THOMPSON HINE

# Construction Update

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## Preparing for Tariffs' Impact on Construction Contracts

On February 1 President Trump imposed a 25% tariff on Mexican and Canadian products and an additional 10% tariff on Chinese products. In response, Canada and Mexico quickly announced retaliatory tariffs. How exactly these tariffs will impact the U.S. economy, the availability and cost of imported products, and, by extension, construction projects across the country, remains largely unknown. The president has since agreed to a 30-day pause on the tariffs against Mexico and Canada as the situation continues to evolve.

With the future of these tariffs uncertain, parties to construction contracts should evaluate their agreements and consider various provisions that have the potential to affect the tariffs' impacts.

### Force Majeure Clauses

One such provision, a force majeure clause, excuses nonperformance resulting from the occurrence of an extraordinary event the parties could not have anticipated or controlled.

Force majeure, unlike the defenses of impossibility and impracticability, is not a product of the common law, but is contractually created. As a result, a force majeure clause "defines the scope of unforeseeable events that might excuse the nonperformance by a party," and a court must look to the language of such a clause in any particular contract to determine if it applies. If a force majeure event within the scope of the clause occurs, the nonperforming party must prove that the event was "beyond the party's control and without its fault or negligence" to successfully excuse their nonperformance.

### Force Majeure and Tariffs

On several occasions, courts have addressed whether the imposition of tariffs on imported products constituted a force majeure event. One such case arose in the fallout of a solar industry "trade war" between the United States and China that saw the imposition of tariffs on solar panel components in 2012 and 2014. In *Kyocera Corp. v. Hemlock Semiconductor, LLC*, the Michigan First District Court of Appeals narrowly construed a take-or-pay contract's force majeure clause that included "acts of government" within the list of possible force majeure events. That court found that, despite asserting that a "precipitous decline" in solar panel prices occurred as a result of the tariff-fueled trade war between the United Stated and China, the plaintiff failed to plead that an "act of government" prevented its performance. The court further held that nonperformance would not be excused as the parties' contract already allocated the risk of shifting market prices such that judicially altering this allocation of risk by broadly interpreting the force majeure clause would be inappropriate.

Other courts, including the U.S. District Court for the District of Minnesota and the U.S. Court of Appeals for the Fourth Circuit, have reached similar conclusions. These courts would not alter the parties' contractual allocation of risk when a government action impacted one party's profit absent clear and express contract language supporting such an alteration.

From these cases, we can learn two lessons about evaluating tariff-related impacts in the context of force majeure clauses. First, government imposition of tariffs should be explicitly included in the clause's list of force majeure events if the parties wish to shift market price risk associated with the future imposition of tariffs. Second, to effectively allocate the risk, the clause should make a clear and specific allocation of risk by referring explicitly to tariff-based "unprofitability," "economic hardship," or "market fluctuations" as an excuse for nonperformance.

## Force Majeure in the Context of AIA Construction Contracts

The standard form A201 - 2017 does not include an explicit force majeure clause, but parties have increasingly incorporated force majeure clauses into the terms of their A201 documents. Careful review of any existing agreements may be necessary to determine if an A201 incorporates a force majeure clause and whether tariffs are specifically contemplated as a force majeure event that could excuse nonperformance.

If an existing A201 document does not contain a force majeure clause, the impending impacts of the Trump administration's tariffs might still be addressed by Section 8.3.1, which operates as a limited, functional equivalent to a force majeure clause. Section 8.3.1 provides:

*If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.*

While Section 8.3.1 will neither excuse nonperformance nor provide for the recovery of damages associated with a tariff-induced price increase, it *may* provide for an extension of the Contract Time.

Since the language of force majeure and other related clauses varies greatly in construction contracts, the particular provisions of any specific construction contract must be carefully examined to determine what, if any, relief is available as the result of tariff-induced price increases or delays. Similarly, such clauses in future contracts need to be carefully worded if the parties desire to specifically allocate the risk associated with tariffs in accordance with their agreement.

## FOR MORE INFORMATION

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