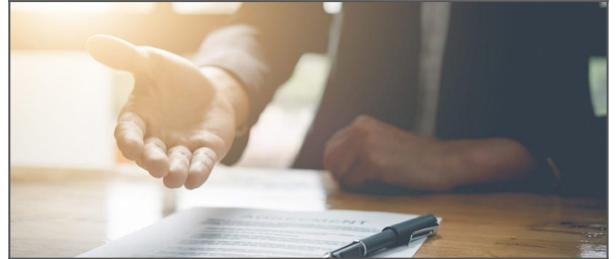


# Contracts - Terms, and Tariffs: Allocating Risks in Uncertain Times

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The simplest legal contract is an exchange, and it can be settled by a handshake or a simple “yes,” or an “I agree.” In business most contracts are settled in writing, in one form or another. The terms and conditions of a written contract might be set out in a detailed supply contract formally signed by the parties, in on-line terms and conditions, in a price quotation, in purchase orders, or sometimes even in invoices. With today’s trade related uncertainties, it is a good time to consider whether your contracts are working for or against you.



## **Contracts are Risk Allocation Devices**

Written sales and supply contracts mainly serve to allocate risk between the contracting parties. They state who is responsible for delivering what, where and when, in what condition, and at what price. They often include terms that set out consequences for incomplete performance or non-performance by a party. They may include terms to deal with expected and unexpected changes in circumstances that might affect performance by a party or that significantly change the economics of the agreement.

## **Who Pays Tariffs?**

Ordinarily (in the common law provinces), the importer of goods is responsible for any import tariffs payable on importation of the goods. Exporters typically bear export duties. All of that can be varied by agreement. For example, a contract term “FOB destination” makes the seller responsible for all risk and charges to the point of delivery, including import tariffs. Similarly, the contract can provide that the seller is the “importer of record” responsible for duties and tariffs. Know your terms and understand what you hope to achieve by them.

## **Whose Terms Apply?**

Imagine the scenario where seller’s standard terms of sale pass on the responsibility for all tariffs to the buyer and the buyer’s purchase order instead says that tariffs are the seller’s cost. This is sometimes referred to in legal talk as a “battle of the forms.”

If you are conducting business in the US or internationally, the rules for determining which

terms apply when a battle of the forms arises are set out in the Uniform Commercial Code (UCC) and the United Nations Convention on Contracts for the International Sale of Goods (CISG). The CISG rules have been adopted by legislation in all provinces and territories except Quebec and apply to contracts between a party in Canada and one in any other signatory jurisdiction, unless explicitly waived. The CISG states that an acceptance of an offer that contains additional or different terms which do not materially alter the terms of the offer is binding, unless the offeror objects to the added terms without undue delay. A reply to an offer that imposes material changes operates as a counteroffer, which must then be accepted to result in a binding agreement.

Avoid surprises by carefully reviewing all documents and terms before accepting them. Ensure that your contract administrators have the proper training to do that. Promptly reject the addition of any new terms that are unacceptable. Consider including a term in your contract that states that it governs regardless of any attempt to add additional terms.

### **Whose Law Applies?**

We have been assuming that Canadian law applies to the contract. If the contract says otherwise the results can be different. Before accepting the law of another jurisdiction as governing law, get some advice as to the implications. That also applies to choice of forum (i.e., where any disputes will be heard). If the contract is silent as to governing law and forum, then both questions might be left up to the courts to figure out.

### **So, You Want to Make an Accommodation...**

Most businesses want to do right by their customers and major suppliers. It is common to make accommodations to preserve business relationships where there are unexpected changes in circumstances. Sometimes it is a matter of economic necessity. If you do give or receive a break, how does it affect your contract? Does the agreement say that any changes must be in writing? Does it have a clause to the effect that any waiver of strict compliance does not obligate you to waive future noncompliance? Is time of the essence? Best practice says that any contract modifications should be in writing and acknowledged by authorized representatives of both parties. If it is a one-time accommodation say so, lest the “course of conduct” affect the future interpretation of the agreement.

### **Unexpected Events**

Many contracts have a “force majeure” or “unavoidable delay” provision. In most circumstances it only allows a party to delay performance for so long as certain circumstances (say a rail strike) continue. They do not address how to deal with the unexpected imposition of a tariff, even one that threatens the economics of the deal. They often only excuse non-performance for a set time, and only under the circumstances described in the provision. Their usefulness as an “out” is therefore limited.

The result is similar for the common law concept of impossibility of performance. Just because a contract will be more costly to perform (even to the point of being a money loser)

does not mean that performance is made impossible such that a party will be excused from performing its obligations.

Some long-term supply contracts have terms to deal with unexpected changes like increased taxes or tariffs or amendments to the law. These may include a reopener, and a duty to act in good faith to negotiate amendments to cover the new circumstances. Remember that an “agreement to agree” will not be enforced by the courts; they are usually found to be uncertain. To avoid the uncertainty trap, consider a term that resolves any failure by the parties to come to a new agreement, such as an arbitration clause. If an arbitration clause is included, be specific as to how and where the arbitration is to take place, under what rules, within what time, and how the arbitrator will be chosen.

### Other Resources

For more resources, check out our Canada-US Tariffs: Business Resources & Support Hub @

[www.tdslaw.com/publications/canada-u-stariffs-business-resources-support-hub](http://www.tdslaw.com/publications/canada-u-stariffs-business-resources-support-hub).

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