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COVID-19 and International Sale of Goods:

Contractual Devices for Commercial Risk Allocation and Loss Prevention

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For further information about UNCTAD's related work, please contact the Policy and Legislation Section at policy.legislation@unctad.org or visit the UNCTAD website at unctad.org/ttl/legal.

Contents

1. COVID-19 and international trade: loss prevention through effective drafting

COVID-19 has been a part of everyday life for more than two years and the option for international trade to revert to its pre-pandemic practices without taking proactive steps is simply no longer available. Exporters, importers, traders, carriers, operators, banks and all those involved in the sale and carriage of goods, should now focus on developing a pragmatic approach to the risks connected with the pandemic and hedge its consequences with the adoption of specific loss prevention techniques. Governments, trade associations, insurers and ports have adopted practical protocols to prevent contagion, contain delays and protect workers. This approach is certainly helpful to contain the spread of outbreaks and the pandemic as a whole, while keeping the flow on international trade as fluid as possible, but it is reactive in nature and therefore not intrinsically structured to prevent or contain commercial losses.

An UNCTAD Briefing Note on COVID-19 Implications for Commercial Contracts – International Sale of Goods on CIF and FOB Terms[1] published in 2021, highlighted the following considerations as part of its conclusions:

> "In the short-term, parties who have been affected by the pandemic and/or COVID-related governmental actions should seek dialogue and cooperate between themselves and within their market, to try and limit the consequences of the disease. Existing contracts will be affected, and solutions must be negotiated quickly; companies should work on pandemic response measures fit for their trade, in order to avoid falling foul of local legislation, bearing in mind that their counterparties may not be aware of the restrictions and limitations imposed on them."[2]

The report further concluded that:

> "Going forward, when entering/drafting new contracts, parties must keep the possibility of other waves of pandemic and epidemic events and/or relevant response measures in mind and should consider catering for such eventualities as part of their contractual agreement. Force majeure clauses expressly addressing the issue are a possibility, but each trade sector should focus on its need and seek the most appropriate solution."[3]

The purpose of this report is to provide contracting parties with some general guidance and advice on how contracts for the sale and purchase of goods and commodities on CIF and FOB terms could cater for the risk of COVID-related events, during the ongoing pandemic, and in respect of possible future events of this nature.[4] The report takes a practical approach and focuses on possible contractual solutions which, by allocating and distributing at the outset the potential risks and cost arising from a pandemic outbreak, allow the parties to a contract, may it be on a spot or long-term basis, to contain the adverse implications of an outbreak for the performance of legal contractual obligations and/or distribute related commercial risks fairly between the parties. The development of relevant contractual solutions does not necessarily require the creation of entirely new commercial terms or

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[1] Available at https://unctad.org/system/files/official-document/dtltlbinf2021d2_en.pdf.

[2] UNCTAD (2021). COVID-19 Implications for Commercial Contracts – International Sale of Goods on CIF and FOB Terms, at p.25.

[3] *Ibid*., at p.26.

[4] The considerations and suggestions set out in this report are offered by way of general guidance, to assist commercial parties in assessing and addressing some of the key implications of the COVID-19 pandemic, but should not be considered legal advice. To obtain advice with respect to any particular legal matter or contract, readers should always seek professional legal advice.

the rewriting of long- established clauses; in fact, relatively minor adjustments to the wording of a standard 'force majeure' clause or the development of a concise "pandemics" clause, coupled with a liberty to use electronic alternatives to shipping documents, may be an option that produces excellent results.

Against this background, this report focuses on three proposed contractual devices: a carefully designed 'force majeure' clause; an *ad hoc* 'pandemic' clause; and the option of using electronic documents. In order to better understand how relevant clauses should be devised and construed however, it is necessary at the outset to focus briefly on the key legal principles underpinning CIF and FOB sales and appreciate how their performance has been affected by the COVID-19 pandemic.

2. Performing CIF and FOB contracts in difficult times: the COVID-19 pandemic

In CIF (cost, insurance and freight) and FOB (free on board) contracts[5] the delivery of the goods is made on board a vessel at the loading port. This is why they are often referred to as sales on *shipment terms*. More importantly, delivery and risk of loss in transit are intimately connected, the latter passing from the seller to the buyer immediately after the former.[6] In these contracts, the risk of transit loss passes from the seller to the buyer on or as from shipment and the seller is never responsible for the safe arrival of goods but only for shipping them in accordance with the terms and conditions of the contract – and tendering the agreed documents.[7] As a result, the risk of loss of or damage to the goods in transit is on the buyer.[8] The net consequence of this rule is that if the goods (shipped in accordance with the contract) do not arrive at their final destination or are damaged or short-delivered, the buyer still needs to pay the full contract price[9] against conforming documents, and its remedies lie against the carrier and/or the cargo underwriters.

Performance of this type of contract entails 'dual' obligations, i.e., both physical (*goods* must be delivered in accordance with the terms of the contract) *and* documentary (*documents* must be tendered as provided for in the contract).[10] Once physical performance has been accomplished and the goods have been shipped, the seller must tender the agreed documents to the buyer and, if the *documents* are in order, the buyer must pay the agreed sale price, even if goods are lost or damaged in transit. Under English law, both physical delivery and documentary tender are essential for the correct performance of the contract. Performance is meticulously scrutinized by the buyer, particularly in a falling market, and both physical and documentary breaches typically allow rejection of the goods and/or the documents and immediate termination, in addition to an action in damages for breach of

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[5] Also referred to as c.i.f., c.&f. (a variant without insurance) and f.o.b. contracts; in Incoterms® 2020 Rules language the main trade terms for shipment sales involving maritime transport are CIF (Cost Insurance and Freight), CFR (Cost and FReight), and FOB (Free On Board).
[6] F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020), at [2-003]; M. Bridge (Ed), *Benjamin's Sale of Goods*, 10th edn (London, 2017), at [18-294] and [14-119].
[7] F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020), at [2-018].
[8] *The Julia* [1949] AC 293; *Scottish & Newcastle Int Ltd v Othon Galanos* [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep 341; aff'd at [2008] UKHL 11; [2008] 1 Lloyd's Rep 462.
[9] Unless the contract provides for price adjustment clauses or is concluded on "landed quantity/quality at contract price" clauses.
[10] *Scottish & Newcastle Int Ltd v Othon Galanos* [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep 341; aff'd at [2008] UKHL 11; [2008] 1 Lloyd's Rep 462, at [48]; F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020), at [5-002].

contract. Importantly, the market relies heavily on the information contained in, and the timing of, shipping documents, and English law[11] regards the duty to comply meticulously with documentary obligations as strict.[12]

Most of international trade is conducted on *shipment terms*, CIF or FOB; in particular commodities are often traded on CIF terms,[13] along a string of contracts, each of which is performed by tender of documents, including a negotiable bill of lading. This key document serves as evidence of shipment/delivery in accordance with the sale contract and provides its holder with the exclusive right of access to the goods, as well as a statutory right of suit against the carrier.[14] As this type of international contract is often subject to English law, by agreement of the parties, and to international arbitration or the jurisdiction of the Commercial Court in London, the present analysis will focus mainly on the position under English law.

While the seller's main obligation relates to the delivery of the goods in accordance with the contract, the buyer's key duty is that of paying the price for the goods bought. In international trade payments are usually agreed on a 'cash against documents' (CAD) basis or through banking instruments such as a commercial 'documentary letter of credit'. The choice of one or other of these payment methods has a significant impact on the parties' *documentary* duties, and a delay or failure to procure one or more of the documents required will have different consequences on the buyer's duty to pay the price. Whichever the method of payment chosen by the parties, documents are to be regarded as the essential key to access payment, and must be exactly as specified in the sale contract or in the letter of credit.[15] Each and every document agreed upon must be prepared in accordance with any relevant contractual provision and, as applicable, match very rigid banking standards,[16] and be tendered within the agreed timeframe[17] in order to be accepted and paid against. When banks are involved, the Uniform Customs and Practice for Documentary Credits (UCP 600)[18] contain detailed formal

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[11] This report makes extensive references to English law, as it is the law commonly chosen by the parties to international commercial contracts.

[12] The consequence of this is that even slight formal documentary defects do generally allow the buyer to reject the documentary tender, refuse payment, terminate the contract and claim damages for breach; see *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44; and *SIAT di Dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep. 53. For a fuller discussion see F. Lorenzon, *Sassoon on CIF and FOB* Contracts, 7th edn (London, 2020), at [7-005] – [7-016]; and C. Debattista, *Bills of Lading in Export Trade*, 3rd edn (London, 2008), para. 9.16.

[13] For differences between FOB and C&F terms under English law, see *Scottish & Newcastle Int Ltd v Othon Galanos* [2008] UKHL 11, at para. 35 (per Lord Mance). Among others: "An FOB contract requires shipment (whether by or on behalf of the seller or the buyer) of the goods at the port (or a port within the range) so specified; i.e., the seller cannot buy afloat […]. In contrast, under a C&F contract responsibility for shipment rests on the seller, and this can be fulfilled by the seller either shipping goods or acquiring goods already afloat after shipment, and moreover, shipment can be at any port (unless the contract otherwise provides)".

[14] See the Carriage of Goods by Sea Act 1992, s. 2.1.

[15] F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020), at [8-006]. Letters of credit, governed by the UCP 600, are usually confirmed and irrevocable; documentary requirements mirror/are aligned with the sale contract. Both the issuing and the advising/confirming bank are required to pay against conforming documents, but will reject non-conforming documents; in case of rejection, the seller will also be in breach of the sale contract and, if the buyer has suffered a loss, may be exposed to a claim by the buyer for damages.

[16] International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits (2007 Revision) UCP 600, ICC Publication n. 600E, Article 14. See https://iccwbo.org/.

[17] UCP 600, Article 6.

[18] UCP 600, Article 1.

requirements for the documents to be tendered under a letter of credit and give the bank the right and duty to reject any presentation which does not strictly meet these standards.[19]

Given that the performance of CIF and FOB contracts has both a physical and a documentary component, it is evident that every hindrance the pandemic may create, any delay, any failure in the supply chain of goods and/or labour, will potentially have a dual effect on both physical obligations relating to the goods and their delivery as well as on relevant documentary obligations. If, for example, the loading of the vessel within the contractually permitted shipment period was delayed due to a restriction imposed on the crew, the delay will also be reflected on several shipping documents,[20] preventing the timely compliance with documentary obligations and affecting the performance of the contract. Similarly, the lack of surveyors to collect samples on board due to working restrictions imposed by COVID-related legislation, may make it impossible for the vessel to sail until her cargo has been sampled, and delay substantively the preparation of the full bundle of shipping documents for tender.

For this reason, when drafting, evaluating or negotiating a clause designed to hedge against the potential adverse impact of yet another wave of pandemic, traders should ensure they cater for both aspects of performance and prepare clauses specifically designed to protect them for physical and documentary non-performance alike.

3. Force majeure clauses

Force majeure clauses may serve as a potentially effective solution to address the delays and disruptions caused by COVID-19 and the emergency rules imposed by affected countries to contain the spread of the disease. While it is certainly true that a carefully drafted force majeure clause can be of significant help in some circumstances, parties to CIF and FOB sales should not be overly reliant on such clauses, as they are difficult to invoke and are often only triggered when performance has become altogether impossible, which may be difficult to establish.

Force majeure clauses[21] are common in contracts for the sale of goods and commodities worldwide. In practice they come in a considerable array of shapes and forms and in a varying degree of detail.

[19] UCP 600, Article 14(a).

[20] Primarily the bill of lading, which will have to show the actual date of shipment, but notably all cargo certificates, export documents and draught surveys would also reveal such delay.

[21] ICC, Force Majeure Clause (2003 edn), ICC Publication No.650, Paris 2004,available at https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/. For other examples of force majeure clauses, see cl. 19 of GAFTA 100 (2021 edn) (Prevention of Shipment Clause), available at https://www.gafta.com/write/MediaUploads/Contracts/2021/Feb2021/100_2021.pdf and cl. 22 of FOSFA 54 (2008 edn), available at https://ciss-group.com/documents/FOSFA_54.pdf. An example of a force majeure clause may read as follows: “Neither the seller or the buyer shall be responsible for non-performance or delay in shipment of the goods or any part thereof occasioned by any Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery and/or fire”. Such clauses, however, should be carefully drafted to protect either or both parties from the event specific to the deal concerned and the circumstances of the case. Further information on drafting force majeure clauses dealing with the pandemic, is also available on the UNCTAD website as part of UNCTAD training materials, see https://unctad.org/meeting/training-course-implications-covid-19-pandemic-commercial-contracts-2.

While civil law systems contain a general principle of force majeure, according to which a party may terminate a contract in cases where its performance has *become* excessively burdensome as a consequence of extraordinary and unforeseeable events,[22] there is no such general principle under English law. This means that in the absence of an express force majeure clause in the contract, the parties will not be able to rely on any underlying general principle to excuse their non-performance and would be fully liable in damages.[23]

For this reason and against the background of the general *contra proferentem*[24] approach which English law adopts towards stipulations which seek to excuse performance failure in commercial contracts, contractual force majeure clauses tend to contain a detailed list of events which the parties agree may be invoked to excuse a related failure to perform.[25] If a party seeks to rely on such a provision, it must do so with great care and establish, following the formalities provided for in the contract, that the event which occurred is covered by the express exclusions. Once it has been ascertained that the actual occurrence falls within one or more of the listed force majeure events, the contract has to be construed to determine the consequence of the event for the party's contractual obligation(s).[26] Some contracts will provide for an automatic right to extend the date of shipment for a fixed number of days or until the named event, or its consequences, cease. Others may provide for the contract to be cancelled.[27] Whatever consequence is envisaged under a relevant agreed clause, it will be enforced by the English courts, based on its determination of the intention of the parties.[28]

Against this background, and on the assumption that a contract is subject to English law, should a party wish to cater for the possibility that a new wave of COVID-19 may affect its performance, it will have to renegotiate the force majeure clause in its existing contracts or – in case of new contracts – draft a clause[29] doing three things:

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[22] See e.g. Article 1467 of the Italian Civil Code; and Article 1218 of the French Civil Code.

[23] The general doctrine of frustration, whereby a party becomes free from its obligation in cases in which performance has become impossible due to unforeseeable circumstances, is applied very restrictively by the English courts. See *The Super Servant Two* [1990] 1 Lloyd's Rep. 1.

[24] I.e., that ambiguous contractual terms are interpreted against the person who put forward the wording, or who seeks to rely on the clause/event concerned to excuse its defective performance or failure to perform.

[25] *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] A.C. 495; *Tandrin Aviation Holdings Ltd v Aero Toy Store* [2010] EWHC 40 (Comm); [2010] 2 Lloyd's Rep. 668; *The Crudesky* [2013] EWCA Civ 1547; [2014] 1 Lloyd's Rep. 1; *Channel Island Ferries Ltd. v. Sealink UK Ltd* [1988] 1 Lloyd's Rep. 323.

[26] *Navrom v Callitsis Ship Management SA (The Radauti)* [1987] 2 Lloyd's Rep. 276 at 281 (affirmed [1988] 2 Lloyd's Rep. 416).

[27] See e.g. FOSFA 54 (2008 edn), clause 22, l.217: "Should such cause exist for a period of 60 days beyond the contract shipment period the contract or any unfulfilled part thereof so affected shall be cancelled".

[28] Parties should be careful not to rely too heavily on general "sweep up" wording referring to "or any other event beyond a party's control". Although there is no automatic application of the *eiusdem generis* rule in commercial documents (*Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240 at 244–255), the parties should aim to be as clear and explicit as possible. See also *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), and for a discussion on the use of the word "prevented" in this context, see *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028 (Comm).

[29] While some specific standard clauses have been developed for use in chartering (e.g. by Intertanko and BIMCO), trade associations have proven so far less keen on developing COVID-19 standard clauses leaving to sellers, buyers and their lawyers the task of developing legal devices capable of dealing with possible new waves of the pandemic.

a. Describing with great care **the event constituting a "force majeure event"** for the purpose of the operation of the clause;
b. Describing with great care **what kind of hindrance or failure in the performance** of the contract is excused by the event described in sub a. above; and
c. Describing with great care **the consequences of** triggering **the force majeure** clause.

The three elements of the clause will be dealt with below.

a. The force majeure event

An outbreak of COVID-19 may well be the root cause of a delay or failure to perform a contract, but it will hardly be enough to trigger the operation of a relevant clause. More than two years of experience have now given a clear picture of how a pandemic affects international trade: port closures, restrictive 'free pratique' practices and lengthy safety protocols have affected the flow of goods and commodities in transit more than the disease itself. On the other hand, the average trader's familiarity with the virus and its effects on the business seems to make it a lot harder to argue for COVID-19, or any response measures taken to contain it, to be an event '*qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées",*[30] needed to trigger the application of the general principle of force majeure as embedded in civil law systems.

Force majeure clauses often include events such as *quarantine restrictions, acts of authorities, failure of the upstream supply chain* and *other 'events'* which may be the cause of the specific non-performance concerned.[31] As discussed elsewhere,[32] some of these 'events' already commonly covered in force majeure clauses, can provide protection to a party whose performance has been affected by the pandemic, but relevant provisions must be carefully worded, particularly when written in contracts negotiated during the pandemic.[33]

[30] Article 1218(1) of the French Civil Code. The provision makes reference to an event "which could not have reasonably been foreseen at the conclusion of the contract and the effects of which cannot be avoided by appropriate measures".
[31] E.g. Clause 24 of FOSFA 11 (available at https://www.fosfa.org/content/uploads/2015/01/Contract-No-11.pdf) reads thus: "Should shipment of the goods or any part thereof be prevented at any time during the last 30 days of the contract shipment period by reason of Act of God, strikes, lockouts, riots, civil commotions, fires or any other cause comprehended by the term Force Majeure at port/s of loading or elsewhere preventing transport of the goods to such port/s, the time allowed for shipment shall be extended to 30 days beyond the termination of such cause, but should the contract shipment period be less than 30 days such extension shall be limited to the number of days allowed for shipment under the contract shipment period. Should such cause exist for a period of 60 days beyond the contract shipment period the contract or any unfulfilled part thereof so affected shall be cancelled. Sellers invoking this clause shall notify Buyers with due despatch."
[32] See, UNCTAD (2021). COVID-19 Implications for Commercial Contracts – International Sale of Goods on CIF and FOB Terms.
[33] This is due to the fact that in many cases a listed force majeure event may only be invoked to trigger the clause if the event was not reasonably foreseeable at the time the contract was concluded. See also further below, in part 3 (a)(iii).

i. Events related to acts of authorities

A good example of such clauses may be Section 65(2)(1)(f) of the BP Oil International Limited General Terms and Conditions for Sales and Purchases of Crude Oil and Petroleum Products (2015 edn),[34] which among the named force majeure events lists:

> "(f) any compliance with any law, regulation or ordinance, or with any order, demand or request of an international, national, port, transportation, local or other authority or agency (including the International Energy Agency ("IEA")) or of any body or person purporting to be or to act for any such authority or agency or any corporation directly or indirectly controlled by any of them;"

Another example from the oil industry may be Section XII(2)(a) of the TOTAL General Terms and Conditions for CFR/CIF/Delivered Ex Ship Sales of Petroleum Products/Feedstock and Liquefied Petroleum Gas (2007 edn),[35] in which the corresponding force majeure event is worded as follows:

> "(a) compliance, voluntary or involuntary, with a direction or request of any international, national, port, transportation, local government or other authority or person purporting to act with such authority;"

Section 43(2)(a) of the more recent TOTSA TOTAL Oil Trading SA General Terms and Conditions for Sales and Purchases of Petrochemical Products (2020 edn),[36] is slightly more wordy and reads:

> "(a) compliance, voluntary or mandatory, with a direction or request or reliance upon any authorisation, representation or statement of any international, national, port, transportation, local government or other authority or agency (including the International Energy Agency ("IEA")) or person purporting to act with such authority; or"

Similarly, the recently adopted BIMCO Force Majeure Clause 2022,[37] a clause which has been developed in the wake of the current pandemic (and which also contains a more specific reference to 'pandemic' among the listed events),[38] provides as follows:

> "(b) Force Majeure Events – For the purpose of this Clause the following shall be Force Majeure Events:
> […]
> (iv) act of government or public authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;"

[34] BP Oil International Limited General Terms and Conditions for Sales and Purchases of Crude Oil and Petroleum Products (2015 edn), available at https://www.bp.com/content/dam/bp/business-sites/en/global/bp-trading-and-shipping/documents/bp-oil-gtc-2015-version-1.2.pdf.

[35] TOTAL General Terms and Conditions for CFR/CIF/Delivered Ex Ship Sales of Petroleum Products/Feedstock and Liquefied Petroleum Gas (2007 edn), available at https://ts.totalenergies.com/wp-content/uploads/2020/05/GTCs-TOTAL-PROD-CFR-CIF-DES-2007.pdf.

[36] TOTSA TOTAL Oil Trading SA General Terms and Conditions for Sales and Purchases of Petrochemical Products (2020 edn), available at https://ts.totalenergies.com/wp-content/uploads/2020/11/TOTSA-petchem-GTCs-2020-edition- -published-version-10112020.pdf.

[37] The BIMCO Force Majeure Clause 2022 has been drafted to address "force majeure events occurring under contracts used by the shipping industry that affects the performance of the parties" with the COVID-19 pandemic clearly in mind. It is available, with an explanatory note at https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/force-majeure-clause-2022.

[38] See further below, in part 3(a)(iii).

In very similar terms, the recently adopted ICC Force Majeure Clause 2020,[39] lists as a force majeure event in subclause 3.d):

> "(d) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;"

This type of force majeure event, already included in many commonly used standard form contracts, can easily excuse any failure to perform the contract caused by a port closure due to specific COVID-related emergency legislation, national or local, as the case may be. Should compliance with an order not to approach a particular port make it impossible to lift cargo from that port within the agreed shipment window, triggering any of the three force majeure clauses reproduced above should not be a problem. However, depending on other provisions contained in the relevant clause in question, this may be limited to cases where the 'event' was not reasonably foreseeable at the time the contract was concluded.[40]

ii. Events related to failure of supply chain

One of the most common trade consequences of the COVID-19 pandemic has been a shortage of goods and products in the supply chain, which is still affecting the provisioning of some sectors of the market. This was particularly evident in the first phase of the pandemic with some electronical and mechanical components produced in Chinese factories the output of which was reduced by working restrictions or compulsory closures.

Shortages due to wars, accidents and other impediments have always affected the supply chain and are not new to the trading industry. It is therefore not surprising that some force majeure clauses do contain specific wording to protect the parties from the risk that such hindrances in the supply chain materialise.

Good examples of such clauses are to be found in the oil industry, which is particularly vulnerable to such events. Among the several examples freely available online, the force majeure clause in the BP Oil International Limited General Terms and Conditions for Sales and Purchases of Crude Oil and Petroleum Products (2015 edn), at Section 65(2)(1)(e) states:

> "(e) any curtailment, reduction in, interference with, failure or cessation of supplies of Crude Oil or Product from any of the Seller's or the Seller's suppliers' sources of supply or by any refusal to supply Crude Oil or Product whether lawful or otherwise by the Seller's suppliers (provided in fact the sources of supply are for the purposes of the Agreement)".

Using similar wording, Section 43(2)(e) of the TOTSA TOTAL Oil Trading SA General Terms and Conditions for Sales and Purchases of Petrochemical Products (2020 edn) includes reference to an 'event' worded as follows:

> "(e) any curtailment of, hindrance to, or delay to the availability, delivery or transportation of, or interference with the manufacturing, receiving, handling or delivery of feedstock of Product as well as the inability to obtain or the curtailment of electric power, water, or fuel."

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[39] Available at https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf.

[40] This is the case, for instance, with both the BIMCO Force majeure Clause 2022 (sub-clause (a) (iii)) and the ICC Force Majeure Clause 2020 (sub-clause 1.b)).

Although reference to the 'failure of supply chain' event is not commonly found in force majeure clauses outside the oil industry, it is here suggested that its inclusion in a force majeure clause may well be helpful in releasing the affected party in those cases in which the sourcing of a specific commodity or a particular product or component may only be done from a specific factory or place, in circumstances in which such factory or place has been badly affected by the pandemic.

iii. Events related to epidemics and pandemics

Some recent force majeure clauses expressly include 'epidemic' and even 'pandemic' among the list of force majeure events. Two easily accessible and recently adopted examples are the ICC Force Majeure Clause 2020 and the BIMCO Force Majeure Clause 2022. The relevant 'epidemic events' are worded as follows:

> ICC Force Majeure Clause 2020: "3.e) plague, epidemic, natural disaster or extreme natural event;"
>
> BIMCO Force Majeure Clause 2022: "(b)(v) plague, epidemic, pandemic;"

It is clear that under these clauses an epidemic or pandemic may in itself be a force majeure event capable of triggering the application of the clause.

However, the insertion of these words in the force majeure clause should not induce the trader or operator to assume a false sense of protection, for two important reasons: (a) 'epidemic' and 'pandemic' are words of art and – in the absence of precedent – a judge or arbitrator may seek an official declaration that a certain outbreak is indeed part of an epidemic or pandemic event. This could easily be addressed by the addition of the words 'declared or undeclared' in the clause, but negotiating such amendment may not be free from difficulty; and (b) the list of events can never be read in isolation and put in the context of the rest of the clause to which it belongs.

The ICC Clause, for example, requires the party who is seeking to rely on the force majeure clause to prove:

> "1.c) that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party."

Put in context, the 'impediment' is the 'epidemic' or 'pandemic'listed in sub-clause 3.e), but proof of existence of such impediment must be accompanied by evidence that the affected party could not have reasonably avoided or overcome its effects.

The application of the BIMCO Force Majeure Clause requires an identical burden, as it also requires:

> "(a) (iv) that the effects of the Force Majeure Event could not reasonably have been avoided or overcome by the Affected Party."

And this may well be a tall order in a global economy where information is readily available and alternatives are very often within reach, albeit for a premium.

Moreover, both the BIMCO Clause and the ICC Clause contain a further requirement, namely for the party invoking the clause to prove:

ICC Force Majeure Clause 2020: "1.b) that [such impediment] could not reasonably have been foreseen at the time of the conclusion of the contract;"

BIMCO Force Majeure Clause 2022: "(a) (iii) that the Force Majeure Event could not reasonably have been foreseen at the time of the conclusion of the contract."

When it comes to impediments and delays due to the ongoing COVID-19 pandemic, it seems hardly ever possible to argue that any party to a commercial contract could not reasonably foresee another global wave or local outbreak, at least for contracts agreed after the end of March 2020. Thus, during the ongoing pandemic at least,[41] it would seem that the two abovementioned force-majeure clauses are of more limited assistance than a casual reading of the list of 'events' alone suggests, and do not in fact provide effective protection, at least in their original form.

However, the wording or the list of events included in such clauses should not be regarded as set in stone; in fact, the ICC Force Majeure Clause itself recommends (at the end of sub-clause 3), that:

"Parties may add or delete events from the list, according to particular situations, e.g. by excluding acts of authority or export restrictions, or by including labour disturbances affecting only their own enterprise. Parties are reminded that adding new events to the list does not relieve them from proving that condition (c) of paragraph 1 is satisfied."

Thus, suitably refined amendments may be agreed by the parties to adjust the circumstances under which the clause shall be triggered. In reality, even the requirement in sub 1(c) of the clause can be dispensed with through careful drafting, e.g. with words such as 'whether or not the requirement in sub 1(c) is satisfied'. Similar wording could be agreed to also exclude the requirement of reasonable foreseeability, in sub-1(b) of the clause. But again, this will require *ad hoc* negotiations between the parties and may be difficult to agree.

b. The hindrance or failure the clause protects against

Any force majeure clause is designed as an exception to the primary obligation of the parties, i.e., the accurate and timely performance of the contract.

As such, while the first ingredient of a clause designed to protect the parties in certain extraordinary circumstances is the list of force majeure events, the second essential ingredient to achieve the intended result is the accurate description of what part or mode of the performance can be excused when the force majeure event materialises.

This part of the clause comes in various shapes and sizes. A good and relatively simple example is contained in sub-clause 5 of the ICC Force Majeure Clause 2020 which reads:

"A party successfully invoking this Clause is relieved from its duty to perform its obligations under the Contract and from any liability in damages or from any other contractual remedy for breach of contract, from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay. If notice thereof is not given without delay, the relief is effective from the time at

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[41] What the future will bring remains to be seen. Regarding the potentially growing risks of future epidemics or pandemics, see e.g. Carlson, C.J., Albery, G.F., Merow, C. *et al.* Climate change increases cross-species viral transmission risk. *Nature* **607**, 555–562 (2022).

> which notice thereof reaches the other party. The other party may suspend the performance of its obligations, if applicable, from the date of the notice."

Another simple example is contained in sub-clause (e) of the BIMCO Force Majeure Clause 2022 as follows:

> "(e) Non-liability for breach – Neither party shall be considered in breach of contract nor liable in damages for delay in or for non-performance of one or more of its contractual obligations to the extent caused by the Force Majeure from the time a valid notice under subclause (c)(i) was given."

More complex examples may be found in the oil trade, where the interest of the relatively small number of sophisticated parties to be relieved from liability in case of force majeure events is mitigated by their strong interest in keeping the flow of crude into their refineries and the distribution of products downstream.

Section 65 (1) and (2)(1) of the BP Oil International Limited General Terms and Conditions for Sales and Purchases of Crude Oil and Petroleum Products (2015 edn) provides as follows:

> "Neither the Seller nor the Buyer shall be liable for a failure to perform any of its obligations under the Agreement insofar as that party proves that the failure was due to an impediment beyond its control. [Such] impediment […] shall […] include delay, hindrance, reduction in, interference with, curtailment or prevention of a party's performance of its obligations hereunder resulting from events such as the following […]."

The provision goes on to set out a detailed list of events. Similarly, Section 43(1) of the TOTSA TOTAL Oil Trading SA General Terms and Conditions for Sales and Purchases of Petrochemical Products (2020 edn) states as follows:

> "Neither party shall be deemed in breach of the Agreement as a result of, or be liable to the other for, any failure, omission or delay in its performance in whole or in part of any of the terms or conditions of the Agreement if such failure, omission or delay arises or results from any impediment reasonably beyond, or to be treated as reasonably beyond, the control of that party (any such event being hereinafter referred to as "Force Majeure")."

While these clauses are all perfectly fit for purpose, when it gets to the specific intent to protect the parties in case of a pandemic outbreak, the crucial element to insert expressly in this part of the clause must be the *delay* in the performance of the contract. And the delay should not only refer to the physical side of the performance, but to the documentary side too.

As noted elsewhere,[42] a number of the issues experienced in the early days of the pandemic were related to the delay in the preparation and procurement of shipping documents, an essential part of the performance of CIF and FOB sales. As the timely presentation of shipping documents triggers the duty to pay, either by the buyer or a nominated or confirming bank under the letter of credit, and failure to pay is usually not a failure to perform to which the force majeure clause applies,[43] it would

[42] UNCTAD (2021). COVID-19 Implications for Commercial Contracts – International Sale of Goods on CIF and FOB Terms.

[43] See for example Section 43(2) of the TOTSA TOTAL Oil Trading SA General Terms and Conditions for Sales and Purchases of Petrochemical Products, (2020 edn), under which: "any impediment shall not include delay, hindrance, interference with, curtailment or prevention of a party's accrued obligation to make payment under the Agreement whether in respect of price, dispatch, demurrage or any other financial obligation whatsoever

be advisable to clarify in the force majeure clause that failure to perform *any or all* obligations – both physical and documentary – is excused under the clause.

This part of the clause must be considered very carefully and should be discussed between the parties as it reflects the parties' agreement on who bears the commercial risk of non- or delayed performance in case of an outbreak.

The words 'neither party shall be deemed in breach' or 'a party is relieved from its duties under the contract', while seemingly balanced and indeed grammatically neutral, do in practice place the risk of non-performance on the party whose performance has generally *not* been affected. If the CIF seller cannot ship a cargo of a particular product from the agreed port because of such port being closed due to a pandemic-related event, the CIF buyer will find itself in a difficult position, with no incoming cargo and unsatisfied on-buyers and downstream customers. When the buyer is a medium/small entity, it will have very limited alternatives but to wait and see how the issue develops and possibly face several claims for non-performance from the local market it supplies.

In fact, it must be remembered that the force majeure clause is only operative between the parties to the contract in which it is contained and cannot be used as a defence vis-à-vis third parties. This is why, in order to use the force majeure as a proper loss prevention technique when it comes to COVID-related situations, the most crucial part of the clause is the part in which it provides for the consequences of the non-performance. This is for two important reasons: a party whose *supply* is affected by the force majeure must know in advance the consequences of its supplier's non-performance in order to (a) cater for them; and (b) allow it to distribute the consequences of the force majeure downstream.

These two points will be discussed in the following pages.

c. The consequences of the force majeure event

This third element of an effective force majeure protection against a COVID-related event is arguably the most crucial ingredient to achieve loss prevention under the clause. As such it should be thoroughly discussed between the parties and tailormade to the specific circumstances of the case.

As noted above, the present analysis should start from the wording already contained in commonly used standard forms. A good starting point may again be the ICC Force Majeure Clause 2020, which provides in sub-clauses 6-8 that:

> "**6. Temporary impediment.** Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraph 5 above shall apply only as long as the impediment invoked prevents performance by the Affected Party of its contractual obligations. The Affected Party must notify the other party as soon as the impediment ceases to impede performance of its contractual obligations.
>
> **7. Duty to mitigate.** The Affected Party is under an obligation to take all reasonable measures to limit the effect of the event invoked upon performance of the contract.

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where the impediment is solely caused by lack of funds." See also the BIMCO Force Majeure Clause 2022, sub-clause (f): "Nothing in this Clause shall impact on either party's payment obligations under the contract unless those payment obligations are directly affected by the Force Majeure".

> **8. Contract termination.** Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days."

This is a simple and rather flexible scheme requiring cooperation and communication between the parties. The party whose performance has been hindered by the force majeure event has a duty (under sub-clause 5) to give notice of force majeure without delay and thence the parties may go on stand-by and see how the situation develops while mitigation efforts are under way. Both parties have the 'right' – i.e., the option – to terminate the contract in case they are substantially deprived of the benefit of the contract.

Other clauses provide for a more structured system but with a narrow focus. An example of such clauses may be found in clause 24 of FOSFA 11 (2015 edn) – a form used for CIF sales – in which the force majeure clause reads:

> "Should shipment of the goods or any part thereof be prevented at any time during the last 30 days of the contract shipment period by reason of Act of God, strikes, lockouts, riots, civil commotions, fires or any other cause comprehended by the term Force Majeure at port/s of loading or elsewhere preventing transport of the goods to such port/s, the time allowed for shipment shall be extended to 30 days beyond the termination of such cause, but should the contract shipment period be less than 30 days such extension shall be limited to the number of days allowed for shipment under the contract shipment period. Should such cause exist for a period of 60 days beyond the contract shipment period the contract or any unfulfilled part thereof so affected shall be cancelled. Sellers invoking this clause shall notify Buyers with due despatch."

Other forms provide for more draconian consequences to the declaration of force majeure. In the oil industry, for example, the TOTSA TOTAL Oil Trading SA General Terms and Conditions for Sales and Purchases of Petrochemical Products (2020 edn) provides as follows:

> "43(4). If a force majeure event occurs, then, at any time thereafter and for so long as the effect of that event continues, Seller shall be entitled to withhold, suspend, reduce or cancel delivery hereunder to such extent as Seller shall in its absolute discretion determine. […] Notwithstanding anything to the contrary, under no circumstances shall Seller be required to purchase or acquire product to replace all or part of the Product supplies disrupted by an event of force majeure."

While this clause provides for a great deal of flexibility for the seller whose performance has been hindered by a force majeure event, it will leave the buyer whose upstream supply chain has been disrupted at the mercy of its seller.

More sophisticated is the solution offered by the BP Oil International Limited General Terms and Conditions for Sales and Purchases of Crude Oil and Petroleum Products (2015 edn). The relevant provision is more articulated that the others cited above, as it provides as follows:

> "65.4 The appropriate relief under this Section shall be as follows:
>
> 65.4.1 in respect of an impediment that renders impossible the Relying Party's performance of its obligations, immediate termination of the affected delivery obligation(s) without liability for damages, penalties and other contractual remedies;
>
> 65.4.2 in respect of an impediment that delays, hinders, reduces or interferes with the performance of the delivery obligation(s), immediate postponement of those obligations without liability for damages,

> penalties and other contractual remedies for a period until midnight local time on the last date of the Laydays, or until such time as the impediment is removed, whichever is the earlier. The impediment shall not, however, operate to extend the term of the Agreement or to abrogate the provisions of Section 74.13. Further, should the impediment continue beyond midnight local time on the last day of the Laydays then either party may terminate the Agreement without liability for damages, penalties and other contractual remedies by and upon giving written notice to the other party;
>
> 65.4.3 in respect of an impediment that delays, hinders, reduces or interferes with the performance of an obligation other than the delivery obligation(s), immediate postponement of those obligations without liability for damages, penalties and other contractual remedies until such time as the impediment is removed.
>
> The Relying Party, if the Seller, shall not be obliged to purchase afloat or otherwise from other suppliers to make good shortages or deficiency of delivery resulting from an impediment."[44]

In many ways, this part of the clause is the most crucial for present purposes: once the force majeure clause clearly identifies the pandemic itself or a COVID-related event as a force majeure event, and specifies which hindrances to performance are covered by the clause, all that remains is to allocate the risk of non-performance. As seen in the discussion above, the general trend in the market is to allow the party whose performance has been affected to walk away from the contract free from liability, or – at least – allow it to delay performance for as long as the impediment lasts. This may leave the party whose supply chain has been affected completely exposed to all liabilities vis-à-vis its downstream customers, unless this party is able to also agree a similar suitably worded clause with its downstream customers ('back-to-back', where feasible).

A very careful market participant could theoretically insert a carefully drafted force majeure clause including 'failure of supply chain' as an event of force majeure and be able to excuse its own failure to perform. It would take care and skill to craft all supply agreements downstream to dovetail with the upstream contract and more skills will be required to manage the force majeure notices and consequences thereof across the chain. In the best-case scenario, the supplier directly affected by the pandemic will be excused from liability for its non-performance upon reliance on the pandemic event and will lose revenue. All those downstream affected by the failure to supply, will also be excused from liability upon reliance on the pandemic and/or failure of supply chain event, and also lose revenue. At the end of the chain, end users and consumers will be affected by a shortage of end-product but will not have to pay for it. In this scenario, end users will not have the availability of the product but will not input money towards its production while the entire supply chain will lose the revenue stream directly associated with the product.

This scenario, however, is not particularly likely in the real world, especially when considering the international nature of these transactions and the wide range current distribution chains reach. In fact, while English law does not contain a general principle of force majeure, most civil law jurisdictions contain in their civil or commercial codes a general principle of force majeure, according to which a party to a contract is not liable for defective performance or default in cases in which such non-performance or default is caused by *force majeure*.[45] It is, however, often the case that the law

[44] Section 65(4).
[45] In general see: G. Treitel, *Frustration and Force Majeure*, 3rd edn (London, 2014); E. McKendrick, *Force Majeure and Frustration of Contracts*, 2nd edn (London, 1995); H.G. Beale (Ed), *Chitty on Contracts*, 33rd edn (London, 2019), at [23-001] and ff; and specifically on sale contracts M. Bridge (Ed), *Benjamin on Sale of Goods*, 10th edn (London, 2017); at [19-125] – [19-146]; and F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020), Chapter 13.

concerned does not contain a definition of what constitutes a *force majeure* event, a key ingredient for the party seeking to rely on the general principle at stake. Moreover, different jurisdictions may well adopt different definitions of *force majeure*, different approaches regarding its effects, and a different level and/or allocation of the burden of proof needed to rely on it and in so doing, the element of predictability, so crucial for a perfect distribution of the risk regarding the force majeure event, may be frustrated.

d. Conclusions

The COVID-19 pandemic may be brought within the scope of a typical force majeure clause, provided the clause is properly and specifically drafted.

When drafting these clauses, the parties should focus on:

a. Describing clearly **the event constituting a "force majeure event"** for the purpose of the operation of the clause;
b. Describing **what kind of hindrance or failure in the performance** of the contract is excused by the event described sub a. above; and
c. Describing **the consequences of** triggering **the force majeure** clause.

Drafting one clause however, will not be enough for all those involved in semi-finished products and any distribution chain. In such cases, not only should the upstream contract contain a properly worded clause but also **all** downstream contracts, all the way to the final consumer.

For this reason, although a force majeure clause may be of significant help in preventing large liability exposures, a better approach would probably be to develop and use industry specific and/or tailormade specialist pandemic clauses.

4. Pandemic clauses

In the exercise of their freedom of contract, the parties to sale contracts can adapt their contractual relationships to ensure that the consequences of known risks are regulated as part of their agreements. When the COVID-19 epidemic was declared a pandemic in March 2020, international trade was taken by surprise and epidemic or pandemic specific clauses were very rare indeed. More than two years later, many private parties have developed some sort of COVID-19 specific provision in their supply contracts, while trade associations have not truly embraced this solution yet.

An ad-hoc clause is certainly better suited to dealing with the complexities of a pandemic than any force majeure clause will ever be. This is not mainly because such a clause can better describe what is to be regarded as an epidemic and/or pandemic for the purposes of the clause or because it can better identify which hindrance in the performance of the contract is covered by the clause, but rather because it can specifically design the most apt terms of risk allocation between the parties. And this is of the greatest importance to contain the effects of any new wave, not only among traders but also at the consumer end of the commercial deal.

a. Pandemic clauses in sale contracts

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-related event can be hedged by a specific clause providing for (a) an exact definition of what a COVID-related event is for the purpose of the clause, and (b) the consequences of the delay, usually a short automatic time extension followed by a longer grace period together with a progressive discount. A relevant 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;[46]

(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-19 has caused in the performance of obligations in international trade. Delay in inspections, preparation and delivery of documents and – of course – as a result of quarantine, are just some of the further problems 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 be more effective than an amended force majeure clause.

Parties to a CIF sale know that the inspection of the cargo on board at loading plays a crucial role in the performance of the contract. Often these certificates are final for both parties in the determination of a certain quality of the cargo, and therefore key for physical and documentary performance as well as for payment. The parties also know that, although vessels may be allowed to load cargo, inspectors' availability may be limited during a new wave of the pandemic. Rather than waiting for a surveyor the parties may – for example – agree on samples to be taken by the crew according to specific methods and kept with the vessel until discharge.[47] This can be done in exchange for a small discount and/or coupled with a clause adjusting the price for variations to be ascertained at discharge.

While a clause of the kind described above may be difficult to negotiate in ordinary circumstances, it may well form a good compromise in uncertain times, especially if negotiated during a break between waves, when optimism prevails, and the clause is only conceived as a safeguard for emergencies.

[46] A relevant clause, which extends the permitted shipment period in appropriate circumstances, would of course need to be replicated in any on-sale of the same cargo by the buyer.

[47] Some may question the level of impartiality of sampling made by the crew; however, in circumstances in which the delay may become substantial and timing is crucial to the production process this solution should not be discarded a priori. It must be remembered that the shipowner has an interest in recording accurately the apparent order and condition of the cargo loaded to avoid possible liabilities at discharge.

Similar reflections can be made when it comes to shortages of goods caused by failure of the supply chain of, e.g. a component of high-tech cargo. The *ad hoc* pandemic clause may well cover failure of supply chain and treat it more specifically than a force majeure clause could ever do, e.g. allowing delay in exchange for priority on future delivery and/or discounts. Such priority or discounts can then be passed on downstream and distribute advantages and disadvantages in the supply chain.

Interestingly, trade associations like GAFTA and FOSFA have so far not produced their own pandemic clauses and seem to suggest to their members to rely on the existing contractual framework instead. GAFTA writes on its website:

> "Both Gafta 64 and Gafta 100 are construed in accordance with English law, under which parties' only recourse to Force Majeure as a means of suspending and / or cancelling their obligations is through the express incorporation of Force Majeure wording. Such wording is present in both Contracts. Under each Contract, Sellers (only) may suspend performance of their obligations where their performance has been prevented "whether partially or otherwise" by an "Event of Force Majeure". In order to rely upon this wording, Sellers will have to prove that the event falls within one of the twelve definitions of "Event of Force Majeure" ((enumerated (a) – (l)). […]"[48]

It may also be that specific routes and/or sub groups in those trades, have developed more specific *ad hoc* pandemic clauses, to allocate among themselves the risks COVID-19 has brought about. There is however no substitute for a tailormade clause developed to find a positive and constructive solution in extraordinary circumstances such as those caused by a global pandemic.

The keys to a working clause are dialogue and clarity in the legal drafting. It is here suggested that an ad-hoc pandemic clause requires three elements: (i) a definition of the hindrance one, or better both, parties want to tackle; (ii) a clear definition of 'pandemic' to trigger the application of the clause; and (iii) the specific consequences one wants to follow. This formula can be adapted to tackle any hindrances from the widest (e.g. any delays 'whatsoever') to specific narrow points (e.g. unavailability of inspectors), be triggered by any epidemic or only by a WHO-declared 'official' pandemic or global outbreak and suggest a solution which would suit both parties by balancing both the interests of seller and buyer. Once the clause is agreed, a transparent and proactive conduct should prevent legal complications and lead to a satisfactory outcome whatever the circumstances.

b. Pandemic clauses in charterparties

As already discussed elsewhere,[49] traders are often parties to carriage agreements which they require to move the goods they buy and sell around the world. These carriage agreements may be contained in bills of lading, voyage charterparties and time charterparties, which in turn have been heavily affected by the pandemic.

Charterparties have contained clauses dealing with epidemic events for some time now and the actual and potential impact of such clauses in the contracts in which they are inserted has been the subject matter of extensive study in a recent UNCTAD Report[50] which covers common clauses like the BIMCO

[48] See https://www.gafta.com/write/MediaUploads/Gaftaworld/GaftaworldApril2020.pdf.
[49] UNCTAD (2021). COVID-19 Implications for Commercial Contracts – International Sale of Goods on CIF and FOB Terms.
[50] UNCTAD (2022). Contracts for the Carriage of Goods by Sea and Multimodal Transport – Key issues arising from the COVID-19 Pandemic.

Infectious or Contagious Diseases Clause 2015, for voyage[51] and time charters,[52] and the 2020, INTERTANKO[53] Coronavirus clause, again for voyage[54] and time charters.[55] The effects of these clauses, however, may extend beyond the charterparty in which they are contained, affecting bills of lading and indeed sale contracts. This may happen as a direct consequence of common words of incorporation contained in both the sale contracts and/or the bills of lading.

The following examples serve to illustrate the situation.

Example 1

B is the CIF buyer of a cargo of straight run diesel oil. Payment is arranged on a cash against documents basis and the documents tendered contain a bill of lading compiled on the CONGENBILL form containing the following clause: "All terms and conditions, liberties and exceptions as per charterparty." The relevant charterparty contains an INTERTANKO Coronavirus Clause. The vessel arrives at the port of discharge and issues a notice of readiness (NOR). The following day the province of discharge is declared at high risk although operations may continue. The master however refuses to enter the port and the seller orders discharge to a nearby port.

Who is liable for the costs B has suffered?

Example 2

S is the FOB seller of a cargo of gasoil which should be lifted in the month of December 2021. The sale contract contains a Laytime and Demurrage Clause stating: "Laytime and demurrage as per charterparty." The charterparty contains a BIMCO 2015 Clause. The vessel arrives and sends a NOR but berthing is denied under local regulation as a member of the crew tests positive to COVID-19. Loading is completed with three weeks delay and the FOB buyer now claims demurrage from the seller under the provision contained in the sale contract.

Is S liable?

These two examples illustrate the type of issue which COVID-19 clauses may generate outside the realm of the charterparty itself. Parties to a sale contract can no longer afford to expose themselves to the uncertain allocation of the risk of a COVID-related delay and should proactively distribute such risk in the way in which they – and their insurers – see fit.

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[51] Available at https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/infectious_or_contagious_diseases_clause_for_voyage_charter_parties_2015.

[52] Available at https://www.bimco.org/contracts-and-clauses/bimco-clauses/earlier/infectious_or_contagious_diseases_clause_for_time_charter_parties_2015. Note that the most recent BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2022 (see further below), was only issued in June 2022, after the UNCTAD report was published.

[53] https://www.intertanko.com/.

[54] Available at https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-voyage-charterparties.

[55] Available at https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-time-charterparties.

A thorough review of the most common charterparty pandemic clauses contained in time and voyage charters has been provided in another UNCTAD report.[56] What remains to be done is to look at the parts of those clauses which may affect those traders who, although not party to the charterparty, potentially find themselves inheriting charterparty terms and – among these – relevant clauses addressing COVID-19 related risks.

i. Charterparty clauses and deviation

The BIMCO Infectious or Contagious Diseases Clause for Voyage Charter Parties 2015 contains provisions which may affect CIF buyers deeply in their right to receive the cargo at the agreed destination.[57]

Sub-clause (d) of the specialist clause reads as follows:

> "(d) If prior to or after arrival and in accordance with Sub-clause (b) the discharging port is determined to be in an Affected Area, the Owners may request the Charterers to nominate an alternative safe port which lies within the Charter Party range. If the Charterers fail to make such nomination within forty-eight (48) hours of receipt of the Owners' request, the Owners may discharge the cargo, or such cargo remaining on board if discharging has not been completed, at any safe port of their choice (including the port of loading) in complete fulfilment of the contract of carriage. If discharge takes place at any port other than the loading port or at a port that lies outside the range of ports in the Charter Party, the Owners shall be entitled to recover from the Charterers the extra expenses of such discharge, to receive full freight as if the cargo had been carried to the discharging port and, if the extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route. The Owners shall have a lien on the cargo for such extra expenses and freight."

The INTERTANKO COVID-19 ('Coronavirus') Clause – Voyage charterparties[58] contains a similar provision, worded as follows:

> "(f) In the event Charterers fail to provide alternative voyage orders as required in sub-clause 2 (a) or (b) above within 48 hours of receiving the request for new orders, Owners shall be entitled to discharge the cargo at any safe port of their choice (including at the loading port) which shall be considered as complete fulfilment of this charterparty. Owners shall be entitled to recover from Charterers the extra expenses of such discharge and to receive the full freight as though the cargo had been carried to the discharge port, Owners shall have a lien on the cargo for such expenses and freight."

The very recent BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2022,[59] while overall more balanced in its approach, also contains a number of sub-clauses giving liberties to the shipowner that are wide enough to severely affect traders' rights in relation to the goods.

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[56] UNCTAD (2022). Contracts for the Carriage of Goods by Sea and Multimodal Transport – Key issues arising from the COVID-19 Pandemic. For additional analysis and comment, including on the recently published BIMCO Infectious or Contagious Diseases Clause for Time Charterparties, 2022, see also presentations and materials available as part of UNCTAD's related training courses, available at https://unctad.org/meeting/training-course-implications-covid-19-pandemic-commercial-contracts-2.

[57] *SIAT di dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep. 53.

[58] Available at https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/intertanko-covid-19-coronavirus-clause-voyage-charterparties.

[59] Available at https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/infectious_or_contagious_diseases_clause_for_time_charter_parties_2022. For analysis and

The relevant parts of the clause read as follows:

> (d) The Vessel shall not be obliged to proceed to, continue to or remain at a place where in the Owners' reasonable judgement there is a high risk from a Disease to the crew or other persons on board the Vessel which cannot be prevented by taking Preventative Measures. Where the Owners decide not to proceed to, continue to or remain at a place as above and provided they have given the Charterers an Exposure Risk Notice:
>
> (i) the Owners shall request new voyage orders from the Charterers which the Charterers shall, subject to their redelivery obligations and any other terms of this Charter Party, issue within a reasonable time.
> (ii) Pending such instructions, the Vessel shall have the right to proceed to the nearest safe waiting place.
> (iii) The Vessel shall remain on hire during such period and the Charterers shall indemnify the Owners for any costs, expenses or liabilities incurred by the Owners in relation to claims from holders of bills of lading as a consequence of the Vessel waiting for and/or complying with the alternative voyage orders.
>
> (e) When acting in accordance with any of the provisions of this Clause anything is done or not done, such shall not be deemed to be a deviation, but shall be considered as due fulfilment of this Charter Party.

While all of these provisions may be justifiable in the context of a charterparty, in which the owner retains a liberty to discharge the cargo at an alternative port at the charterer's expense, or in which the vessel remains on-hire while COVID-19 related issues are resolved commercially, they become very surprising when inherited – through effective incorporation into a bill of lading – by a CIF buyer, who is the holder of a bill of lading made out to the CIF destination.[60] Should any of the clauses above be successfully incorporated in the bill of lading, the buyer would have no means of obtaining discharge of the vessel at the CIF destination[61] and would further incur the cost of transferring the cargo from the port of discharge to the CIF destination.

The incorporation of charterparty clauses into bills of lading is very common practice and great care should be taken when allowing tender of such bills under a contract of sale.[62] Under English law, the rules of incorporation of charterparty terms into bills of lading are well developed and the type of clause which can and cannot be inherited by a third party bill of lading holder is reasonably clear.[63] A review of the relevant case law would be beyond the scope of this report but the legal position could be summarised as follows: the charterparty clause to be incorporated should relate to the carriage of goods (as opposed to e.g. dispute resolution) and be consistent[64] with the express terms of the bill of

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comment, see also presentations and materials available as part of UNCTAD's related training courses, available at https://unctad.org/meeting/training-course-implications-covid-19-pandemic-commercial-contracts-2.

[60] Such incorporation being actually required by the clauses. See e.g. the BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2022, sub-clause (f): "The Charterers shall procure that the provisions of this Clause are incorporated into all sub-charters, bills of lading, waybills or other documents evidencing contracts of carriage that are issued in relation to this Charter Party."

[61] It is worth noting here that under English law, in a CIF contract, shipment of the goods to the agreed contractual destination is a condition of the contract, breach of which entitles the other party to terminate the contract.

[62] See G. Treitel and F.M.B Reynolds, *Carver on Bills of Lading*, 4th edn (London 2017), at [3-012] et seq; M. Bridge (Ed), *Benjamin's Sale of Goods*, 10th edn (London, 2017), at [18-075] et seq. See also N. Gaskell, R. Asariotis and Y. Baatz, *Bills of Lading - Law and Contracts* (London, 2000), at paras 1.65 – 1.67.

[63] See F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020), at [5-014] et seq.

[64] For instance, charterparty clauses relating to freight, laytime and demurrage will be brought in by general words of incorporation (such as 'all terms and condition'), except where the clause in question would not make sense in the bill of lading context without being reworded (such as 'charterer to pay demurrage'); in this case the clause would need to be expressly mentioned in the words of incorporation, see *The Miramar* 1984 AC 676). A charterparty jurisdiction or arbitration clause would also need to be expressly mentioned to be incorporated.

lading.[65] When the Hague-Visby Rules apply to the specific bill of lading concerned, the charterparty clause – even if effectively incorporated – should also not fall foul of Article III.8 of the Rules[66] or else it will be 'null and void and of no effect'.[67]

Even if such charterparty clauses were successfully incorporated into a bill of lading and hence effective in protecting the carrier vis-à-vis a cargo claimant, this would not necessarily imply that tender of a bill of lading weakening substantially the buyer's position against the carrier of its cargo is always allowed under the sale contract; the contrary is in fact true. Tender of a bill of lading incorporating any clauses that lessen or alter the buyer's rights to access its cargo as agreed in the sale contract can – and arguably should – be expressly forbidden in the sale contract itself. It may also be argued that tender of a bill of lading allowing the carrier vast liberties to dispose of the cargo any time a COVID-19 outbreak materialises is an 'unusual contract of carriage'[68] and hence not permitted tender under the Incoterms ® 2020 Rules.[69] Similarly, it could be argued that a bill giving such draconian liberties to the carrier is an 'unreasonable contract of carriage'[70] for the purposes of s. 32(2) of the Sale of Goods Act 1979, and would have the effect of shifting the risk of transit loss back onto the seller. However, these arguments would probably be less likely to succeed the more widespread these clauses become. The solution here suggested, to prohibit tender of a bill of lading incorporating COVID-19 clauses, therefore seems the safest option form the perspective of a buyer.[71]

ii. Demurrage and the incorporation of charterparty pandemic clauses

In chartering, 'demurrage' is the specific legal term used to describe the liquidated damages[72] that are payable for a breach of the charterer's duty to ship or discharge the cargo within the time allowed for

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[65] See G. Treitel and F.M.B Reynolds, *Carver on Bills of Lading*, 4th edn (London 2017), at [3-012] et seq. See also UNCTAD (2022). Contracts for the Carriage of Goods by Sea and Multimodal Transport – Key issues arising from the COVID-19 Pandemic, at C.1.4; and M. Tsimplis, Bills of Lading and Covid 19 - Synopsis (available as part of materials for UNCTAD training course on implications of the COVID-19 pandemic for commercial contracts).

[66] See the wording of Hague-Visby Rules, Article III.8, which provides: "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability". Equivalent provisions are also contained in Article III.8 of the Hague Rules and Article 23 of the Hamburg Rules.

[67] It remains to be seen what approach courts will take in this context to bill of lading clauses (including where incorporated from a charterparty) that shift pandemic-related risks entirely to the Merchant.

[68] *Ceval Alimentos SA v Agrimpex Trading Co Ltd, (The Northern Progress) (No.2)* [1996] 2 Lloyd's Rep. 319 at 327.

[69] For a full discussion of the issue in the context of S. 32(2) of the English Sale of Goods Act 1979, see F. Lorenzon, "When is a CIF seller's carriage contract unreasonable? – section 32(2) of the Sale of Goods Act 1979" (2007) 13 JIML 241.

[70] See Sale of Goods Act 1979, s. 32(2). "Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages".

[71] See F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020), at [5-015]. Drafting such clauses is not per se difficult and a simple "bills of lading not to allow COVID-related deviation" may well suffice. It may however be difficult to persuade a CIF seller/charterer to agree.

[72] The qualification of demurrage payable as liquidated damages is crucial as under English law penalty clauses are unenforceable. In order to be classified as liquidated damages, the demurrage clause should not be a

in the contract, customarily known as 'laytime'.[73] As the CIF seller's promise to its carrier is that the receiver/buyer will discharge the cargo within the agreed laytime, failure to do so on the part of the buyer puts the seller/charterer in breach of its contract of carriage, exposing it to liability for demurrage under the charterparty. In order to avoid bearing the risk of such delays, the seller may insist on a clause in the sale contract, passing onto the buyer the consequences of the delay and hence recover its losses under the laytime and demurrage provisions of the charterparty.

This can be done in a number of different ways spanning from an independent stipulation providing for a starting time[74] and a fixed rate per day pro rata, to clauses which simply contain straightforward references to "laytime and demurrage as per charterparty"[75] or simply "Demurrage: As per charterparty rate, terms and conditions".[76] What is clear, however, is that the charterparty between the seller and the carrier can only be relevant to the solution of the issue of quantum if and insofar as it is expressly incorporated into the sale contract, with the added difficulty that the buyer may not be aware of its terms. Bare references to demurrage being payable as per charterparty, raise difficult issues about the relevance and validity of the notice of readiness triggering the commencement of laytime, the exceptions to the running of time during laytime, and the accounting of demurrage and dispatch.[77] Should the pandemic clause included in the charterparty affect the validity of the NOR or the way in which laytime and/or demurrage are accounted for, its consequences may go well beyond the relationship between owner and charterer and reshape the way demurrage is dealt with under the sale contract.

The INTERTANKO COVID-19 ('Coronavirus') Clause – Voyage charterparties, contains provisions affecting laytime and demurrage which may be incorporated directly into the sale contract by reference. By way of example, sub-clause 2 (c) provides that:

> 2 c) Any time taken for the purposes of obtaining free pratique shall be for Charterers' account and shall not prevent the tender of a valid and effective notice of readiness.

This means that if the vessel is quarantined or delayed for COVID-related inspections, all time lost would count as used laytime or – if the vessel is on demurrage – as time on demurrage. If the demurrage clause in the sale contract simply refers to the L&D clause in the charterparty, the CIF buyer

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secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. *Cavendish Square Holding BV v Makdessi; Parkingeye Ltd v Beavis* [2015] UKSC 67; [2015] 3 W.L.R. 1373. W. Day, "A pyrrhic victory for the doctrine against penalties: Makdessi v Cavendish Square Holding BV" [2016] J.B.L. 115.

[73] See H. Tiberg, *The Law of Demurrage*, 5th edn (Sweet & Maxwell, 2013), Ch.6, p.151; J. Schofield, *Laytime and Demurrage*, 5th edn (LLP, 2005), Ch.2, p.15; J. Cooke, T. Young, A. Taylor, J.D. Kimball, D. Martowski and L. Lamber, *Voyage Charters*, 4th edn (Informa, 2014), Ch.57.

[74] A good example of a free-standing NOR clause can be found *in Suek AG v Glencore International AG (The "Hang Ta")* [2011] EWHC 1631 (Comm); [2011] 2 Lloyd's Rep. 278. See also *Profindo Pte Ltd v Abani Trading Pte Ltd (The MV "Athens")* [2013] SGHC 10; [2013] 1 Lloyd's Rep. 370.

[75] *Gill and Duffus v Rionda* [1994] 2 Lloyd's Rep. 67; *Fal Oil Co Ltd v Petronas Trading Corp SDN BHD* [2004] EWCA Civ 822; [2004] 2 Lloyd's Rep. 282.

[76] *Glencore Energy (UK) Ltd v Sonol Israel (the "Team Anmaj")* [2011] EWHC 2756 (Comm); [2011] 2 Lloyd's Rep. 697.

[77] C. Debattista, "Laytime and Demurrage Clauses in Contracts of Sale—Links and Connections" [2003] L.M.C.L.Q. 508; P. Todd, "Laytime and Demurrage Provisions in Sale Contracts" [2013] L.M.C.L.Q. 150.

will in effect pay for time lost due to COVID-related testing, quarantine and checks at discharge.[78] This would be problematic from the perspective of a final CIF buyer/consignee who should therefore take care to seek to pre-empt the inclusion of such a clause into the sale contract.

c. Traditional bills of lading clauses and their potential use in the pandemic

As has been seen above, specific pandemic/epidemic clauses may affect a CIF buyer of goods, even when these provisions are contained in a charterparty which the CIF buyer had no role in negotiating. In addition, it is also worth noting that some liner bills of lading may contain provisions that may adversely affect the buyer's right to its goods in case of a pandemic, even if the clause in question was not specifically devised for this purpose.

A good example of such clauses is Clause 19 of the MSC Liner Bill of Lading (2017 edn)[79] and the liberties contained therein. The clause reads as follows:

> 19. MATTERS ADVERSELY AFFECTING CARRIER'S PERFORMANCE
>
> 19.1 If at any time the carriage is or is likely to be affected by any hindrance, risk, danger, delay, difficulty or disadvantage of whatsoever kind and howsoever arising which cannot be avoided by the Carrier by the exercise of reasonable endeavours, (even though the circumstances giving rise to such hindrance, risk, danger, delay, difficulty or disadvantage existed at the time this contract was entered into or the Goods were received for the carriage) the Carrier may at its sole discretion and without notice to the Merchant and whether or not the carriage is commenced either:
>
> (a) carry the Goods to the contracted Port of Discharge or Place of Delivery, whichever is applicable, by an alternative route to that indicated in this Bill of Lading or that which is usual for Goods consigned to that Port of Discharge or Place of Delivery; or
>
> (b) suspend the carriage of the Goods and store them ashore or afloat upon the terms and conditions of this Bill of Lading and endeavour to forward them as soon as possible, but the Carrier makes no representations as to the maximum period of suspension; or
>
> (c) abandon the carriage of the Goods and place them at the Merchant's disposal at any place or port which the Carrier may deem safe and convenient, or from which the Carrier is unable by the exercise of reasonable endeavours to continue the carriage, whereupon the responsibility of the Carrier in respect of such Goods shall cease. The Carrier shall nevertheless be entitled to full Freight on the Goods received for the carriage, and the Merchant shall pay any additional costs incurred by reason of the abandonment of the Goods. If the Carrier elects to use an alternative route under clause 19.1 (a) or to suspend the carriage under clause 19.1 (b) this shall not prejudice its right subsequently to abandon the carriage.
>
> 19.2 If the Carrier elects to invoke the terms of this clause 19, then notwithstanding the provisions of clause 9, the Carrier shall be entitled to such additional Freight and costs as the Carrier may determine.

This exceptionally wide liberty clause, which includes even the possibility for the carrier to abandon the goods in cases of 'hindrance, risk, danger, delay, difficulty or disadvantage', 'at its sole discretion

[78] This may seem hard on a CIF buyer who had no opportunity to review the terms of the charterparty – and hence of the draconian laytime and demurrage (L&D) clause – before incorporating it into the sale contract. However, blind incorporation of charterparty L&D clauses is a practice which should be avoided and *ad hoc* drafting of full and complete sale L&D clauses always preferred. On this point see C. Debattista, "Laytime and demurrage clauses in contracts of sale – links and connections" [2003] L.M.C.L.Q. 508.
[79] MSC Liner Bill of Lading (2017 edn), available at https://www.msc.com/en/carrier-terms.

and without notice to the Merchant‘, may certainly be triggered in case of a COVID-related disruption, delay or ‘difficulty’. While its validity and practical effects may be challenged in court and the judge or tribunal will interpret its provisions *contra proferentem*, (i.e., against the carrier trying to invoke its protection), and in the light of article III.8 of the Hague-Visby Rules, it is clearly a clause which may create practical difficulties to the owner of the cargo carried under the bill. It must, however, be remembered that bills of lading are meant to work in the context of international trade and that a well drafted sale contract can protect the buyer/non-charterer against most, if not all, of the consequences of liberties of this kind.

The sale contract may well prohibit or restrict tender of bills of lading containing such clauses by way of express wording, or by providing for an indemnity from the seller for extra costs incurred by the buyer as a direct and/or indirect consequence of the exercise of such liberties.

d. Conclusions

Epidemic or pandemic clauses in sale contracts are certainly the best way for the parties to allocate among themselves in the fairest and most apt way the potential impacts of the pandemic on the performance of their contracts.

These should be drafted taking care of defining both what is meant by “epidemic” or “pandemic” and setting out as clearly as possible the solution the parties intend to adopt, should the pandemic interfere with their contractual relationship.

There are however risks connected with a number of specific clauses now available for incorporation in charterparties as well as cleverly drafted general liberty clauses contained in liner bills of lading. Therefore, great care should be taken not to allow such notably owner/carrier-friendly clauses to resolve pandemic-related issues or interfere with the solutions adopted in the sale contract itself.

5. Use of electronic shipping documents

In the performance of CIF and FOB contracts the tender of documents is as important as the physical shipment of the goods and COVID-19 is known to have affected the ready and timely availability of documents worldwide. Preparation and tender of a negotiable bill of lading, usually required under these contracts to enable the on-sale of the goods in transit, need to be done within the time set provided for in the sale contract or – where payment is arranged via documentary credit – in the letter of credit.

Such bills of lading must be further presented to the carrier at the agreed discharge port, in order to obtain the discharge of the goods. Should the negotiable bill be delayed at issue or in transmission, it may not be available at the disport in good time to allow delivery.[80]

And the bill of lading is not the only document the timely presentation of which is required: certificates of quality, quantity and origin, draught surveys, certificates of analysis etc. are crucial to a CIF seller

[80] This is not an unusual occurrence in practice, and it is ordinarily resolved by way of a letter of indemnity (LOI) issued by the receiver to the carrier. However, LOIs are not always available or acceptable and may not be as reliable as the carrier or the seller will want them to be.

who may well have agreed to tender them for payment to its customer or their bank. Some are also key to a CIF buyer who will need the original documents to clear the goods for import or obtain a phytosanitary licence. In the last couple of years there have been reports of several cases in which certificates or bills of lading have been delayed significantly because of one or more impediments connected with the COVID-19 pandemic: unavailability of surveyors, locked down facilities and measures to prevent contact between on board and on shore personnel, have all contributed to this problem. Delays with processing customs documents, due to reduced public services, have also caused problems. Against this background and in consideration of the serious difficulties the untimely availability of documents can create in the flow of international trade, hedging devices may have become essential.

While the preparation of some of these documents does require a degree of interaction with the cargo on board, the vessel and/or the crew, the data needed for their preparation is often collected without the need for physical contact. Good examples of documents which may be prepared 'at arm's length' are draught surveys, certificates of origin, commercial invoices, insurance certificates and even bills of lading. Other documents do require a more 'hands on' approach, e.g. certificates relating to the physical properties of the cargo, for which the presence on board of independent inspectors is necessary. However, once the physical ascertainment has taken place, the results can easily be sent via electronic communication without the need for any further delay.

At the present time, however, most trades are still done on the basis of the physical exchange of original paper documents, delivered in person, or using postal or international courier services.[81] During the pandemic, this has proven a point of some vulnerability with some short sea trades being particularly affected by the late arrival of shipping documents, with consequential delays in the discharge and clearance of the cargo.

The need for physical tender of the documents stems from the fact that the essential feature of a CIF contract is that delivery is completed only by delivery of documents, and actual shipment of the goods is not enough.[82] It is a basic feature of a CIF contract that on presentation of the shipping documents, if they are complete and regular, the buyer is bound to pay the price, irrespective of the arrival of the goods.[83] However, payment does not preclude the buyer from subsequently rejecting the goods or recovering damages for breach of the contract of sale if, on examination the goods, it emerges that the goods were in fact not in accordance with the contract at the time of their shipment.[84] If goods were shipped in accordance with the sale contract but are lost in transit or arrive in a damaged condition, the buyer ordinarily has a remedy under the policy of insurance or against the carrier under the contract of carriage contained in the bill of lading. Whether in any particular case either of these remedies is available to the final consignee depends upon the terms of the policy of insurance and the bill of lading. But that is only part of the reason why physical documents are so important. In *Schmoll*

[81] See also The Law Commission, Electronic Trade Documents: Report and Bill, Law Com No 405, at para. 1.2 (available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/03/Electronic-Trade-Documents-final-report-ACCESSIBLE-1.pdf).

[82] *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 K.B. 198 at 202, per McCardie J. See also *The Julia* [1949] A.C. 293 at 312.

[83] See F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020), at [8–006].

[84] *Ibid*., at [14–015] et seq.

Fils & Co Inc v Scriven Bros & Co[85] the court speaks of 'symbolical delivery' of the goods through the tender of shipping documents and highlights the need to tender what is probably the most prominent shipping document: the 'order' – or 'negotiable' – bill of lading. In effect, transfer of a negotiable bill of lading operates as constructive delivery of the goods. Possession of the bill of lading places the goods at the disposal of the buyer.

In the words of Bowen LJ in *Sanders v Maclean:*[86] "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo." And this is still good law and – arguably – the current default position under the Incoterms 2020.[87] However, in the exercise of their contractual freedom, the parties may well give up the need for a negotiable bill of lading by allowing tender of a straight bill of lading,[88] a seawaybill, or – even better for present purposes – an electronic transport document. At the present state of the law, none of these documents is to be considered capable of transferring constructive possession of the goods along a chain of contracts,[89] but their use can simplify matters substantially and allow the uninterrupted flow of documents and payments even at times of pandemics.[90]

a. Central questions to be considered

The best way to approach the use of electronic documents for each particular trade is for the parties entering into a CIF or FOB contract to ask themselves the following three key questions:

i. Do we need the tender of physical documents?
ii. Do the structure of the deal or its operational workings require the tender of physical documents?
iii. How can the clause be drafted?

The three questions will be further discussed below.

i. Do the parties to a CIF or FOB contract need the tender of physical documents?

The vast majority of contemporary traders would not have a problem in receiving most typical shipping documents in electronic form. In fact, certificates, invoices and insurance policies are regularly exchanged via e-mail or instant messaging services already. The notable exception to this attitude is

[85] *Schmoll Fils* (1924) 19 Ll. L. Rep. 118.
[86] *Sanders v Maclean* (1883) 11 Q.B.D. 327 at 341, CA.
[87] ICC Rules for the Use of Domestic and International Trade Terms, Incoterms 2020, ICC Publication 723E, CIF, A6, available at https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/.
[88] I.e., a bill of lading made out to a named consignee, not 'to order', whether or not marked as 'non-negotiable'. See also The Law Commission, Electronic Trade Documents: Report and Bill, Law Com No 405, from para. 3.37.
[89] See in general, F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 7th edn (London, 2020), Chapter 5.
[90] Straight bills of lading, where permitted under the sale contract, also need to be presented to the carrier in order to obtain delivery, at any rate where the document includes a clause requiring surrender of the document in exchange for the goods, see *The Rafaela S, JI MacWilliam Co Inc v MSC S.A.* [2005] UKHL 11 at para. 45. However, the potential for delay in transmission of the document is much reduced, as the straight bill of lading would only need to be transferred once, to the named consignee (or its bank).

the negotiable bill of lading, a document the physical possession of which is usually considered as indispensable. But is this really the case?

In reality, a buyer who buys a cargo of goods for its own use, e.g. a refinery buying a cargo of crude for processing, or a mill buying grain for its production of flour, does not need a negotiable bill of lading as it has no interest in trading the goods in transit. The use of a seawaybill in these cases would significantly simplify payment and discharge operations, while protecting both parties from any COVID-related delays in the transmission of the documents. As the physical presentation of an original seawaybill is not required at the port of discharge, the carrier would discharge straight away (upon identification of the consignee). The buyer's contractual rights vis-à-vis the carrier would not be compromised by the use of this type of document as long as the document incorporates the Hague-Visby Rules – as is already the case with the vast majority of standard form seawaybills in commercial use.[91]

Pure traders who buy the goods to resell them in the market, on the other hand, would see their ability to trade the cargo in the open market curbed without a negotiable bill of lading, necessary to pass on constructive possession and delivery rights while the goods in question are in transit. Moreover, buyers for whom independent documentary security is important, will require a negotiable bill of lading. This is because negotiable bills of lading are regarded as documents of title at common law[92] and 'titre de credit' in continental/civil law jurisdictions: documents with a special legal status capable of being pledged as security and re-sold to third parties by way of simple indorsement or simplified legal formalities. But this is exactly why electronic trading systems were developed: to provide traders a secure and user-friendly platform through which to operate their business safely and quickly. The International Group of P&I Clubs (IG)[93] approved the Bolero[94] and the EssDOCS systems[95] in 2010, the e-titleTM system[96] in 2015, the Global Share S.A. edoxOnline,[97] WAVE-BL[98] and CargoX[99] in 2020. Three further systems were recently added: TradeLens eBL was approved in 2021,[100] (however, this

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[91] In the absence of contractual incorporation, the Hague-Visby Rules do not apply to seawaybills. However, their contractual incorporation into the document would make a claim between receiver and carrier subject to the Rules. This is because the Carriage of Goods by Sea Act 1971, the legislation giving the Hague-Visby Rules the force of law in the United Kingdom, expressly provides, in its s. 1(6)(b), that: "any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading" attracts the compulsory application of the Rules. Article III.4 (second sentence) and Article III. 7 of the Hague-Visby Rules would, however, not apply.

[92] See M. Bridge (Ed), *Benjamin's Sale of Goods*, 10th edn (London, 2017), para. [18-107].

[93] UKP&I Club (2017) "Legal Briefing; Electronic Bills of Landing", available at https://www.ukpandi.com/-/media/files/imports/13108/publications/28140---legal_briefing_e_bill_of_lading_web.pdf. On the relevance of the approval of the specific platform by the International Group see also Gard, Paperless Trading (Electronic Bills of Lading), available at https://www.gard.no/web/content/faq-paperless-trading-(electronic-bills-of-lading).

[94] See https://www.bolero.net/rulebook-and-title-registry/.

[95] See https://www.essdocs.com/company/users-agreement-dsua.

[96] See https://www.e-title.net/sol_overview.php.

[97] See https://web.edoxonline.com/index.php/global-share/.

[98] See https://wavebl.com.

[99] See https://cargox.io.

[100] The Shipowners' Club. News. IG Circular: Update on Electronic (Paperless) Trading. 29 March 2021. https://www.shipownersclub.com/ig-circular-update-on-electronic-paperless-trading.

platform has since been discontinued).[101] IQAX Ltd[102] and Secro[103] were approved in 2022. These systems were approved by the International Group[104] as it was reassured that bills issued under them would be capable of performing the three functions of a bill of lading namely as (a) a receipt, (b) a document of title at common law and (c) evidence of a contract of carriage which – of paramount importance in the eyes of a liability underwriter – incorporates the Hague or Hague-Visby Rules.

There is no doubt that an electronic bill of lading issued using such platforms is always capable of performing function (a) and (c) above. Whether an electronic transport record may be capable of being regarded as a document of title at common law is, however, less clear. It is important to bear in mind that electronic equivalents to traditional paper-bills of lading may not enjoy full legal recognition across jurisdictions. In the recent English and Welsh Law Commission's Report on Electronic Trade Documents,[105] this lack of uniform approach is linked with the inability of an electronic record to be the subject matter of physical possession, something which has been a traditional feature of documents of title in general and bills of lading in particular. The Law Commission Report includes a draft 'Electronic Trade Documents Bill'[106] which attempts to solve this particular issue and bring English law in line with more progressive jurisdictions where similar laws have already been passed.[107] While the draft legislation is under consideration, the Bill has not been adopted yet and at the moment English law does not recognise e-bills as documents of title at Common law.

However, this is certainly not an insurmountable obstacle for paperless trading under any such approved systems. Three key considerations should suffice to support this statement:

i. Once the parties have agreed in their sale contract that documentary tender can be made in electronic form, the buyer cannot validly refuse to pay against an electronic bill of lading;
ii. Once the parties have joined membership of any of these systems, they would encounter serious legal difficulties in refusing tender of an electronic bill of lading issues under that system. This is because, by signing their licence, users agree to treat electronic documentation within the systems as the functional and legal equivalent of paper documents, and undertake not to challenge the validity of any transaction or communication made on the ground that the same was made electronically.
iii. Should the seller wish to sell the cargo to a party whose contracts or trading practice exclude tender of e-bills, under the rules of all such systems it can obtain the materialisation of the document and the issue of a new physical set of paper bills.

[101] See https://www.tradelens.com/.
[102] See https://www.iqax.com/en/solutions/ebl/.
[103] See https://britanniapandi.com/wp-content/uploads/2022/11/Electronic-Paperless-Trading-Secro-System-06-2022.pdf, where reference is made to the Secro Customer and User Agreement, dated 6th October 2022 and the Secro e-bill, dated 29th September 2022. Both documents are governed by Singapore law, including the Singapore Electronic Transactions (Amendments) Act 2021 which came into force on 19 March 2021 and which recognises electronic bills of lading under Singapore law.
[104] All members of the International Group of P&I Clubs have issued a similar Member Circular, see e.g. Gard P&I Member Circular No. 11/2022, November 2022, available at https://www.gard.no/Content/34486285/cache=1668411342000/MemberCircular_11_2022.pdf.
[105] Law Com 405, available at https://www.lawcom.gov.uk/project/electronic-trade-documents/.
[106] The Bill is discussed further below, in part 5(b).
[107] E.g. Singapore's 2021 Electronic Transactions (Amendment) Act adopting the UNCITRAL Model Law on Electronic Transferable Records (MLETR).

Among the numerous advantages of the use of e-bills is speed and – in a world in which COVID-19 outbreaks and partial lockdowns have become a regular scenario – speed plays an ever-increasing role. As reported by the UK P&I Club.[108]

> "In early trials conducted, a complex commodity paper BL trade which usually takes 20 days to complete was completed in 4 days via Bolero, whilst a simpler trade which usually takes 4 1⁄2 days to complete using a paper BL was completed in 65 minutes on essDOCS. e-titleTM also conducted some trials on straightforward container line trades in which the eBLs completed their journeys in under a day."

There are other advantages to the use of e-documents such as the lower costs involved in the issuance and management of the documents and the impossibility of losing the original set, always a cause for concern to traders. However, in ordinary times these may be offset by the (perceived) risk of hacking of the system and theft of the digital key. With the advancement of blockchain technologies and the widespread use of ledgers, the risk of hacking has decreased considerably. Moreover, the COVID pandemic has pushed traders, keen on hedging the risk of delay in the preparation and transmission of documents and the irregular cash-flow which they may generate, to give paperless trade a try.

ii. Do the structure of a deal or its operational workings require the tender of physical documents?

The second question traders must ask themselves is whether the structure of the transaction they are putting in place to allow performance of the sale contract is capable of allowing the tender of electronic documents instead of the traditional paper trail.

This is of crucial importance as the complexity of these transactions may create a number of bottlenecks which traders should be careful to avoid. Not only should the documents tendered be in the form and format required by the sale contract itself; they must also be in a form which is supported by their issuers and acceptable to banks, insurers and the authorities of both the loading and discharging ports.

Should payment of the contract price be made under a letter of credit, the banks involved in the transaction would only accept documents issued in formats they recognise and support. When it comes to electronic documents however, banks have been at the forefront of change and their rules for documentary credits – the Uniform Customs and Practice for Documentary Credits (the UCP 600) have an entire supplement devoted to electronic presentations called the eUCP.[109] This set of rules (or e-Rules in the language of the International Chamber of Commerce) describes itself as such:

> "The eUCP supplements the Uniform Customs and Practice for Scope of the eUCP Documentary Credits (2007 Revision, ICC Publication No. 600) ("UCP") in order to accommodate presentation of electronic records alone or in combination with paper documents."

But banks are not the only players that need to be ready to deal with electronic documentation. Carriers and surveyors seem to have embraced paperless trade with relative ease,[110] the former on the basis of their insurers' indorsement and the latter for ease of issue and circulation. Matters can be less predictable when it comes to port and custom authorities where large and modern

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[108] UKP&I Club (2017) "Legal Briefing; Electronic Bills of Landing".
[109] Available at https://cdn.iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf.
[110] A long list of important partners and customers of each e-BL system can be found on their individual websites.

infrastructures at the cutting edge of technological advancements work hand in hand with small public ports whose survival is linked to a small number of unsophisticated customers. And this is where barriers to the use of e-documents are more likely to be found and where COVID-related delays can accrue. As ports and customs authorities must work hand-in-hand to allow the clearance of goods for export and/or import, this is where a clear push towards dematerialisation of documents should come from national, regional or local governments, and be encouraged with some form of support.

In the meantime, as all current e-bill systems allow their users the materialisation of the document and its transformation from electronic data scattered in ledgers into a traditional paper bill of lading, the possibility of going paperless should not be discarded.

iii. How can an appropriate clause be drafted?

Once the parties are satisfied that the workings of the performance of the contract should not be hindered by the use of electronic documents, writing the clause is straightforward. Modern standard form contracts already contain clauses specifying which sort of notice may be given in what form. Typically, e-mails are allowed if sent to a specified address, and instant messaging systems are excluded for the sake of good order and recoverability.

The very same concept will underpin a clause giving the parties the liberty to tender electronic documents in performance of the contract. The clause may be complex and specific, for those traders who already know exactly what system they will be using, the process at loading and discharge and the technicalities of their banks. Or it can be very simple, leaving the parties more flexibility in what system to adopt and whether to adopt it or not. For the purpose of hedging the risk of COVID-related delays, a simple clause will suffice. This could be worded as follows:

"The seller may tender the documents listed under Clause […] above in paper form or in electronic format, provided that bills of lading can only be tendered if issued under one of the systems approved by the International Group of P&I Clubs."

The reference to the International Group approved platforms – although not strictly necessary – helps focus the attention on the fact that carriers will only issue e-bills with the approval of their underwriters.[111]

Of course, all parties involved in the performance of a sale contract are bound by the law under which their contract is regulated and, should the law regard an electronic document as the equivalent of a paper one, all parties should be required to do so. This may well become the case in the UK, should the recently published 2022 Electronic Trade Documents Bill (Law Com 405) become law.[112]

[111] See above, part 5(a)(i).

[112] The Law Commission of England and Wales, Electronic Trade Documents: Report and Bill (Law Com No 405), published on 15 March 2022, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/03/Electronic-Trade-Documents-final-report-ACCESSIBLE-1.pdf.

b. The 2022 Electronic Trade Documents Bill

The Law Commission is a statutory independent body created[113] to keep the law of England and Wales under review and to recommend reform where it feels it is needed. For years the push towards the adoption of electronic documents of title has been hindered by a general feeling that the English law of documents of title did not truly support the move and that the paperless choice may leave traders unprotected. The Law Commission itself, in the report which accompanies the Electronic Trade Documents Bill, describes the current situation with regard to shipping documents as such:

> "The current law in England and Wales does not recognise the possibility of possessing electronic documents; possession is associated only with tangible assets. Industries using these documents are therefore prevented by law from moving to a fully paperless process. To give a sense of the enormous amount of paperwork global trade generates, consider that the world's largest containerships can carry 24,000 twenty-foot containers at any one time on any one voyage. For each one of those cargoes, paper transport documentation has to be produced, and must be processed manually to go from the shipper of the goods to the ultimate buyer at destination, sometimes through numerous intermediaries. The effect of the current law is that much of the documentation needs to be in hard copy. The Digital Container Shipping Association ("DCSA") has estimated that 16 million original bills of lading were issued by ocean carriers in 2020, and that more than 99% of these were in paper form."[114]

And it concludes that:

> "This is clearly archaic, inefficient, and wholly unsuited to a world in which processes and transactions are increasingly in digital form. Allowing for electronic versions of certain trade documents could lead to significant cost savings and efficiencies, together with improvements in information management and security."[115]

These observations have led the Law Commission to work towards a legislative solution with a clear purpose:

> "There should be legislative reform to allow for trade documents in electronic form that satisfy certain criteria to be possessed and therefore to have the same legal effects as their paper equivalents".[116]

Although preparatory work at the Law Commission started well before the COVID-19 pandemic, the timing of this report seems particularly apposite; the Law Commission itself has noted the negative effects of the pandemic on the free and regular flow of documents and the report makes express reference to the difficulties experienced during this time:

> "The push for digitalisation became particularly acute in 2020 and 2021, with the introduction of global restrictions on movement and human-to-human contact in response to the COVID-19 pandemic. Stakeholders pointed to the risk of delays in receipt of paper documents disrupting supply chains for essential goods such as food and medical equipment.[117] […] While the pandemic forced businesses to develop rapid technical solutions, the law continues to lag behind."[118]

[113] See The Law Commissions Act 1965, available at https://www.legislation.gov.uk/ukpga/1965/22.
[114] See Law Com No 405, at para. 1.4.
[115] *Ibid*., para. 1.5.
[116] *Ibid*., Recommendation 2, at p. 222.
[117] *Ibid*., para. 1.6.
[118] *Ibid*., para. 1.7.

The draft legislation is designed to remove the legal obstacles referred to above and allow the "possession" of electronic documents. For bills of lading[119] this is achieved by (a) including expressly bills of lading as "paper trade documents" to which the Bill applies;[120] (b) stating that "[a] person may possess, indorse and part with possession of an electronic trade document"[121] and that" [a]n electronic trade document has the same effect as the equivalent paper trade document";[122] (c) provided that certain (technical) conditions are met.[123]

If this (short and relatively straightforward) draft legislation is to become law, under English law, a CIF buyer would no longer be allowed to refuse the tender of an electronic bill of lading instead of a physical paper one. By the same token, carriers and insurers would also be required to deal with e-bills in the same way in which they now deal with paper bills. English ports and HM Customs & Excise[124] would also be bound by the legislation. Of course, foreign ports and foreign customs authorities would not be bound by English legislation, but – given the wide range use of English law as the law of choice between foreign traders – they would come under increasing pressure to adopt similar legislation or at least encourage contractual solutions. There is, however, one issue which the proposed Bill does not solve: would an e-bill attract the compulsory application of the Hague Visby Rules? The Hague-Visby Rules apply only to "bills of lading" and "similar documents of title" which – arguably – e-bills are not whether or not the proposed Bill becomes law.[125] This does not mean the Hague-Visby Rules cannot be applied by way of contractual incorporation, but they will not afford the third party bill of lading holder the same protection as if they were compulsorily applicable.[126]

The Electronic Trade Documents Bill is extremely good news for those traders who are already keen on the savings and efficiencies of electronic transactions and offers a great opportunity to those who have experienced first-hand the effects of the pandemic on the free and regular flow of paper documents. Some countries[127] have already adopted statutory solutions based on the UNCITRAL Model Law on Electronic Records (MELTR)[128] and the UK is moving in the same direction. However, statutory intervention is not required to do away with the vulnerabilities of paper: a good contractual solution is not only possible, but relatively easy to arrange.

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[119] To which the Report dedicates paras.3.34-3.38.
[120] Electronic Trade Documents Bill 2022, Section 1(2).
[121] Electronic Trade Documents Bill 2022, Section 3(1).
[122] Electronic Trade Documents Bill 2022, Section 3(2).
[123] Electronic Trade Documents Bill 2022, Section 2.
[124] The United Kingdom's Customs authority.
[125] See on this issue the Law Commission Report (Law Com No 405) at para. 3.35.
[126] According to s. 1(6)(b) of the Carriage of Goods by Sea Act 1971, the Hague-Visby Rules have the force of law in respect of "any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading" [Article III.4 (second sentence) and Article III.7 of the Hague-Visby Rules would not apply]. Note that the provision refers to "any receipt which is a non-negotiable document marked as such", which would not seem to cover electronic bills of lading.
[127] For instance, Singapore, which adopted a 2021 Electronic Transactions (Amendment) Act.
[128] The text of the UNCITRAL MELTR, with some explanatory notes, is available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/information_from_the_secretariat.pdf

6. Key points and concluding remarks

The COVID-19 pandemic has significantly affected global trade over a period of almost three years now and the virus and its repercussions for international trade transactions do not seem to be fading any time soon. As the virus continues to evolve to adapt to our post-COVID society, so should international trade, its contractual tools and contracting parties. Evolving and adapting to a pandemic is far from impossible and the tools for a proper allocation of risk, resources, costs and opportunities are all within arm's reach of any trader, no matter how small its sector or its reach may be. At the time of writing, response mechanisms are in place which were not readily available when the pandemic started: a better understanding of the effects of the pandemic and its impacts, the consequences of legislative measures to contain it and the reaction of the markets are now better understood and their medium-term effects already apparent. With an improved understanding of these elements of uncertainty, contracting parties are better equipped to allocate the relevant risks, and potentially contain the adverse contractual consequences of any new disease or future next wave of the ongoing COVID-19 pandemic. We also know at this stage that waves of contagion/disease outbreaks may happen recurrently, and there is therefore limited scope for arguing unpredictability within the meaning of a civil law-type general principle of *force majeure*. We have developed a better understanding of the need for suitably worded force majeure clauses, or better ad-hoc pandemic clauses, carefully drafted to cover hindrances in both physical and documentary performance; and we know that by making use of electronic shipping documents, it is possible to hedge considerably the risk of COVID-related documentary delays in appropriate circumstances.

Key to effective risk-allocation using contractual approaches are both dialogue between the parties and clarity in the legal drafting. Relevant clauses should contain three elements: (i) a definition of the hindrance one, or better both, parties want to tackle; (ii) a clear definition of 'pandemic' to trigger the application of the clause; and (iii) the specific consequences that are intended to follow. Once a suitable clause is agreed, a transparent and proactive conduct should prevent legal complications and lead to a satisfactory outcome whatever the circumstances. Tender of bills of lading that contain unduly owner/carrier-friendly (charterparty) clauses which may adversely affect a buyer's rights can - and arguably should - be expressly prohibited in the sale contract.

What still seems to be needed now, is for traders to be open with each other about the risks of potential waves of infection becoming a more regular occurrence, and discuss among themselves, preferably under the auspices and with active participation of their trade associations, a balanced and proper allocation of those risks. Digital solutions, many of which are now available, need to be embraced with caution and with an understanding of the related benefits and implications, at least until relevant legal systems finally adopt legislation giving electronic alternatives the same legal effects as their paper equivalent. Most importantly, it will be crucial that the outcome of these discussions and developments will be translated into actual clauses, which minimise the uncertainties of already difficult times and spread the risks in a balanced manner. As already noted, trade associations have an important role to play in this context by developing standard form clauses for widespread international use. Those with the size, know-how and resources to act have in many cases already done so. The analysis and observations in this report aim to assist particularly those most at risk of being adversely affected by future waves of the pandemic, to offer them food for thought and some of the tools required to better place themselves in the post-pandemic world of international trade.

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