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Commerce in the Crossfire

Legal Defences Against Trade Volatility

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The global trade landscape is once again in a state of upheaval. Within weeks of returning to office, President Donald Trump has set the stage for a new round of tariff escalations, reigniting concerns over economic protectionism and retaliatory trade measures. Early signals from Washington suggest a reassessment of steel and aluminium tariffs, with Australia scrambling to secure an exemption. Meanwhile, Indian exporters fear that heightened US import duties will lead to surplus steel flooding global markets, exacerbating price instability.

These tensions mirror past disruptions; the aggressive tariffs of Trump's first term triggered a cascade of retaliatory measures, from China's counter-duties on American agriculture to the European Union's imposition of safeguard quotas. The consequences were severe; supply chains fractured, contract disputes surged, and companies found themselves entangled in costly legal battles over obligations that had become impossible, or at least ruinous, to fulfil.

Yet the volatility today is arguably even greater. Unlike in previous trade wars, where battle lines were largely predictable, the current environment is marked by growing legal uncertainty.

While the Trump administration's actions are the most visible, they are merely the most assertive expression of a broader trend: nations across the world are reevaluating their commitments to free trade, deploying regulatory instruments that were once reserved for geopolitical crises. China has already retaliated by imposing countermeasures, including reciprocal tariffs on US imports, and the EU is whispering about a possible application of its Anti-Coercion Instrument (please see latest analysis provided by our team). Similarly, Ecuador has recently placed tariffs upon goods arriving from Mexico, and some global retailers (e.g. Shein) are requesting that their suppliers transfer their production centres to countries less impacted by regulatory risks, thereby altering established supply chains. This shifting regulatory climate means that contracts drafted even a few months ago may no longer reflect the legal and economic realities under which they were signed.

For companies operating across multiple jurisdictions, the risk is no longer theoretical; it is immediate and pressing. Global businesses need to shift from reactive litigation strategies to proactive contract structuring. They must now ask themselves, are their contracts equipped to handle these rapid changes, or are they exposed to legal and financial risks for which there is little or no recourse?

It is a common misconception that courts will intervene when regulatory shifts make performance difficult or commercially untenable. The bar for relief is extraordinarily high, and businesses attempting to escape their contractual obligations will find themselves facing a daunting challenge.

Common-law jurisdictions, such as the US and the UK, take a rigid approach to economic disruptions. Courts have historically refused to excuse performance on the grounds of increased costs or regulatory changes, instead treating such risks as part of normal commercial operations.

Civil law jurisdictions, while more receptive to economic disruption as a justification for modifying agreements, remain reluctant to grant relief absent extraordinary circumstances. The doctrine of *rebus sic stantibus*, recognised in many European legal systems, allows for contract modification or termination when unforeseen events fundamentally alter the contractual equilibrium. However, courts apply this doctrine narrowly, typically requiring that the event be both unforeseeable and severe enough to render the contract's execution grossly unfair. Even when invoked successfully, judicial interventions tend to favour renegotiation rather than outright cancellation. Yet, cases involving private commercial contracts rarely meet this high threshold.

The takeaway from both legal traditions is clear: courts are not designed to rewrite contracts simply because the economic landscape has shifted. Companies facing new tariffs or regulatory changes cannot assume that *force majeure*, "frustration", or "hardship" doctrines will provide a legal escape route. Without explicit contractual provisions addressing such contingencies, businesses are often left with no choice but to perform under substantially more burdensome conditions or face significant penalties for breach.

Every contract drafted in today's volatile climate should be built with resilience in mind. Key risk allocation mechanisms must be embedded into agreements from the outset. They need special-purposes clauses covering as much foreseeable risk as possible. This is an umbrella term, but in the current climate, businesses should strive to incorporate at least one of the following provisions: a change-of-law clause, a clause specifically dedicated to the issue of tariffs, clauses related to price issues and clauses specifying Incoterms and their use as risk allocation instruments.

While tariffs represent only one element of regulatory risk, a broader approach is often necessary. A change-of-law clause allows for renegotiation of contract terms if a legislative or regulatory change fundamentally alters the economic balance of the contract. These clauses would provide a safeguard against sudden, unilateral shifts in trade policy, (e.g. reimposition of tariffs on previously exempt countries, new export restrictions, or government-mandated licensing requirements).

The strength of a change-of-law clause lies in its specificity. A vague provision allowing renegotiation due to "regulatory changes" is ripe for dispute. Instead, the clause should define the applicable threshold. Does the change increase costs beyond a certain percentage? Does it prevent performance altogether? Courts will look at the intent and clarity of the language. In the absence of an objective standard, contracting parties will risk being forced into litigation to determine whether the clause applies at all. For companies operating in industries sensitive to government intervention (e.g. energy, defence, high-tech manufacturing, etc.) change-of-law clauses need to become nonnegotiable; without them, businesses risk being bound to terms that no longer reflect the realities of the market.

A tariff exclusion clause, which explicitly states that newly imposed tariffs should constitute grounds for renegotiation, could also be a worthwhile inclusion. Theoretically, this mechanism ensures that any cost fluctuations engendered by the imposition of some new tariff would require the parties to equitably renegotiate the terms of their operation. For suppliers, it would operate as a guarantee that, in the case of dramatic shifts in tariff policy, they would not be obligated to perform when said performance would significantly and negatively impact their books.

For contracts spanning multiple years or involving volatile markets, a price adjustment clause ensures that neither party is unduly burdened by cost fluctuations. This provision allows prices to shift based on predefined benchmarks (e.g. commodity indices, inflation rates or tariff-triggered cost increases). Such clauses are particularly relevant in long-term supply agreements where raw materials, transportation and labour costs are unpredictable. Without them, suppliers forced to absorb drastic cost hikes may become financially distressed, leading to supply chain disruptions and contract defaults. Price adjustment clauses provide structured flexibility, reducing the risk of disputes and ensuring continuity.

Parties can further refine their risk allocation strategies by incorporating appropriate Incoterms into their contracts. By clearly defining when and where risk transfers from seller to buyer, Incoterms offer an objective, industry-standard method to address tariff uncertainties; for example, i) Delivered Duty Paid (DDP), and ii) Ex Works (EXW).

This explicit allocation reinforces the fixed benchmarks already established in the clauses. Such clarity is invaluable, ensuring that contractual risk allocation remains transparent, enforceable and tailored to the evolving market landscape.

In an era where trade policy can shift overnight, companies must move beyond reactive legal arguments and adopt a proactive contractual approach. Courts have consistently held that commercial difficulty is not an excuse for nonperformance; businesses must, therefore, embed risk-mitigating mechanisms within their agreements from the outset. Every contract negotiated today should be built to withstand uncertainty, or, at the very least, create contractual grounds for suspension of obligations until the contracting parties can equitably renegotiate the terms of their agreement. Whether through tariff regulating clauses, change of law clauses, price adjustment clauses or Incoterm precision, parties must ensure that their agreements remain enforceable, predictable and resilient, regardless of geopolitical turbulence.

Our International Trade and Public Policy lawyers actively monitor global developments and are ready to support clients navigating any eventuality.

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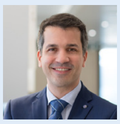

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