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Dynamic Tariffs: Risks and Challenges for Commercial Contracts

I. Introduction

The global trade environment is changing rapidly and the introduction of new tariffs is significantly reshaping the business landscape. These developments demand attention as they compel companies to reassess and adapt their global supply chain strategies to maintain competitiveness, security of supply and flexibility.[1] The evolving trade conditions pose immediate implications for many existing commercial contracts, necessitating a strategic re-evaluation. Companies operating internationally must proactively address trade risks within their new commercial agreements to navigate these uncertainties effectively. Legal strategies play a crucial role in enabling businesses to remain agile and resilient amidst these dynamic changes, while contractual arrangements must strike a balance between providing enforceable commitments and retaining flexibility to adapt to unforeseen developments. Our article explores the implications of the current tariff landscape for existing contracts by considering both civil and common law principles to offer practical tips for structuring future contracts to mitigate risks.

II. Increasing Tariffs: Impact on Commercial Contracts

To assess the impact of increasing tariffs on commercial contracts, it is necessary to first carefully evaluate existing contracts, and second, to address tariffs when drafting and negotiating new contracts.

1. Evaluation of Existing Contracts

Increasing import and export tariffs can have a severe economic impact on commercial contracts covering the sale of goods that were already concluded before the tariffs were increased. As a result, the buyer, seller, or both may face cost increases. In such a situation the affected party will certainly need to know if there are any remedies that could help it avoid bearing such cost increases (*e.g.* by invoking the party's adjustment rights).

a. Who Is Responsible for Paying Increased Tariffs Under the Contract?

In the event of increasing tariffs, parties first need to determine who is generally responsible for paying tariffs under the respective sales contract, which depends on the contractual arrangements made by the parties. Typically, sales contracts contain an express agreement on the cost allocation with respect to tariffs. Particularly, the parties regularly agree on the delivery of the goods based on "*Incoterms*".[2] Incoterms are general (international) trade rules covering, amongst other things, the responsibilities associated with deliveries, transfer of risk and costs.[3] Common Incoterms agreed in sales contracts are:

– Ex Works ("**EXW**"),

– Free Carrier ("**FCA**"),

– Delivered at Place ("**DAP**"), and

– Delivered Duty Paid ("**DDP**").

The Incoterm agreed thus determines who is generally responsible for paying the tariffs (import and/or export tariffs) in the first place and usually extends to apply to tariff increases, irrespective of whether the contract is governed by civil law or common law jurisdictions. Regarding the above stated Incoterms, the following cost allocation applies:

Incoterm	Responsibility for paying (increasing) export tariffs	Responsibility for paying (increasing) import tariffs
EXW	Buyer	Buyer
FCA	Seller	Buyer
DAP	Seller	Buyer
DDP	Seller	Seller

However, in the event that the contract does not contain an express agreement on the cost allocation with respect to increasing tariffs, a detailed assessment on the cost allocation becomes necessary. The basis for such an assessment is the interpretation of the contract or, as the case may be, any applicable civil or common law principles of the law that governs the contract.[4]

b. What Could Help, if a Party Is Generally Responsible for Paying Increasing Tariffs?

After having assessed which party is generally responsible for paying increasing tariffs under the sales contract, the parties then need to assess whether there are any remedies available under the contract itself, or, more broadly, if civil or common law principles could help the affected party avoid bearing the cost increases associated with rising tariffs.

i. Contractual Clauses

The respective contract can provide for several contractual clauses that could help.[5] The exact assessment of any such concept will in each case depend on the specific contract drafting.[6] The following summarizes some general considerations based on typical clauses often used in practice, both in contracts governed by civil law or common law jurisdictions (although, of course, different contract law rules may apply in detail under applicable laws, *e.g.* under German law there may be limitations to the legal enforceability of standard contract clauses if imposed by one party and not negotiated with the other party).[7] Amongst others:

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1 *Farok J. Contractor*, Assessing the economic impact of tariffs: adaptations by multinationals and traders to mitigate tariffs, Review of International Business and Strategy 2025, 190–213.

2 *Dostal* in: Martinek/Semler/Flohr VertriebsR-HdB (5th ed. 2025), § 90 para. 197.

3 *Piltz* in: Kröll/Mistelis/Perales Viscasillas CISG (2nd ed. 2018), Art. 31 para. 58 *et seqq*.

4 *Mihail Dishev/Philipp Hoffmann*, Ukraine-Krieg, EU-Sanktionen und Inflation als Act of God/Force Majeure/Höhere Gewalt?, NJOZ 2022, 1473 (1476).

5 *Julian Rapp*, Krisenbewältigung durch Privatrecht?, ZfPW 2024, 465 (468).

6 *Christoph Graf von Bernstorff*, US-Zölle – Gestörte Vertragsbeziehungen, AW-Prax 2025, 253 (253).

7 *Fornasier* in: MüKo BGB (9th ed. 2022), § 305 para. 1 *et seqq*.

- **Price adjustment clauses** are another mechanism (separate from the Incoterm or other cost allocation clauses) which enables one or both parties to automatically amend or renegotiate the existing prices in an agreement.[8] Parties who wish to trigger an existing price adjustment clause should consider: (a) what are the requirements for relying on the clause – for example, adjustment clauses are often linked to certain indices (which may not be affected by tariff changes), or clauses may refer to specific cost elements of a party's contractual performance (such as production or transportation costs),[9] where again it can be questionable whether this includes tariffs; (b) are there limits on the number of times an adjustment can be made – if so, then it will be important to fully understand the cost implications of the tariffs before amending prices.
- **Termination for convenience clauses** enable a party to terminate an agreement at any time for convenience, meaning without cause. However, in most cases a termination for convenience requires a party to observe a notice period and thus may not help to quickly terminate the agreement. Also, overall termination of the affected supply contract may often not be a viable or preferable option from a business standpoint.
- ***Force majeure* clauses** excuse a party from performing a contract if an event beyond the party's reasonable control prevents performance.[10] Such clauses often provide that the event must have been unforeseeable at the time of the agreement. The specific wording of a *force majeure* clause will dictate whether an increase in tariffs could be deemed a "*force majeure event*." If triggered, *force majeure* clauses typically suspend the parties' rights and obligations under the contract; however, it is unlikely that a change in economic circumstances would amount to *force majeure*.[11] Therefore, a *force majeure* clause would not typically permit a party to claim that increased tariffs constitute a *force majeure event* sufficient to suspend contract obligations.
- Similarly, **hardship clauses** usually define a hardship case as an (unforeseeable) event beyond the party's reasonable control.[12] Different from the typical *force majeure* concept, hardship clauses may apply to mere economic effects of such events – like tariffs. Regarding the legal consequences, hardship clauses usually aim for an adjustment, rather than relief from performance and possible termination of the agreement, making hardship clauses a more viable path to mitigating the effects of increased tariffs.[13]
- **Material adverse change clauses** generally enable a party to terminate an agreement following a significant change in circumstances. In order to argue that the impact of tariffs amounts to a material adverse change, the impacted party would have to undertake an assessment of the specific circumstances in the context of the contract, including any relevant definitions and concepts specified in the contract, as well as under the applicable governing law. Typically, a change in circumstances will not amount to a material adverse change unless the affected party suffers an objectively significant and lasting impact.
- **Change in law clauses** allocate the risk of a change in law and determine which party bears the costs of any necessary adjustments. Alternatively, these clauses may also enable either or both parties to trigger renegotiation or termination of the agreement. A change in law clause may extend to tariffs if it either refers to them specifically or is broad enough to capture the circumstances. However, if the clause is not specifically tailored to include tariffs or does not clearly define what constitutes a "*change in law*", it may not effectively cover tariff changes. A clause which is too vague might lead to disputes over whether tariffs qualify as a valid trigger for a change in law.

ii. Civil Law Principles

Civil law jurisdictions usually have certain codified principles dealing with extraordinary circumstances. For instance, German law has the "*principles of impossibility*" or "*frustration of contract*". These principles are, however, quite narrowly interpreted.

- **Principles of impossibility**: Section 275 of the German Civil Code (*Bürgerliches Gesetzbuch*, "**BGB**") allows a party to refuse contractual performance amongst others in case such performance has become impossible.[14] Increasing tariffs however do not render the contractual performance impossible but only make it more expensive for the affected party. The fact that the contractual performance has become more expensive, however, does regularly not trigger any consequences under Section 275 BGB (except for in very rare cases, which are not relevant in instances of increasing tariffs).[15] Therefore, increasing tariffs generally do not entitle the affected party to invoke on the principles of impossibility and thus refuse contractual performance.
- **Principles of frustration of contract**: Section 313 BGB allows for a contract adjustment if the circumstances on which the contract was based have changed significantly, making it commercially unreasonable for a party to continue its contractual performance without any changes.[16] Proving commercial unreasonableness is often difficult, as the requirements are extremely high. So, while the affected party may argue that the parties mutually understood the agreed upon prices, and specifically, the tariffs, would not significantly increase after signing the contract, it is unlikely this will satisfy the high threshold required to prove commercial unreasonableness.[17]

iii. Common Law Principles

Unlike within civil law systems such as Germany, in common law systems (including the UK) courts are even less likely to interfere with or amend the terms the parties to a contract agreed upon.[18] As a result, there are limited options available to parties in this context "*outside the contract*."

English law does recognize the doctrine of frustration, which allows a contract to be set aside where an unforeseen event either renders performance of contracts impossible or radically changes the party's principal purpose for entering into

8 *Mihail Dishev/Philipp Hoffmann/Sven Müller*, Die Ausführung von Verträgen im Zeichen von krisenbedingten Preissteigerungen, NJOZ 2024, 97 (97).
9 *Lars Eckhoff*, Zur Zulässigkeit von Preisanpassungsklauseln in AGB, GWR 2016, 243 (243).
10 *Determann* in: Martinek/Semler/Flohr VertriebsR-HdB (5th ed. 2025), § 88 para. 68.
11 *Günter Weick*, Force Majeure, ZEuP 2014, 281 (288, 310).
12 *Anna-Lisa Dreyspring/Tim Spielmann,* Auswirkungen von (Straf-)Zöllen auf Lieferbeziehungen, ZASA 2025, 204 (206).
13 *DiMatteo* in: DiMatteo/Janssen/Magnus/Schulze International Sales Law (2nd ed. 2021), Chapter 22 para. 154.
14 *Ernst* in: MüKo BGB (9th ed. 2022), § 275 para. 1.
15 *Id.*, paras 26, 107.
16 *Grüneberg* in: Grüneberg BGB (83rd ed. 2024), § 313 para. 1.
17 *Christian Lührmann/Philip Egle/Heider Thomas,* Störung der Geschäftsgrundlage: Preisanpassung durch Ukraine-Krieg?, NZBau 2022, 251 (252).
18 *Whittaker* in: Beale Chitty on Contracts (35th ed. 2023), Chapter 2 para. 2-0004.

the contract.[19] However, this doctrine is unlikely to be useful in the context of increased tariffs, given purely economic changes often fail to meet the criteria required to rely on the doctrine.[20]

c. Preliminary Conclusion – Available Concepts Will Often Not Help

All in all, in case a party is affected by increasing tariffs and generally needs to pay any such increasing tariffs under the respective contract, a detailed evaluation of the particular situation is required in order to assess whether there are any remedies available that could help the affected party in such situation. While contractual remedies might – depending on the concrete drafting of the respective clauses – help the affected party to at least claim adjustments, they will regularly not entitle the affected party to refuse contractual performance simply because said performance has become more expensive due to the increasing tariffs. Furthermore, in instances where contractual performance has become more expensive but is still able to be performed, neither common law nor civil law principles are likely to help claim adjustments or refuse contractual performance.[21] Ultimately, this leaves affected parties with narrow legal remedies for mitigating the impacts of increased tariffs on existing commercial contracts.

2. Drafting and Negotiating New Contracts

All the more, it is crucial to consider how changes in tariffs can be addressed going forward to make new contracts more resilient and flexible. Like when looking at existing contracts, two aspects should be considered: first, who shall generally bear the cost of increasing tariffs, and second, should there be a way out of the general contractual cost and risk allocation if circumstances significantly change? The following basic considerations apply to contracts governed by both civil and common law jurisdictions, although of course, different contract law rules may apply in detail under applicable laws. For example, under German law there may be limitations to the legal enforceability of standard contract clauses if imposed by one party and not negotiated with the other party.

a. Who Shall Generally Bear the Cost of Applicable Tariffs?

As mentioned above, the typical way of including the general cost allocation for tariffs in the agreement is by referencing an Incoterms clause. That said, in addition to the Incoterms clause, it is helpful to explicitly clarify the parties' common understanding and expectation regarding the underlying facts at the time of the agreement within the contract, given the current situation of dynamic tariffs and related uncertainties of how this will further develop.[22] For instance, in situations where increased tariffs have been threatened or are being negotiated but are not yet finally decided, this may later help to justify or defend any arguments of whether future increasing tariffs were foreseeable or not, and whether such future changes should then be considered within or outside the agreed risk allocation.

To provide for an even more specific risk and cost allocation, the parties could agree on certain tariff thresholds, meaning that the agreed cost allocation would only apply up to that threshold, but not if higher tariffs are enacted (or if existing tariffs are reduced or waived). Such clause should also define the legal consequences if a tariff change beyond the agreed threshold occurs – by negotiating a contract amendment or automatic price adjustment for example.

b. *Force Majeure*, Hardship and the Like

If the contract provides for a general cost and risk allocation regarding tariffs as described above, and assuming that this allocation shall in principle be binding between the parties, the question then becomes whether and to what extent there shall still be a way out of this binding arrangement if circumstances significantly change in an unforeseeable way. This latent conflict between the binding nature of a contractual commitment and the need to remain flexible in order to adapt to unforeseen developments may be addressed by using a tailored *force majeure* or hardship clause (or another contractual concept mentioned in II.1.b. above).[23]

So, how can concepts such as *force majeure* or hardship be specifically tailored to the dynamic tariff situation? This first depends on the perspective: the party that generally bears the tariffs under the contract will seek a broad application of such clauses (thus emphasizing the flexibility aspect), whereas the opposite applies for the other party who will aim for a firmer commitment to performance.

Accordingly, when drafting and negotiating such clauses a party will either go for a broader or more narrow definition of a *force majeure* or hardship event. In the context of the current tariff situation, tariffs could thus be explicitly included in a list of example events agreed by the parties to specify their understanding of the *force majeure* or hardship concept that shall be applied to their contract. Switching perspectives, the contractual definition could expressly exclude tariffs. In a *force majeure* clause, the parties may more generally also clarify that mere "*cost increases*" shall not be deemed a *force majeure event*. Effectively, this would emphasize the existing notion that *force majeure* does not apply to mere economic effects.

Another important aspect is the question of foreseeability – which, as a question of fact, is a difficult one to assess in the current dynamic tariff situation.[24] Generally, a party seeking a broad application of a *force majeure* or hardship clause will first want to avoid any explicit requirement of unforeseeability in the contractual definition (and the other party may want to negotiate the opposite). Second, even if the clause excludes foreseeable events from the scope of *force majeure* or hardship, it may make sense to explicitly describe the common understanding of the current situation and its uncertainties, so as to define the baseline of what is known – or what is not known – and then to clarify that any future developments on tariffs may still constitute *force majeure* or hardship.

Once the scope of the *force majeure* or hardship concept is sufficiently defined, what about the legal consequences? Whereas traditional *force majeure* clauses typically provide for a suspension of and relief from performance, and may even provide for termination of the entire contract, it may in general – beyond the issue of tariffs – be in both parties' interest to provide for more flexible legal consequences.[25]

19 *McKendrick* in: Beale Chitty on Contracts (35th ed. 2023), Chapter 27 para. 27-001; *Davis Contractors v. Fareham Urban DC* (1956) AC 696.
20 *Gold Group Properties Ltd v. BDW Trading Ltd* (2010) EWHC 323 (TCC).
21 *Tsakiroglou v. Noblee Thorl* (1962) AC 93.
22 *Christoph Graf von Bernstorff*, Zollstreit vermeiden – Nutzen von Lieferbedingungen, AW-Prax 2025, 351 (352).
23 *DiMatteo* in: DiMatteo/Janssen/Magnus/Schulze International Sales Law (2nd ed. 2021), Chapter 22 para. 139 *et seqq*.
24 *McKendrick* in: Beale Chitty on Contracts (35th ed. 2023), Chapter 27 para. 27-089.
25 *Id.*, para. 27-085.

Similar to what typical hardship clauses provide for, parties should focus more on mitigating the situation and adapting to the changed circumstances in order to continue the contractual relationship if possible and where appropriate.[26] For example, this could include an obligation to mitigate adverse effects from the *force majeure* event. In addition, a phased approach could be applied, with the parties first attempting to agree on an adjustment of the contract, and only as a kind of last resort having a termination right.

III. Final Conclusion – Dealing with Uncertainty in Commercial Contracts

The last few years have been characterized by a series of supply chain "*shocks*".[27] From Covid-19 to the energy crisis and supply chain disruptions arising from the war in Ukraine and now the dynamic tariff situation, there have been a series of "*unprecedented*" events which have tested the strength and flexibility of commercial contracts.

Existing contracts may often contain common "*standard*" clauses which are more generically drafted to deal with unforeseen events (such as traditional *force majeure* clauses). In addition, contracting parties might also look to the relief that any implied rules the contract's governing law might bring (such as doctrines of frustration). However, as this article demonstrates, these clauses and principles do not always facilitate the desired degree of relief.

Going forward, contracting parties should therefore aim to make their commercial contracts more robust to deal with the dynamic tariff situation and, more generally, with future uncertainties. There is no "*one size fits all*" approach to this, as the best solution will depend on the position and perspective of the parties and the context of the specific contract. However, the lessons learned from recent disruptive events can help tailor contractual concepts dealing with changing circumstances (such as *force majeure* or hardship) to specifically address the current tariff situation, and more generally to also provide for more flexible solutions with respect to future uncertainties. Beyond more advanced *force majeure* or hardship clauses or similar concepts, further ways should be considered to make contractual arrangements more resilient and adaptive overall. For example, advanced forecast and order processes as well as stock-keeping arrangements can help to operatively manage future developments, while clear and sophisticated contract adjustment mechanisms as well as specific and purposeful termination rights may provide more flexibility to manage the status and portfolio of contracts. Ultimately, both sides can benefit from considering the agreement as a whole and building resilience where possible. Especially for complex supply chains, it is well worth stress-testing contracts at the point of drafting and negotiation to see whether they can withstand both ordinary course of business, as well as the extraordinary. ■

26 *Id.*, para. 27-073.
27 *Luca Léry Moffat/Niclas Frederic Poitiers*, Global Supply Chains: Lessons from a decade of disruption, Working Paper 04/2024, Bruegel, available at: https://www.bruegel.org/sites/default/files/private/2024-03/WP%2004_0.pdf (last accessed: 14 October 2025).