presume that a change in economic conditions constitutes an excuse for nonperformance, this does not preclude the parties from negotiating for such an excuse.").

[4] Kyocera Corp. v. Hemlock Semiconductor, LLC, 313 Mich. App. 437, 447, 886 N.W.2d 445, 451 (2015) ("[I]f plaintiff had wished to protect itself from artificial market deflation because of government action (or, for that matter, excessive market downturns of any kind), it could have done so" in the contract); *see In re Old Carco LLC*, 452 B.R. at 119 (performance will be excused only "where a force majeure clause explicitly includes the event alleged to have prevented performance").

[5] *In re Old Carco LLC*, 452 B.R. at 119 (quoting United States v. Panhandle E. Corp., 693 F. Supp. 88, 96 (D. Del. 1988)); see OWBR Ltd. Liab. Co. v. Clear Channel Commc'ns Inc., 266 F. Supp. 2d 1214, 1224 (D. Haw. 2003) (concluding force majeure clause did not excuse nonperformance based upon changing economic conditions because the clause did "not contain language that excuses performance on the basis of poor economic conditions"); Stand Energy Corp. v. Cinergy Servs., Inc., 144 Ohio App. 3d 410, 760 N.E.2d 453 (Ohio Ct. App. 2001) (holding worsening economic conditions did not qualify as a force majeure event that would excuse performance where clause at issue was silent as to economic conditions).

[6] JN Contemp. Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118, 124 (2d Cir. 2022) (quoting Kel Kim Corp. v. Cent. Mkts., Inc., 70 N.Y.2d 900, 903, 519 N.E.2d 295 (1987)).

[7] *Kyocera Corp.*, 313 Mich. App. at 449–50, 886 N.W.2d at 452–53 (concluding tariffs imposed as part of "trade

©2005-2026 K&L Gates LLP. All Rights Reserved.

war" did not constitute a force majeure event because tariffs merely caused the plaintiff's performance to "become unprofitable or unsustainable," a risk that plaintiff assumed in the parties' contract); Shelter Forest Int'l Acquisition, Inc. v. COSCO Shipping Inc., 475 F. Supp. 3d 1171, 1187 (D. Or. 2020) (holding tariffs imposed as part of "trade war" did not constitute force majeure event where agreement provided that "changing markets" would not constitute force majeure).

[8] BAE Indus. v. Agrati - Medina, LLC, No. 22-12134, 2022 U.S. Dist. LEXIS 169785, at *13–15 (E.D. Mich. Sept. 20, 2022) (enforcing contractual obligations where COVID-19 caused steel prices to rise unexpectedly because force majeure clause excluded price increases as a contingency).

[9] Coker Int'l, Inc. v. Burlington Indus., Inc., 747 F. Supp. 1168, 1170 (D.S.C. 1990), *aff'd*, 935 F.2d 267 (4th Cir. 1991) (making distinction between impossible performance and increased cost of performance).

[10] Odyssey Mfg. Co. v. Olin Corp., No. 8:23-cv-940-TPB-CPT, 2023 U.S. Dist. LEXIS 143592, at *6 (M.D. Fla. Aug. 16, 2023) ("[E]ven if a true force majeure event exists, [the nonperforming party's] exercise of its discretion to determine what is fair and reasonable is necessarily limited by the duty of good faith and fair dealing.").

KEY CONTACTS



MARLA TUN RESCHLY
PARTNER

CHARLOTTE
+1.704.331.7417
MARLA.RESCHLY@KLGATES.COM



THOMAS G. ALLEN
PARTNER

WASHINGTON, DC
+1.202.778.9188
THOMAS.ALLEN@KLGATES.COM



DANIEL D. MCCLURG
ASSOCIATE

CHARLOTTE
+1.704.331.7444
DANIEL.MCCLURG@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.