Trumpian Duties, Global Disputes: Arbitration Insights for Today's Tariff Landscape

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Transactional parties facing the newly announced tariffs by President Trump on imports from Canada, Mexico, and China must navigate a web of legal, commercial, and logistical issues. The tariffs, set to go into effect on February 4, 2025, impose an *additional 25% ad valorem duty* on goods from Canada and Mexico and *10%* on products from China. They apply to *all merchandise* imported for consumption in the United States except that certain Canadian energy resources face a lower *10% tariff*. These actions come amid broad hints of further escalation against multiple countries and sectors although on February 3, 2025 it was announced that the Mexico and Canada related tariffs would be paused for one month.

General counsels and corporate executives often assume that their existing free trade agreements or established supply contracts will protect them, only to discover unexpected liabilities. In parallel, the immediate shift in customs policies brings to mind recent arbitral decisions that highlight how a party's contract, its designated Incoterms, and underlying commercial assumptions can determine who ultimately bears the cost or faces liability for failing to deliver goods at the specified price.

Products Covered and Source Market. The White House has indicated that *all articles*, whether industrial, agricultural, or manufactured, coming from Canada and Mexico will face a 25% duty. Canada's "energy or energy resources," including natural gas, oil, coal, uranium, and defined critical minerals, will incur a 10% tariff. Imports from China are subjected to a 10% duty on *all articles* that originate in China and are classified under ISO Country Code CN. This broad net spares only limited personal, charitable, and certain travel-related shipments. E-commerce packages are also affected, as Section 321 customs de minimis entry is suspended, subjecting low-value shipments to the same duties.

Miller Bros v. Recom Insights. The logic and reasoning from **Miller Bros v. Recom** (*Miller Bros, a Division of Wampole-Miller, Inc. v. Recom Corp., Including its Parents, Successors, Affiliates and Assigns, AAA Case No. 01-14-0002-0048*) underscore how tariff risk can abruptly become the centerpiece of a commercial conflict. In that case, Miller Bros insisted on a supply agreement with a fixed price "inclusive of any and all applicable taxes, duties, current or future applicable tariff fees." When the U.S. Department of Commerce announced new anti-dumping and countervailing duties on Taiwanese solar modules, the seller, Recom, tried to shift the burden of these duties to Miller Bros. That attempt triggered a contractual breach finding by the arbitral panel.

The award recounts that "Recom's actions constituted a default and breach under the Supply Agreement, and that Recom's default forced Miller Bros. to procure the solar panels from an alternate source, incurring substantial damages, including the loss of a deposit, higher prices for the new panels, higher costs for installation, and a break-up fee." This chain of events highlights the primacy of contractual language. Had the Miller Bros-Recom contract been less explicit in designating who bears tariff liability, the outcome might have been different. The tribunal observed that new tariffs on Taiwanese solar products "were entirely foreseeable" and that contractual references to *force majeure* did not excuse nonperformance where the tariff risk had been well-known in the industry.

Key Point: Foreseeability. The Miller Bros v. Recom decision emphasized that, when particular duties or trade remedy actions are foreseen or widely publicized, a party cannot readily rely on an unforeseen contingency argument. The award stated: “The evidence adduced with respect to these issues clearly established that Recom was aware of the likely imposition of new tariffs on Taiwanese solar products. The Supply Agreement’s force majeure clause only applies to events that are ‘unforeseeable.’ Recom’s knowledge of the impending tariffs therefore renders the Supply Agreement’s force majeure clause inapplicable.”

World Steel Trade v. Rikko Steel Logic. Another instructive arbitral precedent arises from **World Steel Trade v. Rikko Steel** (*World Steel Trade SA v. SC Rikko Steel Srl, ICC Case No. 24921/GR*) The parties concluded a contract requiring steel rebars to be delivered under the CFR Incoterm (2010). When the buyer faced an unexpected 25% import duty in the European Union, it refused to pay the contract price. The tribunal clarified that under CFR, the seller’s responsibility “ceases upon delivery of the goods to the vessel.” As the arbitrator put it: “The Seller’s responsibility in connection with the goods shall cease upon delivery of the goods to the vessel. After delivery the risk of loss or damage to the goods…are transferred from the Seller to the Buyer.” That meant the buyer, not the seller, was responsible for taxes and import duties once the goods were onboard.

The tribunal also distinguished between the payment documentation required for performance and additional proofs that the buyer later demanded. Despite the buyer’s claims, the arbitrator found that no extra conditions were placed upon the seller under the contract. One excerpt reads: “I do not accept Rikko Steel’s argument that WST unduly waited until it resold the Goods to a third party…the Parties were still negotiating for the buyer to take the Goods, and it is only on 18 June 2019 that Rikko Steel unequivocally stated that it could not purchase them." This underscores that if the buyer balks at paying newly imposed duties, it cannot simply suspend payment and demand new terms from the seller, absent a genuine contractual revision.

Incoterms and Commercial Drafting. Drafting or revising supply agreements in the wake of these new Trump tariffs requires clarity about whether the sales terms reflect DDP, CFR, CIF, or other allocations of risk and cost. Under DDP ("Delivered Duty Paid"), the seller agrees to pay *all* duties, taxes, and charges to deliver the goods to the buyer's location. If the contract designates something akin to CFR or FOB, the buyer usually must pay import duties. That difference, as shown in the steel dispute, can shift hundreds of thousands of dollars in unanticipated tariffs onto one party.

The new tariff environment could also spawn renegotiation. Some suppliers may insert *force majeure* clauses or disclaimers that if trade remedies or special duties arise, the buyer must shoulder the cost. Others might press for break-up or termination fees to dissuade abrupt cancellations. Yet arbitral decisions are prone to side with a party that negotiated a comprehensive "all-in" fixed price, as with Miller Bros, if the contract language states that any future duties are included in the original price.

Contentious Phase: Breaches, Damages, and Award Enforcement. The worst-case scenario is a seller who withholds delivery until the buyer covers new tariffs, or a buyer who refuses to pay extra duties. In both Miller Bros v. Recom and World Steel Trade v. Rikko Steel, the tribunals addressed whether the parties' obligations were discharged or ongoing. One illustration from Miller Bros is the passage: "The undersigned hereby awards in favor of Miller Bros. and against Recom…the sum of $1,807,834.26 as and for actual damages suffered by Miller Bros. by reason of Recom's breach of the Parties'

Supply Agreement." That awarding of deposit recovery, plus additional installation and engineering costs, and the break-up fee underscores the magnitude of potential exposure when a party defaults.

Liability for Additional Fees or Delays. When transacting parties are not aligned on who bears newly imposed tariffs, shipping may stall. The goods could languish in port incurring storage charges, as happened in World Steel v. Rikko Steel. Delay costs, demurrage, and extra handling can mount quickly. The tribunal in that matter wrote: "There is evidence that WST provided within a few days of request the documents requested by Rikko Steel… On receipt of those documents, Rikko Steel therefore had to pay the Price." Even so, the goods remained in the port while the buyer refused to pay the new 25% duty or the invoice. Because the Incoterm was CFR, the buyer faced liability for those extended storage fees and the difference in resale price.

Practical Advice for Future Contracts. Contracting parties must heed the possibility of further U.S. tariff hikes, whether aimed at Canada, Mexico, China, or additional countries. A contract that designates the buyer as the importer of record and incorporates Incoterms such as CFR or FOB places the duty burden on the buyer. By contrast, a seller who cites DDP or who commits to an "all-in" sum that includes all present or future tariffs may be forced to absorb that cost. Industry participants who have not reexamined their provisions risk falling into disputes, incurring arbitral proceedings, or shouldering lost deposits if they do not adapt in time.

When dealing with "all articles" coverage, the very broad tariff scope ensures that even staple goods, from automotive parts to packaged consumer electronics, become subject to the additional duty. In some contracts, a *force majeure* clause might attempt to excuse performance due to sudden tariff changes, but the logic in the Miller Bros award reveals that a known or foreseeable risk is rarely deemed an exempt event. The tribunal there wrote: “The undisputed evidence presented at the hearing regarding the foreseeability of new anti-dumping and countervailing duty tariffs on Taiwanese solar panels rendered the force majeure clause inapplicable.” The parallel is self-evident in the present environment, where many have been bracing for new tariffs for months.

Strategies for Dispute Avoidance. Legal counsel and managers can mitigate risk by building in explicit tariff-sharing or price-adjustment clauses. Where a contract is silent, parties should not assume that force majeure covers newly imposed tariffs. They must also remain mindful of the buyer’s or seller’s obligations to open letters of credit or to provide certain shipping documents, as any failure in those steps can trigger a separate breach claim. In ephemeral markets for steel, aluminum, electronics, or energy resources, one party might find a contract suddenly uneconomical but cannot freely walk away without incurring significant liability. Arbitrators are inclined to hold them to their bargained-for risks, especially if the new duties are widely anticipated or have been publicly threatened.

Conclusion. Recent U.S. tariff hikes on goods from Canada, Mexico, and China deliver a lesson repeated in both Miller Bros v. Recom and World Steel v. Rikko Steel: disputes explode whenever parties ignore the precise allocation of responsibility for new duties. Contract terms matter. Incoterms define who is the importer of record, while commercial clauses can either absorb new tariffs into a fixed price or push them onto the buyer. If a party tries to retroactively shift the burden, the risk is an arbitral finding of breach. As in Miller Bros, the “scope of ‘all-in’ pricing was unambiguous, and the foreseeability of the new tariffs ruled out reliance on force majeure.”

When drafting or revisiting supply agreements, counsel and executives should adopt robust language specifying how special duties or retaliatory tariffs are handled. In a climate where duties can spike overnight, reliance on broad disclaimers is seldom effective. The ramifications are far-reaching, from lost deposits and condemnation at the port to an arbitral award imposing substantial damages. Parties that proceed on assumptions about stable duty rates may soon find themselves in precarious territory. The prudent approach is to anticipate tariffs as a contractual cost from the start and include detailed terms so that both parties understand their responsibilities if a new round of duties materializes.

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