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Tariffs and Commercial Contracts: When Is Nonperformance Excused, and When Is It a Breach?

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In recent weeks, the Trump Administration has imposed sweeping tariffs on U.S. trading partners, based on the country from which the goods are exported and the type of goods imported. For parties to commercial contracts for the sale of goods manufactured outside of the United States, this raises novel concerns about the circumstances for exiting a contract that has become commercially infeasible.

Sellers will be keen to minimize the impact of tariffs on their profit margins, and buyers will seek to avoid having the cost of tariffs passed onto them. Because buyers may be required to pay tariffs in commercial contracts, they may seek to exit a contract based on unforeseen tariff increases. In that case, what is a seller's recourse? If sued for breach of contract, does a buyer have any viable affirmative defenses? Under New York law, a party who believes the other has breached their contract by raising prices due to tariffs, or by attempting to shift the responsibility for those tariffs onto the other, may have a claim for material breach or anticipatory repudiation. By contrast, a party who has been accused of breaching a contract due to its responses to tariffs may consider raising a defense of *force majeure* or commercial impracticability.

While these claims and defenses are available and supported by common law and the New York Uniform Commercial Code ("UCC"), the best practice for buyers and sellers alike is to negotiate clear terms concerning tariffs, whether in new contracts or amendments to existing contracts. However, if a dispute arises regarding which party is responsible for paying tariffs, parties should consider raising the following claims and defenses.

Potential Claims

Anticipatory Repudiation

A buyer's refusal to accept goods based on tariff increases could constitute an anticipatory breach of contract, which would permit the seller to terminate its own performance and sue for breach of contract.

A party to a contract may commit an anticipatory breach (also referred to as anticipatory repudiation) if, prior to the time of performance, it makes a statement or act evincing an intention to refuse performance of the contract.[i] If one party to a contract repudiates its duties before it is required to perform and before it has received consideration, the non-repudiating party can claim damages for total breach. But the repudiation must be an express and absolute refusal to perform that is positive and unequivocal.[ii] Simply expressing that it may be difficult to tender performance, for example, would not constitute an anticipatory breach.[iii]

The UCC permits a non-repudiating party to either wait for the repudiating party to perform or resort to any remedy for breach, and the non-repudiating party may suspend its own performance in the meantime. In any event, the repudiating party has until its next performance is due to retract its repudiation unless the non-repudiating party cancelled or materially changed its position, or "otherwise indicated that [it] considers the repudiation final."[iv]

Additionally, the UCC permits a seller in this scenario to demand assurance of future performance from the buyer when reasonable grounds for insecurity—such as statements constituting anticipatory repudiation—exist. When adequate assurance is not forthcoming, repudiation is deemed confirmed, and the seller may act as though a repudiation had occurred (*e.g.*, sue for breach of contract).[v]

New York courts have held, for example, that a buyer anticipatorily breached a contract where he informed the seller that he would not accept the products he contracted to purchase after the seller had bought the materials for the products but had not yet fabricated them.[vi] For this reason, if a buyer tells a seller it will not accept goods due to increased tariffs, a seller could potentially bring suit for anticipatory breach even if it has not yet manufactured the goods so long as the seller can show it has already incurred the costs necessary to manufacture them.

Material Breach of Contract

Responsibility for tariff payments should be explicitly written into contracts and referred to as material terms of these contracts. Indeed, tariff payments are often the responsibility of the buyer in most standard international contracts for the sale of goods. In this circumstance, a buyer's refusal to pay tariffs would constitute a material breach of contract, allowing the seller to sue to recover for the breach, so long as the buyer's payment of the tariffs is deemed essential to the contract's purpose. Under New York law, a material breach "is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract."[vii] Put differently, a breach is material if it defeats the object of the parties in making the contract and deprives the injured party of the benefit it justifiably expected under the contract.[viii]

For instance, in a recent New York case alleging a material breach of contract, an LLC was held to have materially breached a stock purchase agreement when the LLC did not pay accrued real estate taxes on properties that were the subject of the agreement. The court found that it was a material breach because the purpose of the stock purchase agreement was to effect the indirect sale of the properties to the LLC, which in turn, required timely payment of the real estate taxes to avoid foreclosure.[ix]

Potential Defenses

Force Majeure

As we saw in litigation arising from contracts impacted by the COVID-19 pandemic, *force majeure* may be asserted as a defense to nonperformance of a contract. A *force majeure* event is an event specified in a contract that, upon its occurrence, relieves a party from liability for non-performance or delayed performance caused by that specific event. *Force majeure* clauses excuse non-performance only where the reasonable expectations of the parties have been frustrated due to circumstances beyond the control of the parties.[x]

While no cases have yet decided whether the Trump administration's tariffs constitute a *force majeure* event, the typical structure of international trade contracts suggests that because tariffs are contemplated and allocated by the parties, they have controlled for the event and *force majeure* is therefore unavailable as a defense. Delivery Incoterm rules, for example, often require sellers to deliver the goods to the buyer with any and all duties paid, while other delivery terms may require the buyer to clear goods through customs and pay any required duties.[xi] However, if a contract does not provide for the allocation of tariffs, a *force majeure* defense may be viable.

Commercial Impracticability

Under the UCC, delay in delivery or non-delivery (in whole or in part) is not a breach "if performance as agreed has been made impracticable." A breaching party claiming a defense of commercial impracticability is required to show (1) a contingency, (2) the impracticability of performance as a consequence of the occurrence of that contingency and (3) that the nonoccurrence of the contingency was a basic assumption of the contract.[xii] Nonetheless, impracticability caused only by financial difficulty or economic hardship generally does not excuse performance.[xiii]

A party seeking to defend nonperformance due to tariffs increasing the costs of doing business as commercially impracticable will need to show that the increased costs posed an "extreme and unreasonable expense." For example, the Second Circuit rejected a defense of commercial impracticability where the additional expense was an increase of less than one-third over the agreed-upon contract price.[xiv] In another case, the New York Supreme Court held that a 10.4% increase in the cost of producing and delivering a half pint of raw milk did not rise to the level of commercial impracticability. The New York court rejected the plaintiff's argument that the cost increase was unforeseeable because it was caused in part by an international agreement between the United States and Russia, holding that the plaintiff "had to be aware of" rising milk costs and the varying price of milk set by the Department of Agriculture.[xv]

Based on current New York case law, it is unlikely that the existence of new tariffs alone will render a contract commercially impracticable. However, if the tariffs increase the paying party's costs substantially, a New York court may very well find that to be an "extreme and unreasonable expense."

Conclusion

While the impact of the Trump Administration's tariffs on existing commercial contracts is so far unclear, parties currently contracting or seeking to amend their contracts for the sale of goods can take steps now to solidify which party will assume the cost of tariffs and what effect an increase or decrease in tariffs will have, if any, on the parties' obligations.

Vedder Price continues to monitor the legal landscape for decisions concerning the effect of tariffs on commercial contracts and is available to advise both buyers and sellers on their contractual rights and obligations.

If you have any questions about this article, please contact **David M. Rownd** at drownd@vedderprice.com, **Elvira Razzano** at erazzano@vedderprice.com or any Vedder Price attorney with whom you have worked.

[i] 22A N.Y. Jur. 2d Contracts § 445 (Feb. 2025).

[ii] *Audthan LLC v. Nick & Duke, LLC*, 244 N.E.3d 1059, 1066 (N.Y. 2024).

[iii] *Children of Am. (Cortlandt Manor), LLC v. Pike Plaza Assocs., LLC*, 978 N.Y.S.2d 323, 324 (App. Div. 2014).

[iv] UCC § 2-611(a).

[v] *See Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 705 N.E.2d 656, 660 (N.Y. 1998).

[vi] *McCann v. McSorley*, 39 N.Y.S.3d 583, 585 (App. Term 2016).

[vii] *E.g.*, *Feldmann v. Scepter Grp., Pte. Ltd.*, 128 N.Y.S. 13, 14 (App. Div. 2023).

[viii] *Times Mirror Mags., Inc. v. Field & Stream Licenses Co.*, 103 F. Supp. 2d 711, 731 (S.D.N.Y. 2000), *aff'd*, 294 F.3d 383 (2d Cir. 2002).

[ix] *249-251 Brighton Beach Ave., LLC v. 249 Brighton Corp.*, 192 N.Y.S.3d 133, 134, 136 (App. Div. 2023).

[x] *1877 Webster Ave. Inc. v. Tremont Ctr., LLC*, 148 N.Y.S.3d 332, 336 n.1 (Sup. Ct. 2021).

[xi] Mark A. May et al., *Do President Trump's Tariffs Constitute* Force Majeure?, DENTONS (Apr. 8, 2025), https://www.dentons.com/en/insights/alerts/2025/april/8/do-president-trumps-tariffs-constitute-force-majeure.

[xii] *E.g.*, *Canusa Corp. v. A & R Lobosco, Inc.*, 986 F. Supp. 723, 731 n.6 (E.D.N.Y. 1997).

[xiii] *E.g.*, *Taxis for All Campaign v. N.Y.C. Taxi & Limousine Comm'n*, 2024 WL 4007963, at *6 (S.D.N.Y. Aug. 29, 2024); *Siemens Energy, Inc. v. Petróleis de Venez., S.A.*, 82 F.4th 144, 153–54 (2d Cir. 2023); *J.P. Morgan Ventures Energy Corp. v. Miami Wind I, LLC*, 179 N.Y.S.3d 892 (Table), at *5 (Sup. Ct. Dec. 22, 2022).

[xiv] *Am. Trading & Prod. Corp. v. Shell Int'l Marine Ltd.*, 43 F.2d 939, 942 (2d Cir. 1972).

[xv] *Maple Farms, Inc. v. City Sch. Dist. of Elmira*, 352 N.Y.S.2d 784, 787, 789–90 (Sup. Ct. 1974).