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Tariff Tensions: Assessing Your Cross-Border Contract Risk

President Donald Trump proclaimed April 2 “Liberation Day” and unveiled a new trade policy for worldwide “reciprocal tariffs”. Initial reactions were that Canada (and Mexico) emerged relatively better off in that they would continue to benefit from a 0% tariff on goods compliant with the United States-Mexico-Canada Agreement (USMCA). However, the scope of such exceptions is itself an uncertainty, as the USMCA is up for a review in 2026 and may well be renegotiated sooner than that. In the meantime, Canada still faces the 25% tariff on steel and aluminum which came into effect on March 12, and most importantly a 25% tariff on automobiles and auto parts which comes into effect today.

Businesses relying on the cross-border supply of goods, or key components for the production of goods, may be faced with contracts that no longer make economic sense. In this new period of uncertainty, businesses will be turning to their contracts to assess their exposure and understand their rights, and should keep the following key concepts in mind:

- ***Force Majeure****:* These clauses excuse contractual performance in situations outside of the control of the parties, such as natural disasters, but may also include events like governmental orders, or market events. In *Domtar Inc v Univar Canada Ltd*, a supplier to a paper mill had a contract to buy caustic soda under a price cap. When the price of caustic soda rose significantly, the supplier attempted to rely on the *force majeure* clause to go above the price cap. The clause at issue excused performance where, despite diligent efforts, the supplier could not obtain “raw materials” on commercially acceptable terms. The Court refused to accept that caustic soda, which was the very subject of the contract, could be a “raw material” for the purpose of the *force majeure* clause.
- ***Frustration****:* A contract is said to be “frustrated” when a change of circumstances renders performance “radically different” from what was originally contemplated. Consider *Petrogas Processing Ltd v Westcoast Transmission Co*, where the parties had a gas

purchasing contract with prescribed minimum purchases. After the contract was signed, Canada formed the National Energy Board with the power to fix the export price of natural gas, which resulted in significantly higher prices for gas. The creation of a pricing regulation regime was found to go beyond merely making the contract more expensive or onerous but amounted to a fundamental change in the nature of the contract, and so the buyer was relieved of its minimum purchasing obligations. The result in *Petrogas* was upheld on appeal, but without comment on the issue of frustration. It is also important to bear in mind that frustration cannot be claimed if the contract anticipates the event in any way. Companies considering frustration as a potential position should be aware that it is typically ***very*** difficult to establish.

- ***Termination****:* Contracts often include clauses specifying termination obligations, such as the expiry of a set period of time, or on the occurrence of triggers such as “events of default”. Some contracts can also be easily terminated on notice to the opposite party. However, it is crucial to exercise these rights in good faith. A cautionary example is the case of *CM Callow Inc v Zollinger*. In this case, a company had the right to terminate a services contract on 10 days notice but engaged in misleading conduct with its counterparty before termination. Despite having the right to terminate, its dishonest and bad faith exercise of its rights led a finding of liability for breach of contract.
- ***Forum and Arbitration Clauses****:* A contract may designate that disputes must be resolved in Courts of a certain jurisdiction, or that they must be kept out of the Court altogether. In a cross-border dispute, this may give one of the parties a “home court advantage”. In most commercial contracts, parties will be held to these clauses, but there are occasions where they may not be enforceable. For example in *Uber Technologies Inc v Heller*, the Supreme Court found that a clause requiring mediation and arbitration in the Netherlands, including significant up front arbitration fees, was an unfair arrangement resulting from unequal bargaining power, and was therefore invalid.

Every case hinges on its unique set of facts, and every contract depends on its distinct language. However, given the current political climate, companies will need to maintain a strong understanding of their commitments, and plan proactively to manage legal risk through the topsy turvy of modern cross-border trade. As litigators we can help assess the rights and

risks of parties to stop performing economically unviable contracts, as well as how to effectively respond when faced with such assertions from others.