

Navigating contractual risks in a volatile trade environment

Elisabeth Eklund / Partner / Advokat & **Matilda Claussén-Karlsson** / Senior Associate / Advokat



Navigating contractual risks in a volatile trade environment

Elisabeth Eklund / Partner / Advokat & **Matilda Claussén-Karlsson** / Senior Associate / Advokat

5 of May 2025

The past month has shown how unpredictability creates uncertainty for companies, resulting in the recent plunge and sudden recoils of the global stock markets. Amidst the pause of the EU-U.S. tariffs, the uncertainty of the long-term impacts on global trade remains. The current situation highlights the importance for companies to have robust and comprehensive mitigating strategies related to redundancy and, to the extent possible, predictability in their supply chains.

We recommend companies to use the current ‘tariff pause’ wisely – by preparing for and mitigating risks, to the extent possible. However, we also recommend companies to not take any hasty – and probably costly – measures without having thought things through. Below we will share some of the actions we recommend companies to consider.

Quick Overview over the Trade Tariffs

5 April 2025, the U.S. announced *inter alia* that it will impose universal import tariffs of ten percent on all imports of goods from the EU. These universal tariffs

are added to eventual tariffs already in force. There are also threats of *additional* tariffs on goods imported from the European Union (the “**EU**”), which would raise the U.S.’ universal tariffs on imports of EU goods to twenty percent. These additional tariffs are currently suspended, and some exceptions have also been announced, yet global trade is already plummeting.

The universal tariffs underscore the importance of understanding what is the country of origin for goods intended to be sold to or manufactured in the U.S. In general, determining the country of origin of imported goods is a crucial, yet complicated, and subject to U.S. law (which calls for legal advice from local legal counsels in this regard). In addition to the universal tariffs, there are specific tariffs targeting certain types of goods, such as steel, aluminum, and the automotive sector.

The EU’s planned countermeasures are mainly related to the specific tariffs on steel and aluminum, amending and adapting the countermeasures first enacted in 2018. At the time of writing, the EU’s countermeasures are suspended until 14 July 2025, as a response on the U.S.’ pause of the so-called reciprocal (additional) tariffs. The

EU has thus adopted two legal acts as of the 14 April 2025 – one act imposing the EU’s countermeasures, and a second act suspending all such countermeasures for 90 days.

Considering that the U.S. remains the EU’s largest trading partner, the EU has stated a preference for negotiating with the U.S. instead of imposing universal tariffs on imports from the U.S.

Who pays import tariffs?

Import tariffs are mainly affecting the *importer* of certain goods. The importer is paying the tariffs in accordance with the rules of the importer’s jurisdiction. Such local legislation applies also when determining the country of origin for the imported goods. The tariffs are thus, *from a regulatory perspective*, primarily increasing the importer’s costs for the goods. However, contracts may include specific trade terms allocating risks and responsibility for costs for certain events related to the delivery of goods. Most commonly used is the International Chamber of Commerce’s Incoterms 2020. The use of the specific Incoterms which are allocating costs for imports on the seller may largely affect exporting companies as well (e.g., the trade term “Delivery, Duty, Paid”, DDP). Therefore, *from a contractual perspective*, the tariffs may have different effect depending on the contractual terms. From time to time, the use of specific Incoterms may contradict other wording of the contract, e.g., regarding responsibility for new or amended taxes and tariffs. Consequently, contractual strategies are crucial to mitigate the risks and consequences related to the tariffs.

Both current and potential additional tariffs enacted by the EU and/or the U.S. in the future may affect margins on goods for exporters *and* importers. To keep margins, companies will be forced to increase prices to the customer next to them in the value chain. Companies forced to raise the prices of their products to cover for increased overhead costs will consequently be affected negatively by their products being less competitive on the U.S. market.

Based on our experience, there is also a risk that companies with a multifaceted sourcing and refining strategy may be affected more than once by the tariffs or may be subject to a tariff other than that applicable to the country from which the goods are exported. For example, if components of a product are sourced from a country other than an EU Member State, or if products are finished in a third country outside the EU. It is therefore essential to seek advice from local counsel in the importing country to gain a full understanding of the implications of the applicable tariffs and also seeking to explore and identify the possibilities to avoid such adverse results.

Why not Invoke Force Majeure?

Historically, similar changes in the geopolitical arena have resulted in companies invoking force majeure, i.e., claiming they cannot fulfil their contract. In our view, the imposed tariffs generally do not qualify as a force majeure event.

Force majeure events are absolute. Put simply from a Swedish law perspective, a force majeure event is an event that hinders or makes it impossible for a party to fulfil a contract, unless the contract clearly states otherwise. A force majeure clause also establishes the right for a party to suspend obligations and/or terminate the contract without liability in the event of an impossibility to fulfil the contract.

Tariffs affect global trade and can diminish competitiveness for certain companies, but they do not generally hinder fulfillment of contracts. Companies therefore must consider the risks of international trade being more expensive and be prepared to fulfill existing contracts irrespective of the tariffs, alternatively analyze whether it is possible to invoke a *hardship clause*, if such clause exists in the contract and are applicable for the current situation. Hardship provisions are generally intended to enable a party to renegotiate and/or cancel certain contractually agreed rights and obligations in certain (often financially) burdensome situations.

Unpredictability Calls for Redundancy Strategies in Contracts

Global trade has resulted in global supply chains. Companies have sometimes been fortunate to be able to source raw materials and components from countries all over the world. However, the tariffs impose financial risks and may cause supply chain disruptions in these global supply chains. In essence, the importance of having ensured redundancy in the supply chain *and* having contractual solutions for the predictable yet unexpected, is crucial for companies who are to some extent relying on global trade.

While we do not recommend that companies should take any hasty action, we list several key mitigating strategies for companies to consider below.

- **Map flows of goods, supplies and deliveries:**

It is important to know the companies' flow of goods, vital imports and exports of goods, the origin of components and goods and classification and the countries involved (including potential tariffs of those countries and rules regarding country of origin). If information is missing or not complete, request information from counterparties. The mapping can provide unparalleled insights in the company's exposure for the tariffs and related costs and be valuable for choosing the right actions from thereon.

- **Review existing contracts for potential risks related to the tariffs:** We recommend a thorough assessment of the risks that the tariffs might impose to existing contracts. Such assessment should of course be adapted to the subject of the contract in question, and the importance of the contractual terms listed below may vary depending on each party's role and obligations. The assessment should at least include whether these contracts comprise terms imposing risks (or solutions) in case of unexpected geopolitical changes, such as

- exclusivity and/or territorial undertakings.

- volume commitments.
- specific trade terms including risk and cost allocation among the parties (e.g., Incoterms),
- specified dates for delivery/contract fulfilment in combination with liquidated damages if delivery/finalization dates are not met.
- price adjustment mechanisms, including escalation, references to "changes in law" and similar, and
- hardship, material adverse change (MAC) or material adverse impact clauses or similar.

- **Consider introducing or increasing redundancy in the supply chain:** Consider sourcing raw materials and components from different suppliers. Having more than one supplier of essential materials and components will be crucial to mitigate potential disruptions in the supply chain. Ensuring redundancy should be a long-term strategy to combat disruptions in the business, not a hasty action to be taken only within the 90 days' tariff pause.

- **Address geopolitical risks proactively in new or renewed contracts:** We recommend companies to take the current geopolitical situation into account in the long-term and proactively seek contractual solutions to mitigate and diversify similar risks in the future.

- **Establish connections with legal counsels of the relevant jurisdiction:** It is fundamental for companies to seek advice from local counsels in relation to the regulatory risks related to the tariffs. Especially when it comes to determination of country of origin and potential exceptions, which is necessary for determining the applicable tariffs, legal advice should be obtained from local counsel. Also, it is beneficial for all cross-border issues to be handled in cooperation between lawyers of the affected jurisdictions.

Conclusively, it is worth noting that attempts to circumvent the tariffs, e.g., by misclassifying certain goods, misrepresenting information on value or origin, or similar, may expose companies and their representatives to criminal penalties. In recent case-law from the Court of Justice of the European Union, the Court has ruled that relocating a production facility from a country where tariffs are imposed by the EU to another country with lower tariffs, without other financial motives, can be taken into account when determining origin of goods imported to the EU.

This creates another layer of complexity and unpredictability when considering long-term strategies for location of production facilities. It is thus important to be aware of the tariffs, applicable rules on determination of origin in the value chain and seek legal advice in connection with any countermeasures taken in connection therewith. At Delphi, we are here to assist and liaise with local counsel when needed.

Kontakt

Elisabeth Eklund / Partner / Advokat
+46 (0) 709 25 26 08
elisabeth.eklund@delphi.se

Matilda Claussen-Karlsson / Senior Associate / Advokat
+46 (0) 709 25 26 40
matilda.claussen-karlsson@delphi.se