Published on *The National Law Review* https://natlawreview.com

What Every Multinational Company Should Know About … Tips and Tricks for Sell-Side Contracts

Article By:

Kathleen E. Wegrzyn

David S. Sanders

Gregory Husisian

Assessing Tariff Impacts in Commercial Contracts

With the size and scope of President Trump's tariffs continuing to shift, this is a critical time for businesses to assess their contracts and determine how increased tariff costs might adversely affect profitability, and whether there are any strategies to mitigate the losses.

Contract Review for Tariff Provisions

Tariffs typically affect profitability in two primary ways:

1. Increased costs of material or component inputs due to the tariffs, and
2. Tariffs applied to the final sale price of imported or exported goods.

As indicated below, force majeure and commercial impracticability provisions are blunt instruments, meaning the allocation of tariff-related costs is best addressed in the pricing provisions of commercial contracts. When drafting these provisions, consider the following:

- **Price Adjustments:** Inclusion of a mechanism allowing for equitable price increases in response to rising costs associated with taxes, duties, tariffs, or other expenses resulting from changes in law, regulations, or other agreed-upon reasons can be beneficial to the seller. These types of pricing provisions can mitigate financial strain from tariff hikes.
- **Tariff Allocation:** Tariffs are always paid directly to U.S. Customs by the importer of record, which must be a single party. But Customs does not care if parties reallocate tariff responsibility behind the scenes. Pricing provisions thus can specify how tariff costs are allocated between parties for foreign goods imported into the United States and for goods exported to foreign countries. This allocation can be drafted via express provisions on the topic or through careful use of *Incoterms* to set forth delivery responsibility. Clarity regarding (a) which party is responsible for paying any tariffs to the applicable government agency; (b)

whether the seller, the buyer, or both share responsibility for tariff payments; and (c) what the reimbursement mechanism will be, if any, is essential for cost planning and risk mitigation.

In cases where pricing provisions do not provide adequate protection against tariff-related costs, other contractual clauses should be reviewed. For example:

- **Termination Rights:** Termination provisions may offer an exit strategy if continued performance becomes economically unsustainable. Particular attention should be given to whether termination for convenience is permitted and, if so, what notice requirements apply.
- **Purchase Order Acceptance/Rejection:** Contracts may provide flexibility regarding the acceptance or rejection of purchase orders. In the absence of a fixed quantity commitment or a requirements/output agreement, a seller may be able to reject orders and thereby decline to supply products.

Common Misconceptions Regarding Tariff Relief

- **Force Majeure/Commercial Impracticability:** A frequent misconception is that a force majeure clause or the doctrine of commercial impracticability may apply to excuse performance due to increased tariff costs. While these doctrines are sometimes used strategically to initiate discussions around contract renegotiation, courts often view cost increases as foreseeable business risks that cannot support invoking force majeure or commercial impracticability defenses (unless the cost increase, such as a heightened tariff, is expressly identified as a force majeure event that excuses performance).
- **Tax Allocation Provision:** Another common misconception is that a tax provision, providing the buyer pays all taxes, will permit a U.S. seller to pass along the tariffs on its inputs to a U.S. buyer. Typically, tax provisions are drafted to allocate responsibility for taxes levied on the transaction between the buyer and seller and do not contemplate taxes/tariffs levied on the upstream inputs.

Recommended Next Steps

This is an area of law where sophisticated counsel can help identify your working options under current contracts and maximize your company's ability to take proactive steps to manage future tariff-related risks. Managing the effects of tariffs, or other unexpected governmental actions, requires a tailored approach based on each company's contractual leverage and commercial relationships. A thorough contract review, coupled with proactive communication with business partners, can provide a solid foundation for addressing tariff challenges.

National Law Review, Volume XV, Number 113