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Contractual Protection from Disruptions Caused by Political Decisions

While political decisions have been causing disruptions to business activities throughout history, the past few years have seen an explosion of very well publicized disruptions caused by increasing political decisions around the world. Companies attempting to conduct global trade activities or to plan future business activities have had to contend with disruptions caused by a wide variety of nationalistic and other political decisions such as Brexit, renegotiations of longstanding trade agreements, new trade tariffs and other trade sanctions. Parties that signed contracts made with certain expectations and under certain known conditions may find themselves with an inability to perform or be faced with vastly increased costs because of changed conditions springing from these political decisions. When that occurs, the companies affected will want to know what recourse might be available to them?

Given the state of global politics today, it is not likely that we will see a reduction in the number of political decisions that are interfering with business activities and making it difficult to plan for future business. For that reason, it's imperative that attorneys take an active role in counseling their clients on potential remedies when international business contracts are impacted by political decisions, as well as providing advice on methods to help prevent and manage future risks caused by political decisions.

Force majeure is a legal doctrine that allows a party to be relieved of its contractual obligations if certain circumstances beyond its control occur. Many countries' laws recognize the doctrine of force majeure in some form. Problems with performance caused by political decisions may be the types of activities that impair contractual performance and that are beyond the control of parties. Therefore, political disruptions may be force majeure events.

Generally, courts allow contracting parties to decide what force majeure events should relieve a party of its obligation to perform. The types of events that may relieve performance, the degree to which performance must be impacted for relief to be given, and the remedy to be provided if such events occur can be agreed upon and included in the contract. Unfortunately, some attorneys insert boilerplate force majeure language into a contract as an afterthought, without giving a lot of consideration to what might actually occur, including political disruptions.

Courts and tribunals usually look closely at the language of a force majeure clause and interpret such clauses narrowly, limiting the force majeure exceptions to the specific items mentioned in the clause and events like those listed events. Therefore, it is extremely important to consider the potential impact of political decisions on the industry, business or activities covered by a proposed contract and to customize the terms of a force majeure clause to address those particular risks, in addition to the general risks. Performance is more likely to be excused by a court or other tribunal if there are express contractual force majeure terms addressing the category of events that occurred which caused the harm experienced by a party.

It is also prudent to consider the specific laws of each country that might apply to the contemplated contract to determine how those laws address disruptions caused by political decisions. For example, the laws of some countries may permit relief to an impacted party, even in the absence of an express

contractual provision contemplating the involved circumstances, if the event that occurred made the performance impossible or practically impossible. This is based on an impossibility or frustration of purpose defense. There might be authority in a particular country holding that when an unforeseeable and unpreventable event occurs, making the cost of performance excessive or completely extinguishing the value of the contract for one party, the impacted party should be able to avoid the contract.

The laws of various countries also may differ on whether an event is unforeseeable and unpreventable. For example, if a party is unable to obtain a government permit or license to import or sell a particular product, or to perform certain activities or provide services in a certain country because of political issues, is that a force majeure event? Some countries' courts may take the position that failure to obtain a required government permit is foreseeable and within the control of the party charged with obtaining the permit or license as a matter of law. Therefore, such failure to obtain a permit or license is not a force majeure event. But there are cases in other countries holding that it is a fact issue as to whether the party charged with obtaining the permit or license took reasonable steps to obtain the permits. If it did and it still did not receive the permit or license, then that would be a force majeure event and would relieve that party of liability under the agreement.

Depending on the client's position, it might be beneficial to have such laws apply, or it might be better to exclude such laws from applying by agreement. With the advice of counsel, clients can make a better-informed decision on what laws they wish to have apply, and what events they wish to have relieve them or their contracting partners of obligations to perform.