

NEWSLETTERS

Force Majeure Clause Can't Save A Company From Its Own Bad Deal

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With increased severe weather events and acts of terrorism, force majeure clauses have garnered more attention and importance during contract negotiations. The recent decision in the *Kyocera Corporation v. Hemlock Semiconductor, LLC*, - N.W.2d -, 2015 WL 7779299 (Mich. Ct. App. Dec. 3, 2015) case serves as a good reminder that a force majeure clause is not intended to rescue a sophisticated business entity from its own bad, unprofitable deal.

In the *Kyocera* case, the plaintiff filed a declaratory judgment action against the defendant to escape liability under a long-term “take-or-pay” contract worth over \$1 billion dollars for polysilicon. (A “take-or-pay” contract is where the buyer agrees to pay the seller for a set quantity of a product at a set price, even if the buyer ultimately ends up purchasing less quantity...) The force majeure clause was invoked after the Chinese government entered the solar panel market and caused the market price of polysilicon to drop far below the parties’ contractual agreed upon price for the product. Plaintiff argued that the manipulation of the solar panel market by China was a “force majeure event” under the parties’ contract and therefore they were not liable under the contract for as long as the event continued.

The relevant part of the force majeure clause at issue in the *Kyocera* case provided the following:

Neither Buyer nor Seller shall be liable for delays or failures in performance of its obligations under this Agreement that arise out of or result from causes beyond such party’s control, including without limitation: ... acts of the Government....

Defendant moved to dismiss and argued that plaintiff failed to state a claim because the parties’ force majeure clause did not apply to the situation. The trial court granted defendant’s motion and held that the force majeure clause in the parties’ contract “does not provide any potential relief from [plaintiff’s] obligation to pay merely because the contract price is no longer financially advantageous.” The Michigan Court of Appeals agreed.

The Court of Appeals relied heavily on the fact that the parties’ “take-or-pay” contract was set up so that each side bore its own risk if the market price of polysilicon rose or fell from their agreed upon price during the contract term. The court even stated that “allowing a force majeure clause to provide a party with relief from an unprofitable market downturn

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would defeat the purpose of a take-or-pay contract...[because] [t]he very reason for entering a take-or-pay contract is to insure payment to the producer in the event of a substantial change in the marketplace.”

The court also found that the force majeure clause did not specifically include “market manipulation by the government” as an enumerated “event,” but rather stated “acts of the Government.” The court noted that unprofitability or financial distress did not result in the type of inability to perform under the contract that was needed to satisfy a force majeure clause. Interestingly, the court also raised in a footnote that the term “Government” although capitalized was not defined, making it unclear which “Government’s” acts would be covered by the clause. However, the plaintiff did not allege that the clause was ambiguous. Therefore, the court construed the clause narrowly, by its plain language and found that no force majeure event occurred under the parties’ contract and affirmed the dismissal. The court even stated: “plaintiff has merely pleaded unprofitability, due to deflation of market prices, the risk of which it expressly assumed.”

The *Kyocera* case provides a few good drafting reminders and tips: (1) if you are entering into a “take-or-pay” contract, consider including a price floor or ceiling so you can control price fluctuation risks to some degree; (2) be clear about what “Government” you mean in your force majeure clause in this global economy; (3) if you are in a market that could see manipulation from other countries, include specific language in your force majeure clause; (4) consider other “events” based on your industry and market that you want to have enumerated in your force majeure clause; and (5) remember it’s always good to have an attorney review a contract before you sign it.

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