Luther.

NIXON PEABODY

Newsflash | April 2025

Managing trade barriers – What the new U.S. tariffs mean for international business models

By executive order of 2 April 2025, U.S. President Donald Trump implemented so-called "reciprocal tariffs" against almost all countries trading with the United States. For companies importing into or exporting from the United States, these tariffs massively disturb their business and necessitate economic and legal assessments of their international partnerships and contracts.

While the impact of these new tariffs cannot be nullified, depending on the circumstances and the law applicable, it may be reduced by contractual and legal means, often to the advantage of all parties involved.

Any company importing or exporting goods from and to the United States should legally assess whether they are affected by these new tariffs and counter-tariffs. Even if, as of today, these new U.S. tariffs have been temporarily suspended, companies should confirm without delay what effects they will have on their business.

In the following, Luther will focus on relevant aspects of German contract law, whereas Nixon Peabody addresses relevant aspects of U.S. contract law.

What does this entail under German contract law? *(Luther)*

All companies affected should assess the impact on existing and future trade endeavors. First and foremost, these companies should determine the validity of their contracts under new conditions and how the costs of these tariffs should be allocated among the parties. The U.S. Executive Orders implementing the tariffs do not mandate which party must ultimately bear the costs of tariffs. It therefore depends on the law governing the contract, and on the terms of the contract itself.

In the absence of any contractual agreement regarding tariffs, and notwithstanding the applicability of the United Nations Convention on Contracts for the International Sale of Goods

unyer GLOBAL ADVISORS

(CISG), under Section 448 of the German Civil Code, tariffs incurred by delivery regularly have to be paid by the seller. In practice, most contracts expressly or implicitly stipulate which party has to bear the costs of transportation, customs and tariffs, in particular by including the appropriate Incoterms® clause in the contract. For example, if the parties have agreed on Delivered Duty Paid (DDP), then the seller has to bear all costs for import and export tariffs incurred to the point of delivery (generally, the purchaser's facility). By stipulating delivery Ex Works (EXW), bearing the costs of transport, customs and paying all necessary tariffs falls to the purchaser. For the remaining Incoterms® 2020 clauses the seller generally only bears export costs, whereas the new import tariffs will be borne by the purchaser.

Contractual options and measures under German law *(Luther)*

Every company burdened by these new tariffs should assess whether economic and legal actions can mitigate their damage. One such action would be to pass on the additional costs to customers. A contractual mechanism for this can be a price adjustment clause, for example. However, simply increasing prices for customers may not always be possible or feasible. For example, the parties may be bound by long-term agreements stipulating fixed prices without terms that adapt to unforeseen higher tariffs. In other cases, an increase in prices, even if it is possible to push through to the customer, would decrease the purchaser's market share. This would be especially problematic if the parties agreed on minimum delivery quotas.

One solution would be for one or both companies to unilaterally terminate the contract. Under German statutory law, a right of one or both parties to terminate the contract due to external circumstances requires that the continuation of the contract would be an unreasonable burden to the party wishing to terminate. It is unlikely that the announced tariffs will quantitatively suffice to constitute such an unreasonable burden. Likewise, termination of the contract due to impossibility is not applicable, since the unprofitability of the contract generally is not a sufficient cause for termination.

However, in some instances one party may demand that the other party agrees to amend the contract to account for new circumstances. Such an obligation to adjust the contract requires that the new tariffs were objectively unexpected while the contract was concluded. Whether this is the case cannot be stated with legal certainty.

A more cooperative measure would be to negotiate with the other party to the contract. Good faith negotiations may lead to a fair sharing of the new tariff burden. The results of the negotiation should be recorded in writing, for example as an annex to the existing contract.

Ideally, any contract should include stipulations regarding a common handling of new tariffs or other changed circumstances by the parties. Such stipulations may be designed as hardship clauses or *force majeure* provisions, whereby the prerequisites and legal consequences can be tailored to a high degree to the individual case. One of the main issues to be considered is the effective tariff rate at which the clause should take effect. Possible consequences range from automatic cancellation or adjustments to the contract to compelling both parties to negotiate in good faith towards a mutually acceptable solution. Furthermore, parties should include the appropriate transport conditions (e.g. Incoterms®) and include a proper customs clause, if necessary.

Navigating through these legal measures can prove to be complicated and risk-laden, in particular with respect to the strict German law on terms and conditions. The ideal solution will inevitably vary depending on the individual facts of the case. Companies affected by the tariffs should therefore perform an in-depth legal audit of their current contractual situation and the range of measures available to them.

How does U.S. contract law address tariffs? *(Nixon Peabody)*

As noted above, U.S. tariff policy continues to be in flux with rates changing overnight and exemptions being provided to importers from certain countries and as to certain categories of goods. However, for many counterparties, tariffs will undoubtedly impact (perhaps dramatically) the economics of trade arrangements.

To find relief under U.S. contracts, clients will need to review key terms such as *force majeure* clauses, any Incoterms® or similar provisions, and price adjustment provisions, to determine whether the change in tariffs triggers relief.

For *force majeure*, the key question will be not whether tariff increases were unexpected, but whether they are so significant that they rise to the level of allowing a party to claim that *force* *majeure* exists. If so, it will be important to understand whether that means that the contract is then void, voidable, or simply subject to relaxation of the timing for the performance of certain obligations.

Incoterms® or similar provisions, and price adjustment provisions, will generally be enforced as written by U.S. courts.

A party facing extraordinary new costs in the form of tariffs should also consider whether other legal bases for changes to the deal may exist, (e.g., the legal defenses of impossibility of performance, frustration of purpose, etc.). Any of these might allow a party to revise and/or void the contract in light of the tariffs, or at least raise the possibility of doing so, forcing renegotiations.

There is no single, uniform federal law approach to these matters. Contracts for purchase and sale of goods under U.S. law are generally governed by the laws of the state designated in the contract (with some exceptions such as when the state designated has no connection to the transaction, in which case a court may apply the law of the state where one of the parties is located). Although there are some largely uniform statutes in place across the 50 states (such as the Uniform Commercial Code (UCC)), there are some important differences among the 50 states. This is especially true because the governing law on many of these topics (including *force* majeure, impossibility of performance, etc.) is not statutory, but instead found in the common law as set out in court decisions that have binding precedential value for future cases.

Accordingly, companies should carefully review the wording of their contracts, and also review applicable law for the relevant states, to determine whether *force majeure* and other potential means of modifying or cancelling a contract are viable legal options.

While "tariff" is the word of the year, a similar analysis was required in 2020, when the COVID-19 pandemic struck. At that time, severe disruptions to the supply chain, lack of available workers, and government-mandated shutdowns, among other factors, raised many similar questions. There were, indeed, different legal results across states and even circumstances depending on jurisdiction and contract language. In general, courts across the U.S. looked first to the "plain wording" of the contract, closely examining their terms, rather than applying broad-brush approaches to whole companies or industries. Notably, these courts generally did not allow a party to escape performance of a contract, merely because performance had become less profitable or unprofitable.

Dr. Christoph von Burgsdorff, LL.M.
Partner, German Attorney-at-Law
Luther Rechtsanwaltsgesellschaft mbH
christoph.von.burgsdorff@luther-lawfirm.com

David Kaufman
Director of Global Strategies
NIXON PEABODY LLP
dkaufman@nixonpeabody.com

David R. Brown
Partner
NIXON PEABODY LLP
drbrown@nixonpeabody.com

Release: April 2025