STATE OF MICHIGAN

SAGINAW COUNTY CIRCUIT COURT

KYOCERA CORPORATION,

Plaintiff,

v.

HEMLOCK SEMICONDUCTOR, LLC,

Defendant.

Case No. 15-025786-CK

Judge: M. Randall Jurrens (P27637)

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

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In lieu of filing an answer to the plaintiff's ("Kyocera") complaint for declaratory judgment alleging events excuse its obligation to pay the defendant ("Hemlock') pursuant to a force majeure clause in their "take-or-pay" contract, Hemlock filed a motion for summary disposition, asserting Kyocera has failed to state a claim on which relief can be granted.

For the reasons stated in this opinion, the court concludes that, despite its sympathy for Kyocera's present misfortune, accepting as true the allegations of the complaint, there is no plausible claim for a declaratory judgment that Kyocera's obligation to pay is excused under the force majeure clause.

Kyocera's Claim

Kyocera's complaint for declaratory judgment alleges:

- Hemlock is a Michigan manufacturer of polysilicon, a material used in manufacturing solar panels (Complaint ¶¶ 1, 14-18)
- Kyocera is a Japanese corporation producing and supplying high-quality solar panels (Complaint ¶¶ 1, 13)
- in 2005, amidst a then-existing worldwide shortage of polysilicon resulting from increasing demands for sources of renewable energy, Hemlock offered Kyocera a stable source of supply of polysilicon by significantly expanding manufacturing capacity in exchange for long-term contracts requiring significant advance payments (Complaint ¶ 20)
- from 2005 to 2008, Kyocera and Hemlock entered into a series of long-term polysilicon supply agreements that included quantity, "take-or-pay"[1], and acceleration provisions obligating $2.6 billion in total purchases (Complaint ¶¶ 21-22)
- in order to fulfill its obligations, Hemlock expanded its existing Michigan facilities and constructed a new polysilicon manufacturing facility in Tennessee at a cost of $1.2 billion (Complaint ¶ 23)
- the agreement at issue here, Supply Agreement IV (the "Agreement"), effective November 13, 2008, governs polysilicon purchases from 2011 through 2020 and required plaintiff make advance payments aggregating $514,848,000 (Complaint ¶¶ 2, 24-26, 75)
- the Agreement contains a "bargained for" force majeure clause that excuses either party's obligations if they are unable to perform due to the occurrence of certain events, including "acts of the Government" (Complaint ¶¶ 27-28, 77-78):

> 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 God; acts of the Government or the public enemy; natural disasters; fire; flood; epidemics; quarantine restrictions; strikes; freight embargoes; war; acts of terrorism; equipment breakage (which is beyond the affected Buyer's or Seller's reasonable control and the affected Buyer or Seller shall promptly use all commercially reasonable efforts to

[1] The Agreement contains a "'take or pay' clause that purports to allow Hemlock to invoice Kyocera for the difference between the quantity of polysilicon Kyocera ordered in a calendar year and the net price of the quantity of polysilicon Kyocera was expected to order for that calendar year (at the contracted price)" (Complaint ¶ 22).

As described in *Universal Res Corp v Panhandle E Pipeline Co*, 813 F2d 77, 80 (CA 5, 1987):

> The purpose of the take-or-pay clause is to apportion the risks of [ ] production and sales between the buyer and seller. The seller bears the risk of production. To compensate seller for that risk, buyer agrees to take, or pay for if not taken, a minimum quantity [ ]. The buyer bears the risk of market demand. The take-or-pay clause insures that if the demand for [product] goes down, seller will still receive the price for the [c]ontract [q]uantity delivered each year.

> remedy) that prevents Seller's ability to manufacture Product or prevents Buyer's ability to use such Product in Buyer's manufacturing operations for solar applications; or, in the case of Seller only, a default of a Seller supplier beyond Seller's reasonable control (in each case, a "Force Majeure Event"). In the event of any such delay or failure of performance by Buyer or Seller, the other party shall remain responsible for any obligations that have accrued to it but have not been performed by it as of the date of the Force Majeure Event. When the party suffering from the Force Majeure Event is able to resume performance, the other party shall resume its obligations hereunder. The Term of this Agreement may be extended for a period not to exceed three (3) years so as to complete the purchase and delivery of Product affected by a Force Majeure Event. The party suffering a Force Majeure Event shall provide the other party with prompt written notice of (i) the occurrence of the Force Majeure Event, (ii) the date such party reasonably anticipates resuming performance under this Agreement and, if applicable, (iii) such party's request to extend the Term of this Agreement.
>
> In addition, if due to a Force Majeure Event or any other cause, Seller is unable to supply sufficient goods to meet all demands from customers and internal uses, Seller shall have the right to allocate supply among its customers in any manner in which Seller, in its sole discretion, may determine.

- the worldwide solar industry has been significantly affected by Chinese government subsidies of Chinese solar industry companies that enabled the "dumping" of lower-priced solar panels onto the worldwide market (Complaint ¶¶ 4, 30-33, 38)
- the acts of the Chinese government are "illegal" (Complaint ¶¶ 4, 6, 7, 8, 10)
- in response to developments, Kyocera and Hemlock amended the Agreement, changing short-term (2011 and 2012) pricing and payment schedules (Complaint ¶¶ 6, 44)
- due to Chinese governmental actions, several non-Chinese solar industry companies have gone out of business (Complaint ¶¶ 32, 40)
- due to continuing acts of the Chinese government, Kyocera can no longer pay Hemlock prices that the parties negotiated under the Agreement (Complaint ¶ 8)
- Hemlock has rebuffed Kyocera's efforts to renegotiate the Agreement (Complaint ¶ 9)
- adversely affected itself from the impact of Chinese governmental actions, Hemlock retreated from the solar industry (Complaint ¶¶ 8, 39, 47, 51), and closed its Tennessee plant in December 2014 (Complaint ¶¶ 23, 65-66)
- Kyocera's recent efforts to negotiate settlement have been unsuccessful (Complaint ¶¶ 56-62)
- Kyocera sent defendant notice on February 2, 2015 that it was exercising rights under the Agreement to invoke the force majeure provision based on acts of the Chinese government, which defendant disputes (Complaint ¶¶ 10-11, 68, 70, 80)

Based on these allegations, Kyocera requests a judgment declaring (1) the Agreement contains a force majeure clause, (2) acts of government, with particular emphasis on the Chinese government, constitute a force majeure event under the Agreement, and (3) the alleged events excuse any performance that may be required of Kyocera under the Agreement.

In response, Hemlock requests the court summarily dismiss Kyocera's complaint for failing to state a claim on which relief can be granted, *MCR 2.116(C)(8)*, asserting force majeure does not apply to financial hardship, the force majeure event alleged here, "acts of the Government", do no prevent Kyocera's performance, and Kyocera reaffirmed its obligations under the Agreement subsequent to the Chinese government's adverse actions.

Summary Disposition Standards

Motions brought pursuant to MCR 2.116(C)(8) test the legal sufficiency of a claim. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). Such motions are determined on the pleadings alone, *MCR 2.116(G)(5)*, including any written instrument upon which the claim is based that is attached or referred to as required by MCR 2.113(F). *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). All well-pleaded factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and are construed in the light most favorable to the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). The motion should be granted "only when the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Clohset v No Name Corp*, 302 Mich App 550, 558; 840 NW2d 375 (2013) (internal quotation marks omitted).

Analysis

Force Majeure

Under the early common law, theorizing contracting parties were capable of allocating risks on their own, courts required contracts to be performed absolutely, and unconditional contractual obligations were not excused merely because subsequent events affected one party's ability to perform. See *Paradine v Jane*, 82 Eng Rep 897 (KB 1647). This need to write excuses into contracts is the origin of force majeure clauses. *Northern Indiana Public Service Co v Carbon County Coal Co*, 799 F2d 265, 276 (CA 7, 1986).

As matters of contract, force majeure clauses are subject to contract law principles[2]. *Great Lakes Gas Transmission Ltd Partnership v Essar Steel Minnesota, LLC*, 871 F Supp 2d 843, 852 (2012)[3]. In this regard, contractual language is to be construed according to its plain

[2] The contractual nature of force majeure, so central to this case, was initially recognized by counsel (e.g. Kyocera's April 13, 2015 Response in Opposition, p 15, and Trans pp 31:3-4, 32:18-20, and 37:16-17). As such (although periodically forgotten in counsels' subsequent written arguments), the common law doctrines of impossibility, impracticability (now codified at UCC 2-615, *MCL 440.2615*), and frustration of purpose, have little relevance here.

[3] In *Great Lakes*, the court applied the plain language of an unambiguous force majeure clause and, concluding the plaintiff failed to state a plausible claim for a declaratory judgment, dismissed the case pursuant to Fed R Civ P 12(b)(6).

and ordinary meaning, avoiding technical or constrained constructions, *St. Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998), and when the language of a contract is clear, its construction is a question of law for the court to decide. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 418-419; 546 NW2d 648 (1996).

In recognition of the paucity of Michigan cases discussing force majeure, our state's courts commonly utilize cases from other jurisdictions to provide general authority on interpretation of such clauses. *Erickson v Dart Oil & Gas Corp*, 189 Mich App 679, 688; 474 NW2d 150 (1991).

Analytical Framework

Although other methodologies may be available, the court finds the following framework useful in determining the legal effect of the force majeure clause in this case:

> The analysis of a force majeure clause always requires three steps, but an optional fourth step [applies if a procedure for invoking the clause is included]. The first step involves the events that constitute force majeure. A court will ask itself the question whether there was an event of force majeure that meets the definition of the clause. The second step deals with causation and whether the event was reasonably beyond the control of the party invoking the force majeure clause. The third step involves the effect of the event on the performance that is sought to be excused. For example, does the event render the contract unable to be performed? The fourth step . . . is determining whether or not the procedural requirements set forth in the force majeure clause have been met. [Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 Journal of Law and Commerce 213 (1995)]

In the present case, assuming the allegations of Kyocera's complaint are true (e.g. acts of government beyond Kyocera's control collapsed the world polysilicon market, and the procedural requirements for invoking force majeure have been satisfied), the focus of the present motion is on the third step of the analysis: whether the alleged effect (i.e. financial hardship) of the assumed force majeure event (i.e. acts of the Government) renders Kyocera unable to perform its obligations under the Agreement.

Invocation Standard

Here, the Agreement includes a "bargained for" (Complaint ¶¶ 27 and 77) force majeure clause (Complaint ¶ 28) that provides in pertinent part:

> 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 God; acts of the Government or the public enemy; natural disasters; fire; flood; epidemics; quarantine restrictions; strikes; freight embargoes; war; acts of terrorism; equipment breakage (which is beyond the affected Buyer's or Seller's reasonable

> control and the affected Buyer or Seller shall promptly use all commercially reasonable efforts to remedy) that prevents Seller's ability to manufacture Product or prevents Buyer's ability to use such Product in Buyer's manufacturing operations for solar applications; or, in the case of Seller only, a default of a Seller supplier beyond Seller's reasonable control (in each case, a "Force Majeure Event"). In the event of any such delay or failure of performance by Buyer or Seller, the other party shall remain responsible for any obligations that have accrued to it but have not been performed by it as of the date of the Force Majeure Event. When the party suffering from the Force Majeure Event is able to resume performance, the other party shall resume its obligations hereunder.

Reducing this clause to its most basic, operative language, the parties essentially agreed:

> [ ] ***Buyer*** . . . ***shall*** [***not***] ***be liable for delays or failures in performance*** of its obligations under this Agreement ***that*** arise out of or ***result from*** . . . ***acts of the Government*** . . . ([ ] a "Force Majeure Event") . . . ***that*** . . . ***prevents Buyer's ability to use such Product*** in Buyer's manufacturing operations for solar applications . . . [***until Buyer***] ***is able to resume performance*** . . .

According to Kyocera's counsel (Trans pp 35-37), this clause is triggered (assuming a Force Majeure Event) when Kyocera is unable to perform.[4] Importantly, Kyocera's performance obligation under the Agreement is limited to one of payment (Trans pp 55:24-25, 56:1-3; and Kyocera's May 11, 2015 Reply Brief, p 9). Accordingly, in seeking declaration of its right to be excused from performance, Kyocera's Complaint (¶ 8) alleges "it can no longer [(i.e. it is not "able" to)] pay Hemlock the prices that the parties negotiated before [the occurrence of a Force Majeure Event]".

Application of Standard

The most analogous published case the court has considered[5] involving a force majeure clause with the "[un]able" standard -- particularly in the context of a fixed-price contract subjected to a dramatic drop in world prices caused by acts of government -- appears to be *Langham-Hill Petroleum Inc v Southern Fuels Co*, 813 F2d 1327 (CA 4, 1987).

In *Langham-Hill*, the defendant agreed to purchase fuel oil from the plaintiff at a fixed-price, but the parties agreed there would be no liability "[i]f either party is rendered unable by

[4] Arguably, a more complete reading excuses performance so long as a Force Majeure Event "prevents Buyer's ability to use" the goods being purchased under the Agreement. This may be a distinction without a difference. For purposes of the present motion, the court assumes the propriety of Kyocera's position.

[5] Given the availability of well-reasoned published opinions discussing force majeure, the court has declined to consider unpublished cases cited by counsel (who, with one irrelevant exception, failed to provide a copy to the court), whether from this state, *MCR 7.215(C)(1)*, a foreign state, *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006), or a lower federal court, *Abela v Gen Motors Corp*, 469 Mich 603, 606, 677 NW2d 325 (2004).

force majeure, or any other cause of any kind not reasonably within its control"[6]. When Saudi Arabian attempts to increase its share of the world oil market caused the price of crude oil to collapse, the defendant invoked the force majeure clause and informed the seller it would not perform the remainder of its obligations. The appellate court affirmed the trial court's grant of summary judgment, *Fed R Civ P 56*[7], observing:

> If fixed-price contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated. [813 F2d, at 1330]

Conversely, Kyocera has failed to cite any persuasive precedent excusing a buyer's obligation to pay because of financial hardship, change in market conditions, and the like[8]. Rather, the presented caselaw seems to universally hold (in varying degrees of analogy to the present case) that, even if force majeure events are present, buyers are not "unable" to carry out their obligation to pay in accordance with their contract.

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[6] The full text of the force majeure clause in In *Langham-Hill* provides:

> If either party is rendered unable by force majeure, or any other cause of any kind not reasonably within its control, wholly or in part, to perform or comply with any obligation or condition of this Agreement, upon such party's giving timely notice and reasonably full particulars to the other party such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; provided obligations to make payments then due for products delivered hereunder shall not be suspended. * * * The term "force majeure" shall include . . . acts of any government . . ."

[7] Similar to MCR 2.116(C)(10) governing practice in Michigan state courts, Fed R Civ P 56(a) authorizes federal courts to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law". That *Langham-Hill* was dismissed due to lack of a genuine dispute of material fact does not preclude its persuasive value in a motion on the pleadings alleging analogous, undisputed facts.

[8] With due respect, Kyocera's cases focus on a portion of the court's adopted analytical framework that is not presently at issue: whether there was a force majeure event that meets the parties' contractual definition.

For example, in the much touted case, *Eastern Air Lines, Inc v McDonnell Douglas Corp*, 532 F2d 957 (CA 5, 1976), the defendant-seller asserted a force majeure clause excused it from the timely production and delivery of jet airplanes to the plaintiff-commercial airline due to "pressure" exerted by the federal government on the defendant's parts suppliers to prioritize military equipment during the Vietnam War. Reversing the trial court's ruling that the only excusable delays were those resulting from formal directives issued in strict compliance with the Defense Production Act, *Eastern*, at 994, importantly held that "fundamentally coercive acts of Government, whatever their form [(e.g. formal or informal)], constitute an excuse for breach" under the parties' force majeure clause.

Similarly, Kyocera's reliance on *Teco Coal Corp v Orlando Utilities Com'n*, 2010 WL 8750622 (ED Ky, 2010), where the court denied summary judgment because it could not find as a matter of law that the alleged facts did not constitute force majeure under the parties' contract, presupposes a dispute over whether a force majeure event occurred.

But since the "acts of the Government" alleged in this case are assumed for present purposes to be a Force Majeure Event, it is the "effect" of the event where Kyocera's caselaw and argument is found wanting.

For example, in *Great Lakes Gas Transmission Ltd Partnership v Essar Steel Minnesota LLC*, 871 F Supp 2d 843 (D Minn, 2012), following an unforeseeable worldwide financial crisis, the defendant counterclaimed for a declaratory judgment regarding its duty to perform obligations under a written contract incorporating a force majeure clause that utilized an "unable to prevent or overcome" standard[9]. Noting that contract law narrowly construes force majeure clauses and the parties' force majeure clause did not include financial crises or changes in financial conditions, the court dismissed the counterclaim for failing to state a claim, *Fed R Civ P 12(b)(6)*[10].

In *Northern Indiana Public Service Co v Carbon County Coal Co.*, 799 F2d 265 (CA 7, 1986), a utility company filed a declaratory judgment action in an attempt to escape a long-term, fixed-price contract that contained a force majeure clause[11]. The court concluded that the force majeure clause was not triggered by acts of government that made the contract prohibitively expensive (noting that the trial judge should not have even submitted the issue of force majeure to the jury):

> [The defendant] committed itself to paying a price at or above a fixed minimum and to taking a fixed quantity at that price. It was willing to make this commitment to secure an assured supply of low sulphur coal, but the risk it took was that the market price of coal or substitute fuels would fall. A *force majeure* clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalator provisions give the seller some protection); if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed price contract is to allocate risks in this way. A *force majeure* clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract. [799 F2d at 275]

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[9] In *Great Lakes Gas*, the parties' contract incorporated the terms of the Federal Energy Regulatory Commission (FERC) Gas Tariff which included a force majeure clause:

> Neither Shipper nor Transporter shall be liable in damages to the other for any act, omission or circumstances occasioned by or in consequence of: any [enumerated event] . . . and any other cause, whether the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or concern not a party hereto, not within the control of the party claiming suspension and which by the exercise of due diligence such a party is unable to prevent or overcome.

[10] F R Civ P 12(b)(6) authorizes dismissal if there is a "failure to state a claim upon which relief can be granted"; paralleling the operative court rule in the present case, MCR 2.116(C)(8).

[11] In *NIPSCO*, the plaintiff contracted to purchase 1.5 million tons of coal every year for a period of 20 years at a contract price of $24 per ton, subject to various escalation provisions which eventually drove the price up to $44 per ton. The parties' contract permitted the plaintiff to stop taking delivery of coal "for any cause beyond [its] reasonable control . . . including . . . orders or acts of civil . . . authority . . . which wholly or partly prevent . . . the utilizing . . . of the coal."

Here, Kyocera's only obligation is to pay in accordance with the Agreement[12] (Trans pp 55:24-25, 56:1-3; Kyocera's May 11, 2015 Reply Brief, p 9). Kyocera alleges it "can no longer pay Hemlock the prices that the parties negotiated before" the occurrence of a Force Majeure Event (Complaint ¶ 8). But even assuming a dramatic change in market conditions that makes performance unprofitable, Kyocera has not alleged facts that render it "unable" to pay[13] (in a legally cognizable way). Without more (e.g. more favorable contract language), economic hardship is simply not sufficient to invoke force majeure; and this is particularly true in fixed-price, or take-or-pay, contracts. *Langham-Hill, supra*, and *Northern Indiana, supra*. If Kyocera had wanted to ensure it could avoid an otherwise unconditional obligation to pay if a Force Majeure Event diminished the profitability of purchasing Hemlock's product, it could have done so in clear and unmistakable contractual language[14]. *Jackson Community College Classified and Technical Ass'n, MESPA v Jackson Community College*, 187 Mich App 708, 714; 468 NW2d 641 (1991). It is, as conceded by Kyocera, a "bargained for" force majeure clause (Complaint ¶¶ 27 and 77). However, as written, the parties' force majeure clause does not provide Kyocera any potential relief from its obligation to pay merely because the contract price is no longer financially advantageous.

Illegal Acts of Government

Kyocera's Complaint alleges that the acts of the Chinese government were "illegal" (Complaint ¶¶ 4, 6, 7, 8, and 10). Since acts that are "illegal" are arguably different in kind and/or degree than other "acts of the Government", the court requested further research and argument on whether this aspect of Kyocera's complaint salvaged a viable claim.[15]

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[12] Incorporated into Kyocera's Complaint by reference, *MCR 2.113(F)(2)*.

[13] Or, more closely tracking the actual language of the parties force majeure clause, that "prevents [Kyocera's] ability to use [Hemlock's polysilicon] in its manufacturing operations for solar applications", however unprofitable.

[14] There is undoubtedly a multiplicity of ways that, if successfully negotiated and written into the Agreement, Kyocera's obligation to pay might have been reduced, extended, or excused if the transaction was to have been dependent on a remunerative price.

[15] The alleged "illegal" nature of governmental acts was mentioned only in passing in Kyocera's initial brief (Kyocera's April 13, 2015 Response in Opposition, pp 2, and 15-16) and, concerned that the issue might have greater importance, was brought to the fore by the court at the conclusion of oral arguments (Trans pp 80-84).

Specifically, the court sought "greater certainty on what happens when a sovereign foreign government conducts themselves (sic) illegally", wondering "if that isn't a game changer" (Trans pp 80:17-19), with Kyocera's counsel indicating, "we would like the opportunity to follow-up on that point" (Trans pp 81:25), with briefing to "be focused just on that issue" (Trans 83:21). To the court's dismay, both parties, to one degree or another, took the opportunity to repackage prior arguments, together with engaging in detours through the inapplicable common law doctrines of impossibility, impracticability (now codified at UCC 2-615, *MCL 440.2615*), and frustration of purpose, and in the case of Kyocera, to submit voluminous documentary evidence (including a Declaration of Vice Chairman Tatsumi Maeda and an Affidavit of Seth T. Kaplan) (Kyocera's May 4, 2015 Supplemental Briefing) that exceeded what the court may consider in determining the present motion, *MCR 2.116(C)(8), MCR 2.116(G)(5), MCR 2.113(F), Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007), as well as attaching an Order of esteemed US District Judge Thomas L. Ludington in the case of *Hemlock Semiconductor Corp v Deutsche Solar GmbH* (Case No. 13-CV-11037, ED MI) (Kyocera's May 11, 2015 Reply Brief) in which the defendant's defense of force majeure had been withdrawn and was not even addressed. Suffice it to say, the court soon questioned the wisdom of

Unfortunately, although not altogether surprising (based on counsels' assurance that their prior efforts had been thorough, but unsuccessful), the parties' supplemental research provided no case directly addressing the effect, if any, of "illegal" acts on the court's analysis.[16]

The court concludes, consistent with its analytical framework, whether the "acts of the Government" were legal or illegal is of little import here: (1) on its face, the phrase is not limited to, nor strengthened by, the nature of the acts (presumably embracing both legal and illegal acts of government), and (2) deciding whether the "cause" (acts of the Government, legal or illegal) constitutes a force majeure event is but one step in the analysis that also requires demonstration of "effect", "Does the event render the contract unable to be performed?". Here, that the alleged "acts of the Government" may be in the extreme, or even illegal, merely punctuates the existence of a Force Majeure Event, but does nothing to satisfy the requirement that Kyocera plead facts demonstrating it is legally "unable" to perform.

Further Development Unnecessary

Kyocera's April 13, 2015 Response in Opposition (pp 8-10) asserts that it is entitled to further develop its allegation that it "has barely survived the trade war thus far, but it can no longer pay Hemlock the prices that the parties negotiated before China used its economic power to inappropriately influence and destroy the normal market forces of the solar industry by illegal propping up Chinese producers of solar products", as well as asserting there is a question of fact "whether the force majeure event alleged in the Complaint is nothing more than anticipated economic decline as opposed to unanticipated government acts" (pp 17 and 19).

Kyocera's May 4, 2015 Supplemental Briefing (p 17) asserts it should be allowed to proceed with discovery because "(1) the 'market' for polysilicon has been destroyed by the Chinese government's illegal acts; (2) the parties did not foresee the destruction of the polysilicon market through the illegal actions of the Chinese and did not intend to allocate this

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its decision to invite counsels' guidance on whether the alleged "illegal" nature of acts of the Chinese government impacted the parties' force majeure clause.

[16] For example, Kyocera's supplemental briefing cites three force majeure cases, *Huhn v Marshall Exploration*, 337 S2d 561 (1976) and *Axis Petroleum Co v Taylor*, 42 Cal App 2d 389; 108 P2d 978 (1941) (both dealing with oil and gas leases requiring continued production as a condition for continuation of the lease except for causes beyond the lessee's control, and the lessee's were deemed protected from the lessor's attempt to terminate the lease when production was temporarily interrupted due to criminal acts of third parties), and *Cartan Tours, Inc v ESA Services, Inc*, 833 So 2d 873 (2003) (where, following the September 11, 2001 acts of terrorism, the plaintiff sought declaratory judgment as to its rights and obligations under a contract requiring it to pay a hotel manager for the license of hotel rooms at the 2002 Salt Lake City Winter Olympic Games unless there was a force majeure event liberally "affecting the ability of the Olympic Games to be held"), and a non-force majeure case, *Chang v Pacificorp*, 212 Or App 14; 157 P3d 243 (2007) (where the court affirmed the trial court's grant of relief from a prior summary dismissal of a complaint for declaratory judgment involving a contract for the purchase of electricity when subsequently discovered evidence disclosed extraordinary manipulation of the energy market, thus, potentially admitting applicability of the common law doctrine of "frustration of purpose"), to demonstrate how illegal acts of third persons can excuse performance. But while confirming that illegal acts may constitute force majeure events no less than legal ones, and that such acts may be sufficient to excuse performance (depending on the facts of the case, including the particular language of any force majeure clause), they do not support the proposition that an illegal act of a third person (or government) is such a different "cause" (here, acts of the Government) as to trump the need to demonstrate a sufficiently adverse "effect" (here, inability to perform).

type of risk to Kyocera as demonstrated by the force majeure clause; and (3) the law does not impose the burden of unforeseen illegal acts on Kyocera under these circumstances".

Kyocera's May 11, 2015 Reply Brief acknowledges that "[w]hat matters is the parties' intent", and asserts it intended greater protection in bargaining for the Agreement's bilateral force majeure clause (pp 8-10).

Each of Kyocera's arguments presupposes a genuine issue of material fact or need for further factual development. However, based on the pleadings and arguments, there is neither. Hemlock's motion assumes the truth of the allegations in Kyocera's complaint (Hemlock's April 17, 2015 Reply Memorandum, p 8).

Moreover, Kyocera does not assert that the force majeure clause is ambiguous (not in its Complaint or its oral or written arguments), only that the court must enforce the clause in a manner consistent with the parties' intent.

Admittedly, in matters of contract, courts are obliged to determine and enforce the intent of the parties. *Quality Product & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). But if the contractual language is unambiguous, courts must interpret and enforce the contract as written, because, importantly, "an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id*. Here, again, Kyocera does not assert any ambiguity in the force majeure clause, only its own intent to achieve a more favorable allocation of risk.

In *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004), the following core principles of contract interpretation were articulated:

> [The] unilateral subjective intent of one party cannot control the terms of a contract. It is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms. Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms.
>
> The main goal of contract interpretation generally is to enforce the parties' intent. But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent. An unambiguous contract must be enforced according to its terms. The judiciary may not rewrite contracts on the basis of discerned "reasonable expectations" of the parties because to do so is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. [citations and quotation marks omitted.]

Accordingly, ambiguity does not exist simply because a party disagrees about what the contract means; and extrinsic evidence cannot be used to manufacture an ambiguity.

Here, assuming the truth of the factual allegations pled in Kyocera's Complaint, rather than offer some potential if afforded an opportunity for further development, Kyocera's arguments run contrary parties' unambiguous force majeure clause. Accordingly, no delay is justified "when [Kyocera's] claims are so clearly unenforceable as a matter of law that no factual development could possibly justify [the requested relief]." *Clohset, supra*.

Conclusion

Kyocera seeks a declaration of rights under a force majeure clause in its "take or pay" contract, alleging that, due to acts of government that caused a dramatic drop in market price, it can no longer pay prices required under the parties' contract. Hemlock counters that, even assuming every allegation to be true, the complaint fails to state a claim on which relief can be granted.

As pled (and argued), Kyocera's allegations do not satisfy the contractual requirement that a force majeure event render Kyocera not "able" to perform in order to avoid liability but, rather, only demonstrate that events have rendered performance unprofitable.

In the end, despite sympathy for Kyocera's plight, the court concludes that, accepting all well-pleaded allegations as true, Kyocera has failed to state a plausible claim for a declaratory judgment that, based on the parties' force majeure clause, its duty to pay in accordance with the Agreement is delayed or excused.[17]

Accordingly, Kyocera's complaint for declaratory judgment is being dismissed pursuant to MCR 2.116(C)(8).

IT IS SO ORDERED.

This Order resolves the last pending claim and closes the case.

Date: June 16, 2015 /s/ (P27637)

M. Randall Jurrens, Circuit Judge

[17] Having determined Hemlock's motion on its two economic-related arguments for dismissal (financial hardship does not constitute force majeure, and Kyocera is not prevented from performing its payment obligation by the occurrence of a force majeure event), the court need not address Hemlock's remaining, unrelated argument for dismissal, that Kyocera reaffirmed its obligations under the Agreement subsequent to the Chinese government's adverse actions.