

# Evaluating the Impact of Tariffs on Customer and Supplier Relationships

## Client Alerts

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As tariffs are imposed and additional tariffs are threatened, companies concerned about the impacts of tariffs on agreements with customers and suppliers should review their contracts and the parameters of the tariff to determine how they may impact ongoing relationships. The following are some general guidelines for evaluating your customer and supply relationships.

*First*, examine existing contracts to identify provisions that may address tariffs:

- Check the applicable delivery terms. Many contracts use the International Chamber of Commerce (“ICC”) Incoterms to determine whether the buyer or seller is liable for shipping costs and import or export duties. Those provisions may already allocate payment of tariffs to the buyer or the seller. For example, the Incoterm Delivery Duty Paid (“DDP”) usually requires the seller to pay any export and import duties. Conversely, delivery terms such as Free on Board (“FOB”) from the origin point and Ex Works (“EXW”) typically make the buyer responsible for importing the goods and paying resulting duties. The ICC publishes a guide detailing specific requirements of various Incoterms.
- Check contract provisions that allocate payment of taxes, and whether the definition of taxes can be read to encompass tariffs or other trade duties.
- Check whether your contracts permit price adjustments, and whether adjustments are permitted for tariffs. Contracts may have a wide array of price adjustment mechanisms. Some agreements permit periodic price adjustments based on actual costs or published price indices that may or may not capture the impact of tariffs. Other contracts may require the parties to renegotiate pricing in the event of material changes to the costs or changes to the law, which might include the costs of tariffs.
- If the parties exchanged documents with conflicting terms and conditions, you may need to consider which party’s terms govern under the “battle of the forms.”

*Second*, beyond examining whether existing contracts already allocate responsibility for tariffs, parties may want to examine the extent to which the parties are bound to continue performing,

including whether the contract may be terminated. This review may identify areas of leverage or challenges to a party in discussions about tariffs with their counterparty. Some considerations include:

- Whether a force majeure clause or doctrines such as commercial impracticability might excuse performance due to the impacts of tariffs. Historically efforts to avoid contractual obligations due to the cost of performance have been met with skepticism. However, the issue should be evaluated based on the terms of the specific contract, and the specific impact that a particular tariff will have on performance.
- Whether you have termination rights, including the right to terminate for convenience, and whether the costs of continued performance may be higher than the costs or damages you face if you terminate.
- Whether the contract is binding at all. In some industries, supply arrangements are established by “blanket” purchase orders that do not commit the buyer to purchase any particular quantity of goods or even specify a term. These types of purchase orders may not be binding under the statute of frauds or may constitute an illusory bargain. Contracts of indefinite duration, with no set end date, may be terminable at will by either party.

*Third*, regardless of your legal evaluation, buyers and sellers in long-term supply relationships may have an interest in resolving issues amicably by negotiating mutually acceptable terms. Finding ways to modify existing contracts may be particularly important where there are few or no qualified replacement suppliers, or where tariffs threaten the viability of links in the supply chain that could put all participants’ businesses at risk. Thus, the parties might modify existing provisions regarding tariffs, or add provisions where none currently exist. Where accommodation cannot be agreed, the parties will need to lay the foundation for successful dispute resolution, for example, by making demands for adequate assurance, or complying with any prerequisites to litigation or arbitration provided for in a contract.

*Fourth*, prospectively, companies should consider how they may want to allocate the risk of tariffs in future contracts. For example, by adding express terms allocating who pays existing or future tariffs, or permitting termination or renegotiation where tariffs exceed certain thresholds.

Jenner & Block is ready to assist our clients as they navigate their way through these difficult issues.

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Jenner & Block’s Tariff Task Force brings together a multi-disciplinary team of litigators, former government prosecutors, and subject matter experts to help clients navigate this uncertain landscape. Recognized as a litigation powerhouse, we provide best-in-class litigation capabilities to challenge the legality of the tariffs, navigate contractual disputes related to supply chain issues, defend government investigations into alleged non-compliance, and provide guidance on

compliance with varying regulatory requirements between countries. We also provide counseling and strategic advice on how to manage existing and future business relationships affected by the tariffs. Debbie Berman and Doug Litvack co-chair the Tariff Task Force.

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