



***UNCTAD Training Course on
Implications of the COVID-19 Pandemic for Commercial Contracts***

May/June 2022

Setting the Scene -

Background and Introduction to the Course

Regina Asariotis

Chief, Policy and Legislation Section, UNCTAD

unctad.org/ttl/legal

Regina.Asariotis@unctad.org



COVID-19: Key international commercial law implications

Unprecedented disruptions associated with the pandemic and its socioeconomic consequences giving rise to a plethora of legal issues affecting traders across the globe

Effects may lead to business losses and bankruptcies and overwhelm courts and legal systems, with implications for governance and the rule of law

In all cases where performance is disrupted, delayed or impossible, legal consequences arise, increasing need for (costly) dispute resolution/litigation; jurisdictional issues in a globalized context

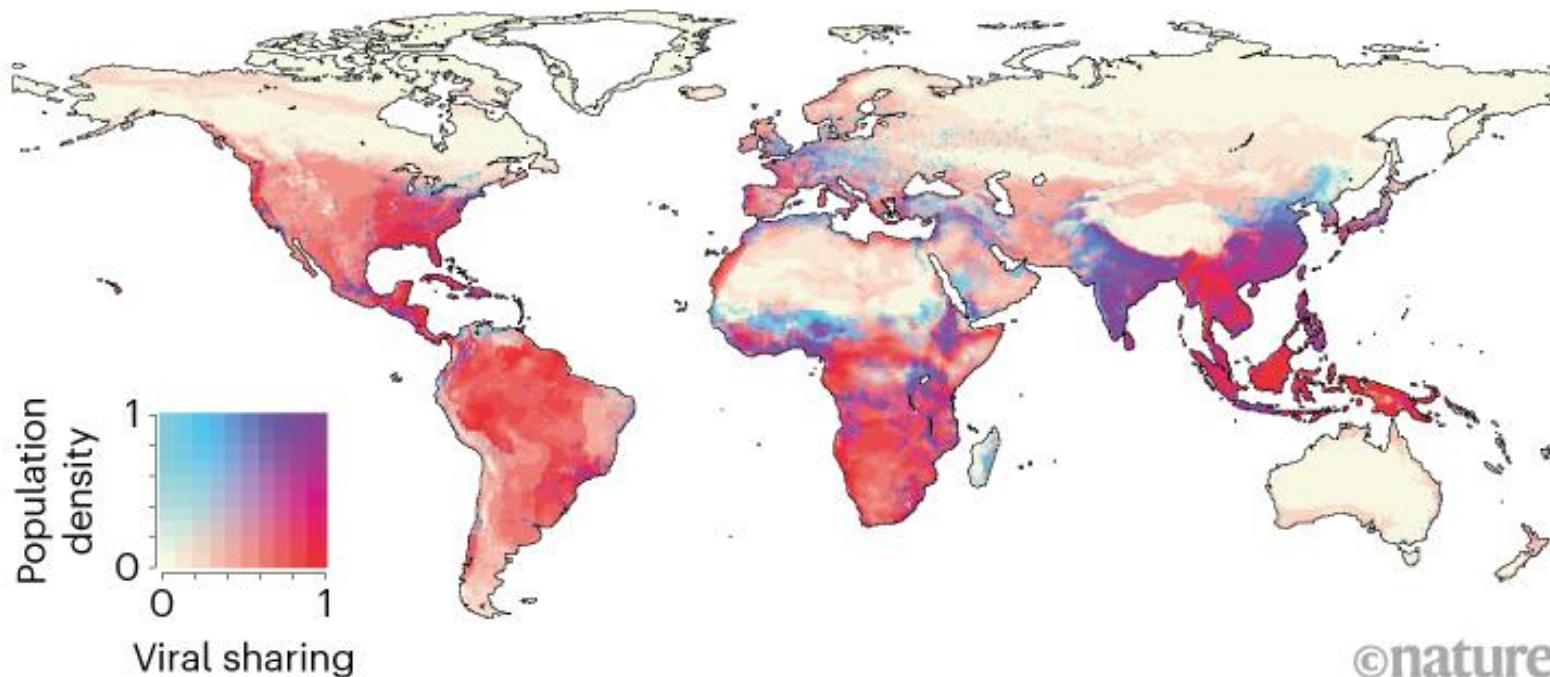
Common and collaborative approaches needed to reduce incidence of disputes and facilitate their resolution, including

- contractual extensions; restraint in pursuing legal rights and claims; efforts at mediation and informal dispute resolution
- commercial risk-allocation: standard form clauses drafted to address contractual rights/ obligations in light of the circumstances associated with the pandemic



Future pandemics risk: Climate change could lead to new pandemics

Models suggest that by 2070, climate change will be driving many mammal species to cooler regions, where they will meet for the first time and could exchange viruses. If Earth warms by 2 °C, they say, the regions with the highest chance of virus sharing will overlap with areas of dense human population, including parts of India and Indonesia. That will increase the risk of pathogens transferring to people.





COVID-19: Key international commercial law implications

Much of global commodities' trade is conducted on CIF and FOB terms and more than 80% of the volume of global merchandise trade is carried by sea.

Implications of the pandemic for contractual rights and obligations deserve particular attention and need to be better understood, to reduce the need for costly litigation and to help inform commercial contracting practice into the future.

Focus of the course is on key commercial contracts in international shipping and trade:

- Contracts for the international sale of goods on shipment terms CIF and FOB; and
- Contracts for carriage of goods by sea under charterparties and bills of lading

To help in the understanding and assessment of

- key issues arising from the pandemic for different types of contracts
- relevant legal implications
- contractual approaches to commercial risk-allocation between the parties through the use of standard form clauses



COVID-19: Key international commercial law implications



COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms



COVID-19 implications for commercial contracts: Carriage of goods by sea and related cargo claims



Contracts for the carriage of goods by sea and multimodal transport

Available at <https://unctad.org/ttl/legal>; see also related report by [ESCAP](#)

- UN Technical Assistance project: Transport and trade connectivity in the age of pandemics <https://unttc.org/>



Housekeeping

- For Zoom, please include your name and affiliation (in brackets)
- Q&A through chat function
- PPP and materials will be posted in chat box and will in due course be included on meetings web-page

Key points to note about the course

- Consideration of position under English law
- In the absence of jurisprudence: no legal certainty
- Intended to provide some guidance, not legal advice
- Time constraints: not possible to be comprehensive
- Further information available in earlier UNCTAD Briefing Notes and Reports

Course structure

- DAY 1 – Sale of Goods on Shipment Terms CIF and FOB; Force Majeure Clauses
- DAY 2 – Voyage Charterparties and Time Charterparties; Pandemics Clauses
- DAY 3 – Bills of Lading and Cargo Claims; Related considerations for Sale of Goods
- DAY 4 – Exercises/Problems



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Setting the scene –

**Contracts for international carriage of goods by sea and
sale of goods on shipment terms**

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Chief, Policy and Legislation Section, UNCTAD

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Carriage of Goods by Sea

Selling goods internationally entails the need for transportation; more than 80% of the volume of global merchandise trade is carried by sea

Main contracts used in international trade: Charterparties and Bills of Lading - rights and obligations may be affected by pandemic-related delay and disruption

Charterparties: *Contracts* between S/O and charterer

- usually for the use of an entire vessel
- Typically subject to negotiation, standard form contracts with riders
- Parties to a C/P are potentially of *equal bargaining power*
- Not subject to any mandatory international convention
- Specialist clauses may be agreed to allocate pandemic-related risks



Time charterparty

The vessel is chartered (hired) for a certain period of time

Shipowner:

- undertakes to place the *ship at the disposal of the charterer* for the carriage of goods in accordance with *charterers' instruction*
- *remains in possession and control* of the vessel: master & crew remain its agents and servants

Time charterer

- *assumes commercial operation* of the vessel and bears certain costs with regard to its employment
- *pays hire for the charter period*, irrespective of the number of voyages the vessel may perform
- bears the *risk of delay at sea or in port*
- *pays for bunker fuel*
- *pays for port charges* and cargo handling expenses



Voyage charterparty

The vessel is chartered for a specific voyage or a series of voyages

Shipowner

- *undertakes to carry cargo* from a port / a range of ports of loading to a port / a range of ports of discharge
- *retains possession / control and management* of the vessel, providing services through his master and crew
- bears the risk of *delay at sea*

Voyage Charterer

- *pays freight based on the quantity of cargo carried*, or a lump sum, irrespective of the time the voyage may take
- *obligation to provide the contracted cargo* for the ship to carry



Principal Clauses in Time C/Ps

Description of the vessel:

- name, present position, deadweight carrying capacity, registered tonnage, class, ***speed and fuel consumption***: very important for charterer as it pays for fuel and hire on time basis

Port and time of delivery of the vessel to the charterer

Cancelling clause

- giving charterer right to cancel C/P if vessel is not delivered by a particular date

Trading area - safe port

- charterers' obligation to order vessel only to a safe port or place

State of vessel on delivery – seaworthiness

- vessel to be in every way fit for the service



Principal Clauses in Time C/Ps

Employment and indemnity clause

- master to be under orders of charterer & sign B/L as presented by him.
Charterer to indemnify S/O against consequences of signing B/L

Responsibility for loading, stowage, discharging cargo

Owner's responsibility for cargo loss/damage – exemptions

Paramount clause: incorporating the H/HVR into the C/P

Payment of hire and withdrawal clause

- charterer's obligation to pay hire & S/O's right to withdraw vessel in case of non payment

Off-hire clause

- hire to cease to be payable on the occurrence of certain events



Principal Clauses in Time C/Ps

Re-delivery clause

- charterer to redeliver vessel in same order & condition when delivered, fair wear and tear excepted

Lien

- on the cargo for freight, dead-freight, demurrage and damages for detention

Arbitration clause

- agreement to refer disputes arising under the C/P to an arbitration

General average clause

- incorporating the York-Antwerp Rules into the C/P



Principal Clauses in Voyage C/Ps

Common / similar terms with Time C/Ps:

- Description of vessel
- Cancelling clause
- Seaworthiness
- Owner's responsibility for cargo loss/damage
- Paramount clauses
- Lien clause
- Arbitration clause
- General average clause



Principal Clauses in Voyage C/Ps

Clauses Specific to Voyage C/Ps

Clauses determining loading and discharging places

- often agreed within ranges at charterer's option

Laytime

- time allowed to the charterer to load and discharge

Demurrage

- a sum agreed in the C/P to be paid by the charterer as liquidated damages for delay beyond laytime.



Principal Clauses in Voyage C/Ps

Clauses Specific to Voyage C/Ps

Payment of freight:

- payable irrespective of the time the voyage takes
- may be fixed as a lump sum or at a rate per ton of cargo carried

Deviation:

- implied condition in voyage C/P that vessel will not deviate from ordinary trade route.
- Deviation clause allows carrier to deviate for certain purposes, e.g. *save life / property at sea*



Carriage of Goods by Sea – bills of lading

Bills of Lading – Liner carriage of containers – issued for the carriage of a *specific consignment of goods*

- Carrier's standard terms of contract (not individually negotiated)
- Relevant in a cargo claim by shipper or third party consignee of cargo
- Typically subject to mandatory cargo-liability regime (Hague, Hague-Visby, Hamburg Rules)

Charterparty bills of lading – issued for a specific consignment of cargo loaded on board a chartered vessel

- Incorporates charterparty terms
- No contractual function for the parties to the charterparty (receipt for shipment)
- Functions as a contract if transferred to a party other than the original charterer (e.g. in performance of a sale contract on CIF terms)
- Relevant in a cargo claim by third party consignee of cargo
- Typically subject to mandatory cargo-liability regime (Hague, Hague-Visby, Hamburg Rules)



Carriage of Goods by Sea – bills of lading

Why have mandatory international liability regulation?

- Compare charterparty and bill of lading contracts
- Carriage of goods on bill of lading terms: potential for abuse/unfair contract terms
- Role and function of bill of lading in international trade
- Mandatory minimum standards of carrier liability which take precedence over conflicting contractual provisions
- To ensure protection of small shippers and third-party consignees (e.g. CIF buyer) in a cargo claim against unfair contract terms of the carrier

From the Hague Rules 1924 to the Hague-Visby Rules 1968, ... the Hamburg Rules 1978 (... the Rotterdam Rules 2008?)



Hague-Visby Rules (HVR)

International Convention establishing mandatory minimum levels of carrier liability for carriage of goods under a bill of lading in cases where (i) carriage is from a Contracting State, (ii) the b/l is issued in a Contracting State or (iii) where the b/l incorporates the Rules

N.B.: in cases where application of the Hague-Visby Rules is mandatory, according to the law of the place where legal proceedings take place,

- they will prevail over any contractual provision that have the effect of reducing the carrier's liability, but
- contractual increase of carrier liability is allowed, and
- carrier enjoys benefit of time-bar, exceptions and limitation amounts

HVR do not apply mandatorily to charterparties, but are often incorporated (clause paramount) and applicable by agreement; in cases of conflict interpretation of the parties intention (construction of the contract)



Quid pro quo under the Hague Visby Rules

carriage under b/l

- Seaworthiness (due diligence) – C liable for fault
- Care of cargo (from ‘tackle to tackle’)
- Issue of b/l (evidence of shipment)
- No “contracting out” – liability cannot be excluded/reduced by “agreement”

loading – discharge

-
- Time-bar (1 yr)
 - List of 17 exceptions to liability (including ‘fire’ and ‘nautical fault’)
 - Monetary limitation of liability

 - C is presumed to be liable for multiple causes
 - S is liable for fault, misstatements re: goods, and losses due to dangerous goods shipped without C's knowing consent



International sale of goods on shipment terms CIF or FOB

- Different trade terms serve different purposes
- CIF (cost insurance freight) and FOB (free on board): developed by the custom of merchants and later “codified” in INCOTERMS
- CIF: seller responsible for transport and related costs; FOB buyer responsible for transport and related costs
- Often supplemented by terms in standard form contract (eg GAFTA, FOSFA)
- CIF and FOB contracts are subject to the national law governing sales contract (typically chosen by the parties; often English law).

N.B. Under English Law, INCOTERMS only apply if incorporated into contract

- Most international trade is conducted on CIF (cost insurance freight) or FOB (free on board) terms; especially commodity trade
- CIF (or C&F/CFR) particularly suitable, as it enables (performance of) sale of goods in transit along a chain of buyers/sellers (string sales)



International sale of goods on shipment terms CIF or FOB 'documentary sales'- key features

Sale of goods performed by way of tender of documents

- "Physical" duties as to the goods / as to the transport of the goods
- Documentary duties

The Seller undertakes only that goods were shipped/dispatched

The Seller remains responsible for the goods until their shipment
= *shipment* terms (cf. arrival terms)

The Seller "delivers" by providing documents (= documentary sales)

- evidence of shipment of goods in accordance with contract
- "representing" the goods
- giving buyer rights to claim goods from the carrier or sue on reasonable terms



International sale of goods on shipment terms CIF or FOB 'documentary sales'- key features

The risk of loss or damage of goods in transit is on the buyer

- IF conforming goods are shipped but do not arrive/are short-delivered or are damaged in transit, B cannot refuse to pay S, provided the documents are in order
- Any legal remedies of B (or subrogated insurer) lie against the carrier – cargo claim

Key document: (shipped/on board) negotiable bill of lading

- enables delivery of goods (transfer of possession/physical control) down a chain of contracts, while goods are in transit



Three key functions of the bill of lading

Receipt = evidence of shipment (shipped on board)

Contract = terms of contract with carrier
subject to mandatory international law, e.g. HVR

Document of title = “constructive possession” of goods

- original document must be surrendered to C to obtain goods
- embodies exclusive right to demand goods from C (“key to the warehouse”)
- enables delivery (= transfer of possession) of goods by tender of document
- provides independent documentary security

Negotiable (bearer, order) bill: rights are transferable – suitable for string sales

Non-negotiable (straight) bill, made out to named consignee: rights are not transferable – not suitable for string sales but provides documentary security
(The Rafaela S, JI MacWilliam Co Inc v MSC S.A. [2005] UKHL 11)



The negotiable bill of lading allows traders to do three things:

Traders can sell goods that are in transit - and take advantage of market price developments

S and B are able to raise finance by pledging goods / documents and are provided with independent documentary security

B obtains rights against C to

- demand delivery of goods from carrier on discharge (Document of title)
- sue on reasonable terms for loss of / damage to goods (Contract – important in a cargo claim)
- rely on the statements as to state of goods on shipment (Receipt – important evidence in cargo claim)



International sales on shipment terms CIF and FOB

Summary of seller's main obligations under English

Seller must:

Ship/ arrange for shipment of goods in accordance with contract - or 'procure' a shipment afloat (CIF) of goods in accordance with contract

Shipment must be within contractually agreed period of time

- CIF: on board a vessel bound for contractual destination (CIF) or
- FOB: on board a vessel nominated by B at agreed port of loading (straight/strict FOB) – note “extended FOB” (seller acts as agent)

CIF: Provide insurance

AND

Tender appropriate documents: unless otherwise agreed, usual dox are

- Commercial invoice
- (insurance policy, CIF only)
- **negotiable bill of lading (shipped on board)**

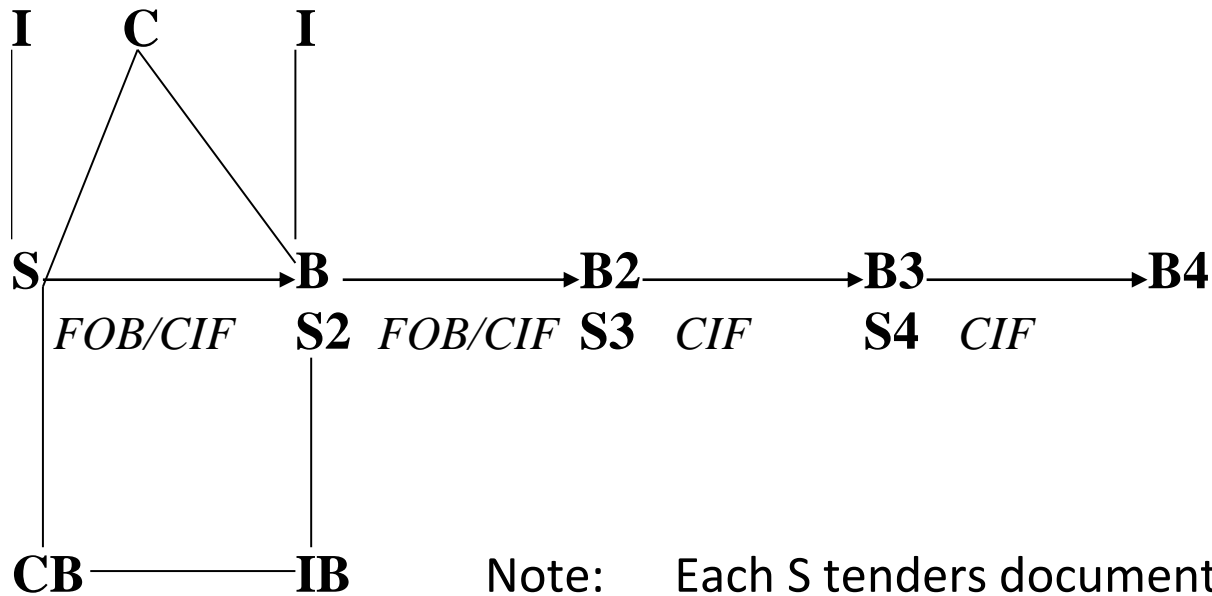


... which

- indicates shipment (of goods as per contract) at contractual loadport / to contractual disport, within the contractual shipment period
- and accurately records the date of shipment (b/l must be “genuine”)
- gives B the exclusive right to demand delivery of the goods from C
- enables B to sue C (cargo claim)
- provides reasonable contractual terms for a suit against C
- evidences the quantity and apparent good order and condition of the goods on shipment (b/l must be “clean”)

N.B. Documentary obligations and time obligations are strict: any breach is “repudiatory”, i.e. B may reject documents (terminate the contract) and, as appropriate claim damages

A typical chain of export transactions – string sales:



Note: Each S tenders documents to his B (bank)
 Each B bears transit risk
 Payment against conforming documents
 Final B obtains rights against C (and I)?



Thank you!