

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

Drafting Covid-19 clauses in sale contracts – Problem/Exercise

Professor Filippo Lorenzon, Dalian Maritime University (China)¹

1. **Ad-hoc Pandemic Clauses: delay...**
2. **... and more**

1. Ad-hoc Pandemic Clauses: delay...

Since the beginning of the Pandemic suppliers and traders affected by partial and total lockdowns, delays and additional documentary requirements have been working with their legal advisors to draft ad hoc clauses to protect themselves from at least the most harmful consequences of Covid 19.

Delay in shipment, in the production or presentation of documents, in providing samples or surveys, certificates and customs formalities may all be expressly allocated to buyers or sellers depending on who is best suited to absorb the individual risk or simply has a weaker negotiating position.

So failure to load on time due to a Covid-19-related event can be hedged by a specific clause providing for

- an exact definition of what a Covid-19-related event is for the purpose of the clause and
- the consequences of the delay, usually a short automatic time extension followed by a longer grace period entangled to a progressive discount.

The clause may read as follows:

- a. In case shipment is delayed due to Covid-19 related restrictions, such as total or partial shut downs, slowdowns and port closures, the Seller shall have the right to extend the time of shipment for a maximum of 14 running days without discount.
- b. Should the Covid-19 related restriction last beyond 14 days, the Seller shall have the right to extend the time of shipment for a further 30 days, at a discount of X% per day pro rata;
- c. Should the delay extend for more than 45 days, the Buyer shall have the option to cancel the contract.

But delay in shipment is not the only issue Covid has caused to international trade. Delay in inspections, preparation and delivery of documents and – of course – quarantine are just some of the further problem which have become everyday concerns to traders. And it is the delay in inspecting cargo and providing certificates of quality which may provide a good example of why an ad hoc Pandemic Clause may hit the bull's eye better than an amended force majeure clause will ever do.

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

2. ... and more

When drafting an ad-hoc pandemic clause one must ask itself a crucial question:

Q: what am I worried about?

Surely delay and its consequences will be the most common concern but is it all one ought to worry about? Is there anything more specific maybe?

e.g.

Issue: unavailability of surveyors at the loadport

Consequences: delay at loading and demurrage, inability/delay to provide documents for payment, inability/delay to provide entire presentation to bank under the LC

Possible solution: consider a clause in the sale contract which does away with certificates at loading “in case of unavailability of surveyors at loadport due to sanitary emergencies...”; consider switching to a D sale; avoid listing certificates in the LC...

Issue: delay in transmission of bills of lading

Consequences: delay at discharge and demurrage, inability/delay to provide documents for payment, inability/delay to provide entire presentation to bank under the LC

Possible solution: agree on tender of a seawaybill instead of a bill of lading unless bill is necessary (to buyer) in the circumstances; agree for ‘tender’ of electronic alternative; make sure the LC reflects the choice made

Anything else?