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Arbitration Under Geopolitical Pressure – Risk Allocation And Enforcement Challenges: Part One

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Geopolitical tensions–trade wars, sanctions and strategic competition–increasingly disrupt commercial contracts, generate disputes and complicate enforcement. This three-part blog post series examines where risks arise and how parties can manage them in an arbitration context.

When Geopolitics Disrupt The Deal: How to Manage Tariff-Related Disputes

Tariffs are typically used to give locally produced goods a price advantage over competing imports and to raise revenue for importing governments. For companies with cross-border supply chains, they rarely arrive in a dispute as an abstract trade-policy question – rather, the central issue is about who agreed, expressly or implicitly, to bear that risk.

That question remains timely. After President Trump's "Liberation Day" tariffs were held to be unconstitutional in February, the U.S. administration turned to other statutory tools, including a temporary 10% global tariff under Section 122 of the Trade Act of 1974, later rejected by the Court of International Trade, and a new 10-12.5% tariff on products from more than 59 countries and the European Union.

Meanwhile, the UN Conference on Trade and Development expects world merchandise trade growth to fall sharply in 2026, while the Federal Reserve Bank of New York has found that nearly 90% of the economic burden of US tariffs fell on US firms and consumers.

These dynamics help explain why tariff-related shocks can fuel commercial disputes. Tariffs may lead to price imbalances, supply chain disruptions, and breakdown of long-term agreements. In arbitration, the outcome will usually turn on contract language, governing law, evidence of foreseeability, the parties' allocation of risk and bargaining power.

Tariff-related disputes: what defenses are available?

Parties may invoke contractual defenses, statutory remedies, or common-law doctrines to excuse performance, terminate, or renegotiate their contract.

Force majeure: difficult without clear wording

Force majeure may suspend or excuse non-performance, temporarily or permanently, where an extraordinary and unforeseeable event beyond a party's control prevents it from performing its contractual obligations.

Parties may define, extend, or limit force majeure by agreement. A distinction must be drawn between contracts governed by common law -which does not recognize force majeure as a defense absent a contractual provision- and contracts governed by civil-law, where force majeure is typically a statutory doctrine whose application may, to varying degrees, be modified by agreement.

US courts and tribunals tend to interpret force majeure clauses narrowly. In *Shelter Forest v. COSCO Shipping* (D. Or. July 28, 2020), a clause covering "acts of god, strikes, embargoes, or events similarly beyond the knowledge or control of either party", but excluding "commercial contingencies", was held insufficient to excuse tariff-affected performance. Again, in *Kyocera Corp. v. Hemlock Semiconductor* (Mich. Ct. App. Dec. 3, 2015), tariffs were rejected because they were not expressly contemplated in the contract. In *Miller Bros v. Recom Corp* (AAA Case No. 01-14-0002-0048, Mar. 10, 2016), the defense also failed where the supplier had contractually assumed import/export responsibility and the tariff risk was found to be foreseeable.

The same issue arises under French law, although through a different framework. Article 1218 of the Civil Code requires an external, unforeseeable, and irresistible event that makes performance impossible, rather than merely more onerous. Because tariffs typically increase costs without precluding performance, the statutory threshold may be difficult to meet. Parties can, however, define force majeure contractually. Recent French court decisions confirm that a clause that expressly captures disruptive regulatory or tariff changes may therefore be decisive.

These authorities underline three practical points: a tariff-related cost increase will rarely be enough to invoke statutory or generic force majeure clauses where performance remains possible; tariffs should be expressly referenced in the contract if parties wish to treat them as force majeure, and risk-allocation language can be decisive.

Hardship and related doctrines: where performance is possible, but the bargain changes

Hardship is aimed at situations where an unforeseeable event materially changes the economics of the deal, without preventing performance altogether. This can be particularly relevant in tariff-related disputes.

In common law jurisdictions, absent an express hardship clause, courts are generally reluctant to intervene. By contrast, in civil law systems, statutory doctrines may enable the affected party to seek renegotiation. Under Article 1195 of the French Civil Code (known as “*imprévision*”), for example, a party may request renegotiation where an unforeseeable change of circumstances makes performance excessively onerous for a party that had not accepted that risk. The affected party must continue to perform during renegotiation. If renegotiation fails, a court may revise or terminate the contract.

A party may argue that tariffs qualify as hardship where they were unforeseeable at the time of contracting, caused significant economic imbalance, and fell outside the affected party’s assumed risks.

In arbitration, the key questions will generally turn heavily on the facts of the particular case: were tariffs foreseeable when the contract was signed? Did the cost increase cause significant economic imbalance? Did it fall outside the affected party’s assumed risks? The stronger the evidence that tariff risk was foreseeable, contemplated or allocated, the harder it will be to rely on hardship as a basis for relief.

US common law doctrines: a high bar

Under U.S. law, impossibility, impracticability and frustration of purpose may be invoked to attempt to excuse performance in some tariff disputes, but the threshold is high:

- Impossibility requires an unforeseen post-contract event that makes performance itself impossible, not merely more expensive or less profitable.
- Impracticability requires an unforeseen event, the non-occurrence of which was a basic assumption of the contract, that has made performance commercially impracticable.
- Frustration asks whether the unforeseeable event destroys the contract’s principal purpose.

Cases like *TPL Inc. v United States* (Fed. Cl.Sept. 16, 2014) and *Shelter Forest* (D. Or. July 28, 2020) show the limits of these doctrines: courts rejected tariff-related defenses where performance by other contractors remained possible, or the tariffs risk was foreseeable due to the ongoing trade-war. *Murphy Marine v. Dole Fresh Fruit* (D. Del. Jan. 13, 2022) reached a different result on specific facts: an unexpected port tariff, following a port privatization, supported an impracticability defense where the contract presupposed no such tariff and the charge undermined the deal’s commercial purpose.

Using contractual tools to build tariff risk into the deal

The best way to manage tariff-related risk is before the dispute arises. Parties entering long-term, supply-dependent or import-sensitive contracts should consider:

- Providing expressly whether tariffs, customs duties, trade restrictions, export controls and sanctions are included or excluded from force majeure.
- Using tariff-specific price adjustment clauses with objective triggers. These clauses allow prices to be adjusted under specified conditions, such as a change in law or a material increase in input costs, without requiring full renegotiation.
- Tailoring material adverse change clauses in M&A transactions involving import-dependent businesses. These clauses allocate the risk of significant adverse developments between signing and closing.
- Including hardship or renegotiation clauses that specify timing, interim performance obligations and consequences if renegotiation fails, where appropriate.

- Carefully choosing the governing law, because common law systems often set a high bar for tariff-related excuses, while some civil-law systems offer more flexible hardship remedies.
- Building in structured negotiation steps before litigation or arbitration.

The arbitration takeaway

Geopolitical shifts can lead to tariff-related disputes. These are generally won or lost on risk allocation, foreseeability, causation, and proof. For parties negotiating cross-border contracts, the practical question is often straightforward: should tariff risk sit with the buyer, the seller, or be shared through a price-adjustment or renegotiation mechanism? The clearer the answer in the contract, the better the parties' chances of avoiding lengthy proceedings with uncertain outcomes.

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