

CLIENT ALERTS

Who's Going to Pay the Cost of the New Tariffs and What Legal Options Should You be Considering?

Client Alert

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Suppliers do not need a lawyer to tell them that the 25% tariffs on Canadian and Mexican imports authorized by President Trump on February 1st will have a staggering impact on the automotive industry. As of this Alert, the tariffs on Mexican and Canadian imports are reported to have been pushed back one month. Knowledgeable industry experts estimate new tariffs will cost the industry \$60 billion. The new tariffs raise many questions for the industry including whether the tariffs are lawful. For information on the actual tariffs, this link will connect you with our previously published Client Alert.

This Client Alert focuses on the questions that are probably of the most immediate interest; who in the supply chain will bear the cost of the new tariffs and, if it is your company, are there legal options for relief you can explore?

There is no single answer to the question of who will bear the cost because the answer is determined most often by contract and not all contracts give the same answer. Contracts must be analyzed, both upstream and downstream.

We start with what we have found to be two common misunderstandings. The first misunderstanding is that tariffs are borne by the importer of record. While the importer of record must pay to the U.S. government the duties to bring the goods into the U.S., it is *the contract which determines the party that will ultimately bear that cost*. Sometimes that is the importer of record, but it is the contract, not customs law that provides the answer. The second misunderstanding is that the place of transfer of title determines which party bears the tariff costs. Incoterms (International Commercial Terms) do not address transfer of title, nor tie that to payment of duties. Although the contract may connect transfer of title and responsibility for duties, that too is a matter of contract law.

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Accurate contract analysis begins with identifying the shipping terms (almost always an Incoterm). Each Incoterm (such as DDP or Ex-Works) provides which party is responsible for duties. The Incoterm can usually be found in one (or more) of three places: (i) the standard terms; (ii) an individual PO; or, less often, (iii) within an incorporated “Shipping Guide,” or the like. But that is only the starting point, because the parties’ contract can modify the Incoterm. For example, the specified Incoterm might provide for the buyer to pay duties, but another contract provision might provide that the seller will do so. In that case, the seller is responsible for the payment. And there is a further complexity—sometimes the contract requires the seller or buyer to pay duties, except for “special” or “extraordinary” duties. Such sorts of terms are rarely, if ever, defined in the contract, and often whether or not a duty is “special” is debatable.

In sum, the necessary analysis requires review of all the relevant contract documents. Experienced automotive counsel with knowledge of automotive industry terms can greatly improve both the speed and reliability of the process.

If the analysis above identifies your company as the party responsible for tariff costs, you may have legal options available for relief. Do you have a basis for challenging the enforceability of the supply contract? Do you have a release-by-release contract that permits you to reject future customer releases? Has the contract expired? Do your customer’s terms allow you to terminate supply upon reasonable notice of termination? Does the applicable force majeure provision provide any relief? These, plus other potential legal arguments, may provide you with the leverage required to avoid or reduce tariff responsibilities in commercial negotiations or, if need be, litigation.

Butzel’s Automotive Industry Group is available to provide legal advice on the matters discussed within this Client Alert. Please feel free to contact the authors of this Client Alert or your Butzel attorney for more information.

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