

INSIGHTS

Steel and Aluminum Tariffs: Time to Dust Off the Price Adjustment Clause?

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The continued and controversial imposition of tariffs has not only resulted in global economic and political fallout but has also adversely affected contractual relationships for suppliers, manufacturers, contractors and project owners far downstream from the government. Whether you are the manufacturer of products incorporating steel or aluminum that is losing profit because of a fixed price contract, or a project owner that is hit with cost change orders from your contractor, the repercussions of the tariffs have been significant.

In the first two articles of our series, we focused on whether you can turn to a force majeure clause for relief from rising prices, and what considerations are important when deciding to invoke or fight against the invocation of a force majeure clause.¹ Now that tariffs are a reality, and the likely reluctance of courts to declare tariffs a force majeure becomes more apparent, we decided to consider how to protect your business now and in the future from tariffs.

One of the more effective tools to hedge against drastic price fluctuations, whether because of tariffs or other economic forces, is by using price adjustment clauses, which are sometimes referred to as escalator clauses. A price adjustment clause is a contractual provision that allows for increases or decreases in price depending on certain conditions. These clauses also provide the benefit of allowing for longer term contracts that do not have to be frequently renegotiated. Price adjustment clauses between sophisticated parties are generally enforced by the courts. However, dusting off that old price adjustment clause is not as simple as it seems. The main challenge to inserting a price adjustment clause into an existing or a new contract, is getting your existing or prospective contractual partner to agree to its terms. There has to be some give and take, and it is important for the party with the most leverage during the negotiations to recognize that in the future, the shoe could be on the other foot.

The important consideration for negotiating a price adjustment clause is to make sure the adjustment is conditioned upon a reliable and well-established price index, and that it is only triggered by material changes in the market, *i.e.*, the price will remain fixed unless there is a large fluctuation in price over a short period of time. Additionally, providing a floor and a ceiling that defines the limits of adjustment is important to avoid inequitable consequences during drastic long-term market occurrences. In many cases, these limits can be contractually tied in with early termination or force majeure clauses. And, consulting with experienced counsel is always an important consideration when drafting and negotiating these clauses.

In the long run, negotiating a price adjustment clause that protects both parties from drastic price fluctuations is the best practice because it provides for a long-term mutually beneficial and collaborative relationship with your customer or supplier that weathers a short-term market collapse or spike and minimizes the likelihood of a breach or default during difficult times.

¹ <https://bracewell.com/blog/steel-and-aluminum-tariffs-can-you-turn-your-force-majeure-clause>