

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



Professor Filippo Lorenzon

Institute of Maritime Law, Dalian Maritime University (PRC)

Training course on Implications of the COVID-19 Pandemic for Commercial Contracts

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1. Drafting ad hoc pandemic clauses

During this course we have focused on:

- a. Duties under the sale contract; and
- b. Possible hindrances to the performance of those duties.

We have also discussed possible issues in using force majeure clauses to avoid or contain liability for delayed or non performance.

My suggestion: **draft your own pandemic clause** which must contain three elements -

- i. A definition of the hindrance one wants to tackle;
- ii. A clear definition of 'pandemic' to trigger the application of the clause; and
- iii. The specific consequences one wants to follow.

NB: The parties are free to negotiate for themselves the consequence they see fit.

2. e.g. delayed physical and/or documentary performance

i. A definition of the hindrance one wants to tackle;

Should shipment of the goods and/or the issue and/or transmission of any shipping documents related thereto, be delayed, hindered or prevented by...

ii. A clear definition of 'pandemic' to trigger the application of the clause; and

... Covid-19 or any other pandemic or epidemic, whether or not formally declared by national or international authorities...

iii. The specific consequences one wants to follow

... the performance of all and any obligations arising out of or in connection with the contract are automatically extended for 7 running days. Should such performance be delayed, hindered or prevented for longer, the Price will be reduced by 0.5% per day pro rata. Should performance be delayed, hindered or prevented for more than 30 days, each Party has the right to cancel the contract...

2. e.g. delayed physical and/or documentary performance

To avoid delays in transmission one could add:

The Seller shall have the liberty to tender to the Buyer all shipping documents in electronic form. Bills of lading issued in electronic form are acceptable if issued under any of the systems approved by the International Group of P&I Club at the time of issue...

It would be safer for the parties to agree on a specific system such as:

- Bolero;
- EssDOCS;
- E-titleTM;
- Global Share S.A. edoxOnline;
- WAVE-BL;
- CargoX;
- TradeLens.

3. Other hindrances

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...

Anything else?

3. Other hindrances

Q: what am I worried about?

e.g.

Issue: Pandemic clauses or clever exclusions in bills of lading may undermine the buyer's rights vis-à-vis the carrier;

Consequences: rights against the carrier may be compromised;

Possible solution: consider a clause in the sale contract which forbids tender of bills of lading with unusual or unreasonable liberties. However, the 'red flag clauses' should be properly identified in the prohibition clause. NB Banks will not help in this process as the UCP600 Article 20(a)(v) and 21(a)(v) does allow the bank to ignore carriage terms in the LC.

Anything else?

4. Conclusions

Thank you!



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