

UNCTAD training course on implications of the COVID-19 pandemic for commercial contracts

Bills of lading: the sale contract and the letter of credit: Covid-19 and documentary performance

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If *documentary* performance is hindered, delayed or distorted by Covid-19, the consequences for sellers, buyers and banks may be quite tricky to deal with and indeed prevent effectively.

In this part of the course we will focus our attention on the documentary duties which may be affected by a wave of pandemic and which forms of prevention may be available.

We will treat documents as an essential part of the seller's performance and evaluate issues in both (a) cash against documents transactions and (b) letters of credit.

It must be noted at the outset that under English law all documentary requirements are a condition of the sale contract, breach of which entitles the innocent party to terminate the contract.

By the same token, all documents required by the bank under a LC are essential to trigger the bank's duty to pay the price.

(a) Cash against documents (CAD)

(b) Letters of credit (LC)

(a) Cash against documents

Let's look at three documents tendered by a CIF seller in a CAD transaction and ask for each of them:

- (i) Why does this document matter;
- (ii) how can Covid affect its issue and availability; and
- (iii) how can this be prevented.

CAD - The bill of lading.

The bill of lading is one of the key documents which a buyer on CIF terms has the right to receive from its seller.

- (i) *Why does this document matter;*

¹ The views expressed are those of the author and do not necessarily reflect the view of the United Nations.

This is because the buyer needs:

- i. A key to the goods giving him/her access to them and the power of transfer them to on buyers (document of title);
- ii. A receipt giving evidence that goods were of the contract description when they were delivered (to the ship SOGA s. 32(1)); and
- iii. A contract of carriage giving them title to sue the carrier in case the goods arrive damaged;

(ii) *How can Covid affect its issue and availability?*

Covid has affected the issue and availability of bills of lading, mostly in two ways: difficulty in carrying out key meetings to compile, approve and sign the form (mostly for bulk); and delays in transmission.

(iii) *How can this be prevented?*

Difficulties in gathering data and properly compiling the form have now been resolved by having e-meetings and issuing bills with signing software when required by restrictive local policies.

Delay in transmission can be resolved by:

- a. Removing the need to transmit the document altogether and opt for a seawaybill instead. This is a great solution when commercially viable but it must be agreed upon in the sale contract, otherwise under English law tender of a non-negotiable document would not be allowed;
- b. Removing the need of physical transmission by agreeing on tender of an electronic bill of lading with one of the many approved systems. This is a solution which is increasingly common but:
 - **BEWARE:** an e-bill is not a document of title at Common law and its tender under a CIF contract is only allowed if the party have so agreed, preferably expressly in the sale contract;
 - The Law Commission of England and Wales has very recently issued a bill enabling all documents of title to be issued electronically. But this is still just a proposal and it would be premature to rely on it. Should the Bill become law, tender of an electronic bill of lading (within the statutory definition as it shall be) will be allowed under an ordinary CIF contract without the need for a specific agreement in this sense.

CAD - A quality certificate.

(i) *Why does this document matter?*

As a CIF buyer is usually not present at loading but assumes the risk of the goods being deteriorated in transit from the very moment they cross the ship's rail, it usually hires surveyors to sample the goods and report on their condition at shipment. It is not uncommon for the parties to attach great legal significance to these certificates, making them 'final and binding' as to what they represent.

They can be considered an independent 'picture' of the goods at shipment.

(ii) how can Covid affect its issue and availability; and

It has happened that surveyors have become scarcely available at times and/or unable to board the ships to take the samples according to sectoral standards and practice. This has generated delays and at times unavailability of the certificates with significant issues of quality determination and payment.

(iii) how can this be prevented?

The obvious answer here is to avoid loading certificates altogether but this would increase exponentially the risk of later disputes over the quality/quantity/origin etc of the goods shipped.

Selling on DES or DAT terms may also be a solution but it is rather extreme. Truth is that so far the market has shown willingness to show flexibility in the approach to certification, allowing last minute changes and adapting to the circumstances. However, so far the problem has not found an adequate solution.

CAD - A policy of insurance.

(i) Why does this document matter?

Tender of a valid insurance certificate for the goods shipped is a key requirement under a CIF contract.

(ii) how can Covid affect its issue and availability?

To my knowledge, Covid has affected the issue and availability of cargo insurance only in very minor ways with small problems in the timing of declarations of shipment under open policies and the usual delays in physical transmission.

(iii) how can this be prevented?

Underwriters have been flexible and accommodating and this has allowed covers to be unaffected. As to the issue of delay in transmission, agreeing to tender of an electronic certificate is recommended.

(b) Letters of credit under the UCP 600

Let's now look at the same three documents tendered by the same CIF seller, but this time under a LC incorporating the UCP600. Again, let's ask for each of them:

- (i) Why does this document matter;
- (ii) how can Covid affect its issue and availability; and
- (iii) how can this be prevented.

LC - The bill of lading.

- (i) *Why does this document matter to the bank?*

Because it is listed in the LC as part of the presentation and must be presented under Article 14(a) and 19, 20 or 22 of the UCP 600.

- (ii) *how can Covid affect its issue and availability*

Same as in CAD above.

- (iii) *how can this be prevented?*

Banks today are less interested in the value of bills as collaterals and would usually insist on alternative security. This does allow for two solutions:

- Avoid requiring tender of a bill of lading in the LC and opting for a seawaybill or other documents in lieu of a bill;
- Opting for tender of an e-bill, allowed under the e-UCP.

LC - A quality certificate.

- (i) *Why does this document matter to the bank?*

Because it is listed in the LC as part of the presentation and must be presented under Article 14(a) of the UCP 600.

- (ii) *how can Covid affect its issue and availability*

Same as in CAD above.

- (iii) *how can this be prevented?*

On the banking side, the answer is easy: avoid requiring tender of a quality certificate in the LC. The problem however is only resolved on the payment side.

LC - A policy of insurance.

- (i) *Why does this document matter to the bank?*

Because it is listed in the LC as part of the presentation and must be presented under Article 14(a) and 28 of the UCP 600.

(ii) *how can Covid affect its issue and availability*

Same as in CAD above.

(iii) *how can this be prevented?*

On the banking side, the only issues have been those related to delay in transmission and the solution offered by the e-UCP would seem sensible and easily accessible.