Who Will Pay The Tariffs?

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Effective March 23, 2018, the U.S. government imposed new tariffs on steel and aluminum under Section 232 of the Trade Expansion Act of 1962 on most countries, excluding Canada and Mexico and providing a temporary reprieve to the European Union and certain other countries. On March 22, 2018, the White House announced its plans of pushing ahead with the Section 301 proceedings under the Tariff Act of 1974, which threaten to impose a significant tariffs on a wide range of Chinese products. These are just a few recent examples of new U.S. tariffs that are imposed without much prior notice and will likely come as a complete surprise to importers. These tariffs raise concerns about who will be responsible for the price increases under existing supply/purchase contracts. While the temporary order to suspend the steel and aluminum tariffs for the EU, Australia, South Korea, Brazil and Argentina until May 1, 2018 has provided an opportunity to find a negotiated solution, the general cloud of uncertainty remains. In addition, these tariffs already have resulted in retaliation by China, who has imposed tariffs on a number of U.S. exports such as pork, beef products, and certain agriculture goods. Europe is not far behind and is prepared to initiate its own retaliatory tariff remedies. In light of a potential trade war, responsibility for payment of the tariffs threatens the economic viability of supply/purchase contracts.

Now Would Be a Good Time to Review Contracts

The question of who will be responsible for the additional costs imposed by the tariffs will be governed (in the first instance) by the supply/purchase contract. Some contracts contain clear clauses allocating the cost of any tariffs to one of the parties. Such clauses are enforceable under the governing laws of a U.S. state. Problems arise when the parties exchange multiple documents such as proposals, invoices, purchase orders and confirmations, each containing terms and conditions that conflict. Reliance on the fine-print terms included on the back page of such documents or references to a website containing a company's general terms and conditions can lead to disappointment. Frequently, in the rush to close a deal, parties do not include general terms and conditions that appear on the back page of a sales document or fail to object to those terms and conditions. In such circumstances (assuming the contracts are governed by the laws of a U.S. state), Section 2 of the Uniform Commercial Code (UCC), as adopted by the governing state, generally will determine what constitutes the terms of the contract. The UCC treats conflicting terms as offers and counteroffers, and the rules for determining the governing terms can be complex and expensive to litigate. This conflict among forms is referred to as the "battle of the forms." Clear drafting can avoid this "battle of the forms."

In addition, we recommend reviewing the importation process to determine if the U.S. "importer-of-record" designation is in line with the contract's importer-of-record designation. In the first instance, U.S. Customs looks towards the "importer-of-record" as the party responsible for all import duties.

What Can Be Done?

First, review with your legal counsel the contract documents to determine what are the governing terms assigning responsibility for the payment of tariffs. Second, make sure the contract is governed by the laws of a state within the U.S. Applicability of state law assures the enforceability of the tariff allocation clause and avoids conflict of laws questions. Third, avoid any "battle of the forms" by revising the governing contract so that it contains a clear, enforceable statement designating which party is responsible for the payment of tariffs. Taking these steps will provide maximum protection.

Force Majeure v. The Right to Amend/Terminate

Force Majeure is a doctrine that allows, under certain circumstances, a party to be excused from performance of its contractual obligations. The availability of force majeure arises from contract law and is not a common-law defense. Thus, the governing documents must contain a force majeure clause in order to raise the defense. Force majeure is related to impossibility of performance and commercial impracticability, and therefore, force majeure applies in situations where the performance is rendered virtually impossible by unforeseen circumstances. That a contract is made more expensive to perform or made less profitable generally is insufficient to prevail under a force majeure clause. Most U.S. courts view the imposition of tariffs as a foreseeable risk of entering into the contract. Because a force majeure clause is subject to a state's law regarding interpretation of contracts, chances for a successful defense of force majeure are enhanced by drafting a broad force majeure clause with specific reference to the imposition of tariffs as a force majeure event. Absent such a clause, successful declaration of a force majeure is unlikely.

A more straightforward contract remedy may be to add a broad right to either terminate the portion of a supply agreement affected by the tariff increase or amend the price to reflect current conditions that affect the price, including increase in raw material prices, labor prices and tariffs that had not been imposed at the time the contract was negotiated and executed.

If you have any questions about any of the above information, or wish to discuss a particular matter, please feel free to speak with any member of our Litigation Practice by calling us at 412-297-4900 or visiting https://www.cohenlaw.com/practices/litigation. To receive future news alerts, please send an e-mail to bulletins@cohenlaw.com.