

West Coast Ports Labor Turmoil Time to Dust Off That Overlooked Force Majeure Clause?

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AUTHOR NOTE: The Pacific Maritime Association and the International Longshore and Warehouse Union announced on Friday evening, February 20, 2015, that they had reached a tentative new 5 year labor contract covering all 29 West Coast ports. However, news reports indicate that some time will be needed to clear what has been described as an "epic" backlog of ships and shipping containers that has developed - perhaps 90 days. Since the last lockout in 2002, the West Coast ports have doubled their capacity, so the backlog is likely to be greater than that experienced after prior work stoppages.

The simmering labor dispute between the International Longshoreman and Warehouse Union and the Pacific Maritime Association, which represents West Coast port owners, has begun to capture the attention of businesses that have supply chains subject to the "choke-point" of the West Coast ports. News reports contain accusations of work slow-downs and lockouts, drops in shipping container imports through the Port of Oakland, California, a partial shutdown of 29 West Coast ports over President's Day weekend and the involvement of the U.S. Secretary of Labor at the direction of President Obama. Honda Motor Co. indicated that it would slow production for a week at plants in Ohio, Indiana and the Canadian Province of Ontario in connection with the delay of parts shipments. The possibility exists that President Obama may declare a national emergency under the 1947 Taft-Hartley Act, in an effort to bring about a settlement. Finally, more than 70 trucking companies have allegedly sent "force majeure" letters to the Intermodal Association of North America and shipping lines indicating that they will be unable to fulfill contracts because of unforeseen circumstances.

These events remind us of the need to focus on an often overlooked "boiler-plate" provision in contracts for the purchase of goods: the force majeure clause. Any business which is reliant upon a supply chain that must pass through U.S. West Coast ports should be considering the impact on its operations and its customer relationships of any delay caused by shipment of products to the business through the West Coast ports. While everyone hopes that the matter on the Pacific Coast of the U.S. will be resolved, we suggest that businesses examine their force majeure rights with respect to both their suppliers and their customers and we offer the following brief comments to assist in your review.

What is Force Majeure? Force majeure is often viewed as a cause or occurrence which is outside of the control of a party to a contract, rendering performance by that party impossible. Often, reference is made to "Acts of God", as well as to specific foreseeable but uncontrollable events, such as lightning, earthquakes, storms, floods, fires, wars and civil unrest, riots (and in more recent years, terrorism), new government restrictions and even power or communication outages. The list also frequently includes labor disputes,

strikes or unrest, such as the current ports dispute.

Force majeure provisions of contracts typically contain two important parts: (1) the description of what constitutes a "force majeure" cause or event and (2) the rights of the parties when such a cause or event occurs. Both portions must be examined.

The parties can spell out in detail in their contract the events which will constitute force majeure events and the rights and duties of the parties when one of those events occurs. Absent contract terms on force majeure or "excused performance", the current law applicable to most contracts for the sale of goods is largely governed by the provisions of Section 2-615 and Section 2-616 of the applicable Uniform Commercial Code (UCC). The UCC provides that when performance of the contract becomes "impracticable" as a result of the occurrence of a contingency the nonoccurrence of which was a basic assumption of which the contract was made, the delay in performance or nonperformance is not a breach. In the event that a seller under a contract experiences this commercial "impracticability", the seller must allocate product deliveries among its customers but may, at its option, include regular customers not then under contract, as well as its own requirements for further manufacture. The seller may allocate limited product in any manner that is fair and reasonable.

How Will My Supplier Claim that a Force Majeure Event has Occurred? A seller under a contract for sale of goods must provide notice to each buyer that there will be a delay or nonperformance and, if allocation of product is required, the notice must contain the estimated quota which will be made available to the buyer. Such notice must be made "seasonably". While the UCC does not define "seasonable" notice, courts have focused on the need to provide notice as soon as practicable, particularly with regard to the possibility that the buyer may be able to mitigate the impact of the seller's delay or nonperformance, such as obtaining goods from another source. In addition, these force majeure provisions speak to situations where there are no alternative means to perform or avoid the delay. When other, more expensive means to perform exist (for example, shipment of some products when feasible by air rather than through West Coast ports), the supplier is very likely obligated to utilize those means.

Have I Received a Force Majeure Notice? There is no specific requirement that a force majeure notice from a seller or supplier be presented in a certain form or be titled in a certain manner. Purchasing department personnel should be alerted to the possibility that they will receive notices (either correspondence or email, depending upon the contract's notice requirements) that may discuss the great difficulties the supplier is facing but do not use the formal words "notice" or "force majeure" or refer to the UCC. Such correspondence or communication should be referred to management and legal counsel for review. Identifying force majeure notices is very important, because Section 2-616 of the UCC indicates that when the buyer fails to respond to a force majeure notice within a reasonable time not exceeding 30 days by either (1) terminating the contract and discharging the unperformed portion of the agreement or (2) agreeing to modify the contract by accepting the seller's proposed available product quota and substitution, then the contract is automatically terminated with respect to any performance effected by the notice. Note that the seller's notice requirements under Section 2-616 of the UCC cannot be waived by the contract, but can only be made more burdensome.

How Do I Deal With My Own Customers? If the disruption caused by your supplier's force majeure notice will affect your ability to meet your obligations to your own customers, you may find it necessary to provide a

similar force majeure notice to your customers. In such circumstances, asking for additional information from your own supplier will allow you to be more accurate when addressing your own customers and it will enable you to establish an appropriate claim against your seller, if your seller did not provide proper notice or if your seller has not actually experienced a true force majeure event. All of the issues described above will be equally applicable to your notice to your customer. In particular, your ability to obtain raw materials, parts or finished goods through alternative supply channels must be carefully examined before sending notices to your customers.

Conclusion. When you realize that your supplier's difficulties are becoming your difficulties, it is important to learn as much as you can about the situation. Careful examination of your contract with your customer with respect to force majeure events and other contract terms may afford you an opportunity to address unexpected difficulties. If your business depends upon supply chains that pass through West Coast ports, start to examine your contracts with those suppliers and with your customers. Hopefully, the labor disputes will be settled, but continuing disruptions may require you to address the effect on your business. As you might expect, consulting with legal counsel on the application of your contracts and applicable laws to the supply disruptions will allow your business to anticipate and respond in an optimal manner.

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