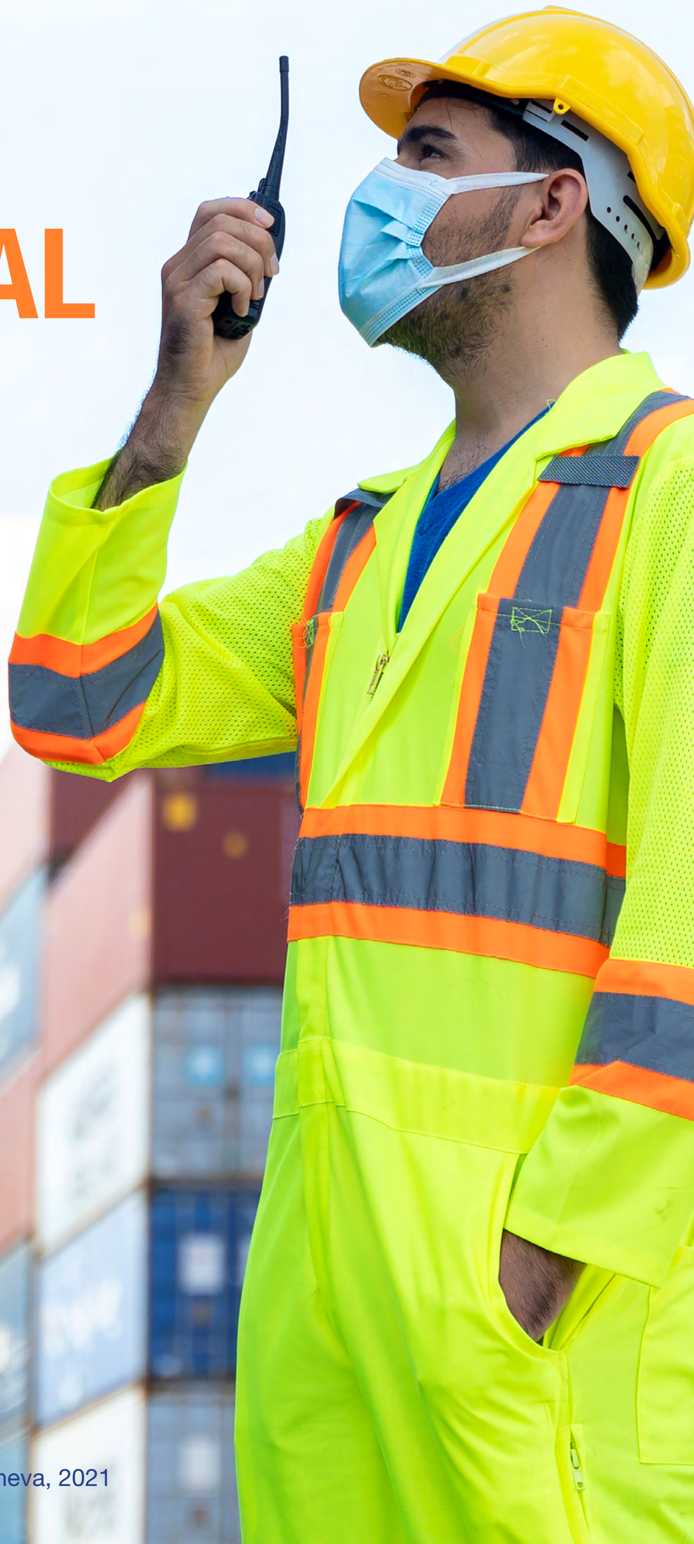
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

COVID-19 IMPLICATIONS FOR COMMERCIAL CONTRACTS

INTERNATIONAL SALE OF GOODS ON CIF AND FOB TERMS



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COVID-19 RESPONSE

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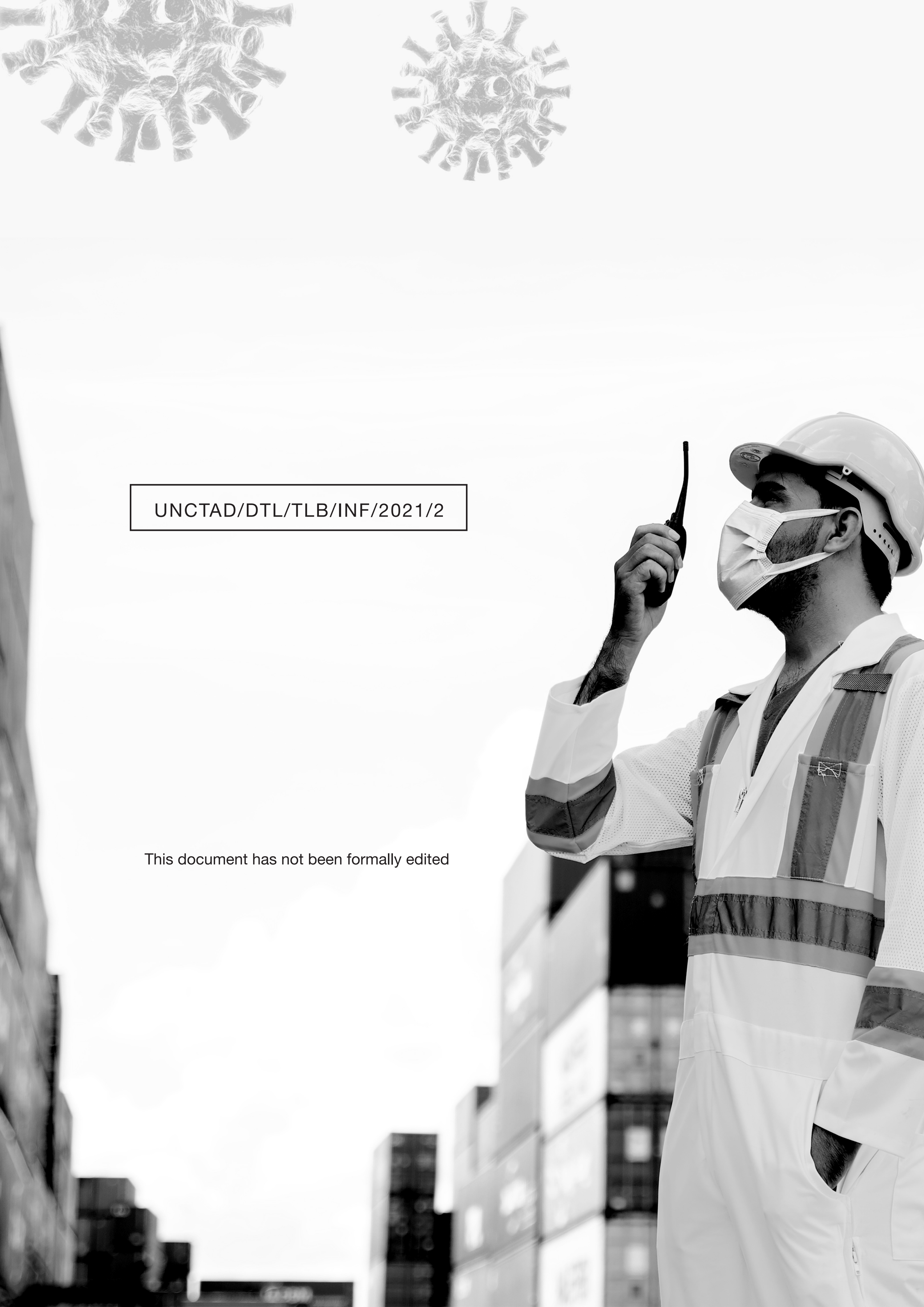

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Note

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A related briefing note on "*COVID-19 implications for commercial contracts: carriage of goods by sea and related cargo claims*" (UNCTAD/DTL/TLB/INF/2021/1), prepared under the same project, may also be of interest to readers, and should be considered in context.

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Abbreviations

BIMCO	Baltic and International Maritime Council
CIF	Cost Insurance and Freight
CFR	Cost and Freight
DAP	Delivery at Place
FIATA	International Federation of Freight Forwarders
FOB	Free on Board
FOSFA	Federation of Oils, Seeds and Fat Associations
GAFTA	Grain and Feed Trade Association
ICC	International Chamber of Commerce
P&I Club	Protection and Indemnity Club
UCP	Uniform Customs and Practice for Documentary Credits

1. COVID-19 implications and international trade: background and context

The ability to trade globally, through a seamless logistic network, moving goods across international boundaries, integrating engineering and technology from different parts of the world has been a fundamental element of the globalized trading system. Raw commodities travelling from one part of the world to be converted into plastic or metal components only to be shipped again to be manufactured and then again for assembling and distribution is something which traders and consumers alike take for granted. The current COVID-19 pandemic has and still is interfering heavily with international trade, creating inefficiencies, delays and supply-chain disruptions on an unprecedented scale.

The world has seen pandemic outbreaks before and international trade has been around for millennia, however, the logistical chain has never been as efficient and complex as it is now, and the timing of every step of it has never been more crucial. Shippers, customs authorities, ships, agents, banks, receivers, and underwriters, all rely heavily on the efficiency of the system and the ability to procure, produce, transmit goods and documents and turn them around very quickly. This is where the pandemic has caused severe disruption. Temporary closures of factories, partial closures of logistic providers, ports, and port services, has caused shortages of supplies and delays to the logistical chain with compound effects around existing bottlenecks.

Manufacturers are struggling to procure their components and ship their products, shippers and vessels are delayed at port and in transit, and sellers struggle to meet their banking deadlines for payment. In turn there is a compound failure to pay business suppliers on time, with an increased risk of insolvency.

All of this is clearly only temporary, but the effects it may have on the modern way in which international trade works, are potentially severe.

The purpose of this briefing note is to illustrate the way in which the mechanics of international trade may be affected by the COVID-19 pandemic and identify a number of common legal and commercial issues arising from it. Some possible approaches will also be suggested with the purpose of encouraging discussion between the affected parties and stimulating preventive measures for future agreements and their performance.

2. Introduction: contractual arrangements for the sale of goods carried by sea

International trade relies heavily on ships for the delivery and distribution of commodities and manufactured goods worldwide. Contracts of sale and supply invariably contain clauses dealing with the description of the goods and payment of the price while the details of the shipping arrangements are often left to standard trade terms[1], the Incoterms®[2] or the custom of the specific trade concerned. In normal circumstances, delivery, shipping, distribution and payment happen seamlessly and keep the global supply chain moving. However, when something happens of a large enough scale to seriously impact one or more links in the chain, the entire system is at risk of grinding to a halt. A pandemic may be just this type of event, as it may affect a number of links in the chain in different ways and at different stages of contractual performance.

In order to understand the impact the COVID-19 crisis has had, and may continue to have in the coming months on the flow of international trade and how it can be minimised, it is necessary to look at the terms of the contract concerned and the ways in which the relevant rights and obligations have been affected by the pandemic. This will in turn depend on two main factors:

(a) the type of sale contract in question and the agreed delivery arrangements; and
(b) the payment method adopted.

2.1 The type of sale contract in question and the agreed delivery arrangements

Contracts for the international commercial sale of goods may be divided into three main groups depending on the mode and place of delivery of the consignment sold: *E terms*[3] (or *ex works* contracts), *D terms*[4] (destination/arrival or delivered contracts) and *shipment terms*.[5] Broadly speaking, the delivery of the goods is made at the seller's premises in the case of *E terms*, at the buyer's premises in the case of *D terms* and, generally, on board a vessel at the loading port, in the case of *shipment terms,* such as CIF (cost, insurance and freight) and FOB (free on board)[6]. 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.[7] So, E terms see the risk of transit loss passing on lifting the cargo at the point of origin and D terms see the risk of loss resting with the seller across the entire logistical chain.[8] More complex is rule of passing of risk in CIF and FOB sales where the seller is never responsible for the safe arrival of goods but only for shipping them in accordance with

[1] Trade organisations such as GAFTA (the Grain and Feed Trade Association, www.gafta.com) and FOSFA (the Federation of Oils, Seeds and Fat Associations, www.fosfa.org), usually provide their own standard form contracts, but it is increasingly common for large, medium and even small companies to draft their own general terms and conditions of trade. For example, in the oil industry see the BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products, 2015 edn; and the Shell International Trading and Shipping Company Limited General Terms & Conditions for Sales and Purchases of Crude Oil, 2010 edn.
[2] International Chamber of Commerce, *Incoterms 2020: ICC Rules for the Use of Domestic and International Trade Terms* (ICC 2019), ICC publication n. 723E; in force from 1 January 2020. Earlier versions, e.g., INCOTERMS 2000 or 1990 may also be used.
[3] EXW in Incoterms® 2020 Rules language.
[4] The current Incoterms® 2020 Rules D terms are as follows: DAP (Delivered At Place), DPU (Delivered At Place Unloaded) and DDP (Delivered Duty Paid). The term DAT Incoterms® 2010 was in fact renamed DPU in the Incoterms® 2020 to, as ICC itself put it, "emphasis[e] the reality that the place of destination could be any place and not only a 'terminal'", Incoterms® 2020, ICC Rules for the Use of Domestic and International Trade Terms, ICC Publication n. 723E, London 2019, at 16. In turn, the terms DAF (Delivered At Frontier), DES (Delivered Ex Ship), DEQ (Delivered Ex Quay), DDU (Delivered Duty Unpaid) as they appear in Incoterms® 2000 had been replaced by the DAT and DAP terms above. Incoterms® 2000 and 2010 can still be used if the parties to the contract choose to incorporate them.
[5] C.i.f., c.&f. and f.o.b. contracts; in Incoterms® 2020 Rules language the shipment sales for maritime transport are CIF (Cost Insurance and Freight), CFR (Cost and FReight), and FOB (Free On Board); for other means of transport FCA (Free CArrier), CPT (Carriage Paid To) and CIP (Carriage and Insurance Paid to) should be used.
[6] In the case of FCA, delivery is made when the goods are handed over to the carrier.
[7] 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.
[8] F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020), at 2-005.

the terms and conditions of the contract – and tendering appropriate documents.[9] As a result, the risk of loss of or damage to the goods in transit is on the buyer.[10] 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[11] against conforming documents, and his remedies lie against the carrier and/or the cargo underwriters.

This is because performance of this type of contract is 'dual', 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).[12] Once physical performance has been accomplished and the goods have been shipped, the seller must tender the agreed documents to the buyer. This normally includes a negotiable bill of lading, a 'document of title', which can be transferred, and provides the holder with the exclusive right to claim delivery of the goods from the carrier. 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, on top of the usual action in damages for breach of contract. Importantly, the market relies heavily on the information contained in, and the timing of shipping documents, and English law[13] regards the duty to comply meticulously with documentary obligations as strict.[14]

While the performance of contracts agreed on D and E terms may have also been badly affected by the pandemic, the allocation of the responsibility for non-performance and/or delay is generally straightforward and the liabilities that follow fall squarely on one or the other party. Most of international trade, however, is conducted on *shipment terms*, CIF or FOB; in particular commodities are often traded on CIF terms,[15] 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 (document of title), as well as a statutory right of suit against the carrier.[16]

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[9] F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020), at 2-018.

[10] *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.

[11] Unless the contract provides for price adjustment clauses or is concluded on "landed quantity/quality at contract price" clauses.

[12] *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. For an overview of different types of transport documents, their features and effects, see also UNCTAD, The use of documents in international trade, UNCTAD/SDTE/TLB/2003/3.

[13] This Briefing Note makes extensive references to English law as it is the law commonly chosen by the parties to international commercial contracts.

[14] 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.

[15] 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)".

[16] See the Carriage of Goods by Sea Act 1992, s. 2.1. See also UNCTAD, The use of documents in international trade, UNCTAD/SDTE/TLB/2003/3.

For this reason this briefing note focuses on sales on *shipment terms*, where the link between the sale contract, the shipping arrangements and the circulation of documents becomes more complex[17] and where the impact of COVID-19 may prove less predictable in the medium and long term. 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. Therefore, this briefing note will focus mainly on English law, although reference will be made to other jurisdictions where necessary.

2.2 The payment method adopted

Payment is extremely important in every sale contract and particularly so in international transactions in which the physical distance between the parties and the delay between delivery and reception of the goods increase the risks of non-payment, intervening insolvency and quality/quantity disputes.

In international trade, payments are usually agreed on a 'cash against documents' (CAD) basis, or through banking instruments such as commercial 'documentary letters 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 a different consequence 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.[18] Each and every document agreed upon must be prepared in accordance with any relevant contractual provision or, as applicable, match very rigid banking standards,[19] and be tendered within the agreed timeframe[20] in order to be accepted and paid against. When banks are involved, the Uniform Customs and Practice for Documentary Credits (UCP 600)[21] contain a large number of very detailed formal requirements for all documents to be presented under a letter of credit and gives the bank the right and duty to reject any presentation which does not strictly meet these standards.[22]

Given the essential function of documents in international trade, and the different effects COVID-19 may have had on the preparation and timely transmission of shipping documents, this briefing note will consider some of the main documentary issues caused by the pandemic.

3. CIF and FOB contracts: carriage arrangements

First of all, it must be made clear that both c.i.f. and f.o.b. sales are *shipment* contracts where the duty of the seller as to the delivery of the cargo is fulfilled by shipping goods on board a vessel (or,

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[17] See F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020), at 2-003.
[18] 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.
[19] International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits (2007 Revision) UCP 600, ICC Publication n. 600E, Article 14. See www.iccwbo.org.
[20] UCP 600, Article 6.
[21] UCP 600, Article 1.
[22] UCP 600, Article 14(a).

in c.i.f, procuring goods shipped on board a vessel in accordance with the contract),[23] rather than by handing them over to the buyer at the port of discharge. But whereas the duty to procure the cargo always rests with the seller, the duty to fix a vessel suitable to carry the cargo from the port of loading to the port of discharge, does not always follow. Generally speaking, in c.i.f. (or c.&f.) agreements it is the seller who is under the obligation to fix the vessel[24] whereas in bare (or straight) f.o.b. sales such duty falls on the buyer.[25] Particular care, however, should be taken with regard to f.o.b. contracts where – in practice – such default position is often amended by way of contractual variations, the most common of which is often referred to as "f.o.b. of the classic type".[26] In its "classic" form the f.o.b. contract provides for the seller to conclude a contract of carriage as an agent for the buyer, who remains at all material stages the original party to the contract of carriage with the carrier; the commodity will be still invoiced by the seller at f.o.b. rate but a commission for the fixture is usually added as a separate item. Another common alternative may be referred to as "f.o.b. with additional carriage services" where the seller fixes the contract of carriage with the carrier in his own name and then transfers its contractual position by endorsing the bill of lading. In this case again the commodity is invoiced at f.o.b. rate and freight and commission are charged separately or specifically itemised.

Distinguishing between c.i.f. sales and the various sub-types of f.o.b. terms is crucial in cases where the shipping link of the chain is affected by the pandemic. This is because the issues generated directly and/or indirectly by the pandemic will affect sellers and buyers differently depending on the type of contract they have agreed upon. Delay is a good example as it may affect a number of elements of performance: upstream supply may be delayed; the arrival of the vessel may be delayed; the issue of documents may be delayed; their transmission may be delayed. The real issue however is which party is affected by the delay, and which party has to bear the risks and costs of such delay having materialised.[27] Moreover, it is not uncommon for commodities to be bought and re-sold several times while in transit; in this case the seller is usually an intermediate trader who does not handle any goods and performs its part of the bargain by procuring a cargo afloat and tendering relevant documents. In this case, delay on the physical front may have less of an effect on the specific deal concerned as it may not affect the seller's ability to perform the contract.

4. CIF and FOB contracts and COVID-19

COVID-19 was declared a pandemic by the World Health Organization on 11 March 2020[28] but by that time, it had already generated a lot of issues in international trade and shipping. A pandemic generates variations and distortion to business life even without the legal restrictions which may accompany it, but as soon governments worldwide take preventive measures to contain the spread of the disease, the effects on the ordinary course of business become significant and long standing.

The key effect of a total or partial lockdown is that services cannot be provided with the speed and efficiency with which we expect them to be and this causes delays and – most significantly –

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[23] See fn. 15, above.
[24] Alternatively, the CIF or C&F seller may procure a shipment (in accordance with the contract) afloat, see fn. 15, above.
[25] In general, see: F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020); M. Bridge (Ed), Benjamin's Sale of Goods, 10th edn (London, 2017); and C. Debattista, Bills of Lading in Export Trade, 3rd edn (London, 2008).
[26] See Lorenzon (fn 4), [9–001] and ff.
[27] A delay in the vessel's arrival at the loading port may translate into a breach of the CIF seller's duty to ship on time. In case of an FOB sale, the very same delay and the consequential failure to load on time would not be for the seller's account.
[28] WHO Director-General's opening remarks at the media briefing on COVID-19. 11 March. https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

compound delays. Delay at the producing plant may lead to a partial or total failure to deliver; delays at the loading port may also translate into a failure to ship by the agreed time and extensions may be hard to negotiate at difficult times; delay in the preparation and/or transmission of the documents can prove fatal to both a 'cash against documents' and a letter of credit transaction. As time in general and proper timing in particular are key ingredients of international trade, any disruption affecting it may have severe consequences for both sellers and buyers.

Example 1. A sells a container of frozen fish to B on CIF terms, shipment period March 2020. The regular service on which the box is booked to be loaded arrives on schedule on 24 March but is delayed as one of the crew members has a fever and local legislation imposes testing for the whole crew. Tests come back negative, but the vessel has been delayed for three days. By the time she starts loading, port handling facilities have been reduced and loading takes longer than usual. As a result of this, the bill of lading is issued on 1st April 2020, 8 days later than expected. Shipment in April is a breach of the sale contract and the buyer may elect to terminate the contract and sue the seller for damages.

In the commodity market, it is not uncommon for cargo to be shipped by the original seller and then sold on a string of consecutive spot deals. None of the traders involved with the intermediate sales gets involved with the physical handling of the cargo which is and remains idle on board the ship. All they deal with, and rely upon, is the quick and reliable flow of the shipping documents: any disruption in that flow due to slow or intermittent postal or banking services will affect this type of trade too.

Example 2. A sells 60,000mt of soyabean to B on FOB terms. B charters the ship and arranges the loading operations. The cargo is regularly shipped and the vessel sails. In the meantime, B sells to C who in turn sells the goods to D on CIF terms. B's bank works at a reduced capacity due to COVID related restrictions and the flow of documents is delayed beyond the expiry of D's letter of credit. In the meantime, the ship arrives at the discharge port and D has no bill of lading to collect the cargo. Laytime under the carriage contract is running and D, worried about the pandemic, decides to terminate the contract for his seller's failure to tender the shipping documents on time.

A pandemic should be treated as a specific 'event' and evaluated in its contractual context on a case-by-case basis. The 'event' itself may be the root cause of a contractual default but it is more often the case that the true reason of a failure or delay in performance is the consequence of the 'event' rather than the event itself.

Example 3. Factory A produces microchips. Factory A supplies Factory B - the maker of 100,000 mobile phones per month, which in turn supplies C - a large retailer of electronic products. One of the employees of Factory A tests positive to COVID-19. The law of the Country in which Factory A is located imposes a precautionary 30 days shut down of every factory, plant or office with ascertained COVID-19 cases. Factory A has to shut down and suspend production. Factory B has 20 employees affected by the pandemic but the law of the Country where its plants are based only requires personal isolation and testing. Production of the phones could go on, but without microchips, production has to be suspended. C is out of phones and cannot deliver them to its customers.

In the last example, COVID-19 had a significant impact for many workers and families, but the contractual 'event' which causes the failure in the supply chain is different for each contract: between Factory A and Factory B the failure to supply is due to a compulsory closure order, between Factory B and C, as well as between C and its customers it is due to a failure in the relevant upstream supply chain. The consequences of such events are to be found in the relevant contract and the law applicable to it.

It would appear that the most common events of default connected with COVID-19 so far have been:

a. Delayed shipment/delivery;

b. Delayed discharge; and
c. Delay in the availability of documents.

As the performance of CIF and FOB contracts is substantially different, the following paragraphs will examine the above listed issues in the separate contexts of CIF and FOB contracts with the aim of highlighting current difficulties and suggesting ways to minimise the negative effects of the coronavirus crisis.

5. CIF contracts

The distinguishing feature of CIF contracts is that "the seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered[29] [on the agreed date or within the agreed period]"[30]; and "contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery[31] to the named port of destination […]".[32] So, not only do the goods have to comply precisely with their description in the sale contract but such description includes (i) the shipment period and (ii) the port of loading, when named in the contract, as well as (iii) in all cases shipment on board a vessel bound for the named port of discharge. Failure to deliver contractual goods[33] on board a vessel bound for the agreed port of discharge[34] within the agreed time[35] is a breach of condition, at least under English law, and the buyer can elect to terminate the contract.[36]

COVID-19 and the restrictions imposed by governments worldwide may seriously affect sellers who may be or become prevented from using a particular jetty, quay or port or may need significantly longer time to receive or load the ship and/or prepare the documents necessary for the ship to end the loading operations.

5.1. Delayed shipment/delivery

In CIF terms, shipment of the goods in accordance with the contract, on board a vessel bound for the contractual destination, *is/amounts to* delivery of the goods (provided relevant documents are tendered in due course). The goods might well be ready for loading alongside the vessel, in full compliance with the contractual requirements, but unless they are physically placed on board the ship, they have not been delivered. By the same token, should the goods be shipped but never arrive at the port of discharge or be delayed on board the vessel, the seller's duty to deliver them would not be affected: these would all be post-delivery 'events' and as such at the risk and responsibility of the buyer. That means a buyer needs to pay the seller in full, against conforming documents, even if goods do not arrive, are short-delivered or damaged in transit. Any redress the buyer may have,

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[29] Incoterms® 2020, A2.
[30] Incoterms® 2020, A1; A2. See also fn. 15, above.
[31] It should be noted that under common law, there is no obligation to agree a contractual port of loading in a CIF contract, see *Scottish&Newcastle v Othon Galanos* [2008] UKHL 11at para. 35 (per Lord Mance). However, when a port of loading is agreed, the place of shipment will be considered a condition of the contract with which the seller must comply strictly.
[32] Incoterms® 2020, A4.
[33] Sale of Goods Act 1979, s. 13; *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower)* [2001] 1 Lloyd's Rep. 341, at [42]; and the discussion at F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020), at 4-016 – 4-024.
[34] *Continental Imes Ltd v HE Dibbie* [1952] 1 Lloyd's Rep 220; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109; and the discussion in F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020), 4-059 – 4-062.
[35] *Hartley v Hymans* [1920] 3 KB 475, at 483; *Bowes v Shand* (1877) LR 2 App Cas 455; and *J Aron & Co v Comptoir Wegimont* [1921] 3 KB 435.
[36] *James Finlay & Co Ltd v NV Kwik Hoo Tong HM* [1929] 1 KB 400.

will be against the carrier and/or its underwriter[37], in a cargo claim under the bill of lading or other transport document.[38] For the seller, as part of its contractual obligations, it is therefore critical that it is able to ensure the timely shipment of goods in accordance with the contract. Such timely shipment will need to be recorded in the shipping document issued at loading: typically, a bill of lading or a seawaybill, and be consistent in timing and content with the contract and with all other documents to be tendered under the contract. These will usually include an insurance policy or, if agreed,[39] other evidence of insurance cover, a certificate of origin, quality etc., depending on the commodity at stake.[40]

COVID-19 is known to have affected the delivery of some cargoes which, although ready for dispatch, could not be shipped in time. This may be due to reduced capacity at the loadport, quarantine restrictions imposed on particular ships, refusal of a particular ship to comply with her charterer's orders to proceed to a port affected by the pandemic, partial or total closures of ports, terminals and jetties etc. In some cases, the delay has not affected the loading operations themselves but rather the preparation and/or production of documents necessary to achieve payment from the buyer. Difficulty in getting surveyors on board to collect samples necessary for certification or delays in handling custom formalities are representative examples of this kind of issues.

Whatever the root cause for the specific non-performance, traders must act swiftly and cooperate to salvage the contract and prevent difficult and expensive litigation. This applies to both CIF seller and buyer as, while it is true that the duty to ship at the agreed time and from the agreed place, if any, is strict and rests entirely on the seller, English law also imposes a general duty on any party who claims damages for breach of contract to mitigate its losses.[41] Should the Incoterms® be incorporated into the contract, they further contain a number of provisions requiring the parties to assist each other and cooperate. At times of hardship, cooperation and flexibility are often connected with concepts like 'business sense', 'reasonableness' and – where relevant – good faith[42], which may help at a later stage in settling disputes by mediation, arbitration, or in court.

Prompt and constructive communication is certainly key at the early stages of an issue.[43] Should the surveyor be prevented from accessing the ship on which the cargo is loaded, the seller should inform the buyer immediately and attempt to find a positive solution. Time of delivery may be extended until samples are collected with an agreement on the costs arising out of the delay (e.g.,

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[37] CIF buyers will invariably be beneficiaries of a cargo insurance policy, one of the documents to be tendered under any CIF contract, both under the Incoterms ® 2020 Rules (under CIF, A5) and at Common law; *Diamond Alkali Export Corp v FL Burgeois* [1921] KB 433; and F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020), [6-001]- [6-092]. If a loss is covered by cargo insurance, it may be the subrogated insurer who brings a cargo claim against the carrier to seek redress.

[38] On the issue of cargo claims under the current pandemic see UNCTAD Briefing Note "COVID-19 implications for commercial contracts: carriage of goods by sea and related cargo claims", UNCTAD/DTL/TLB/INF/2021/1.

[39] Note also that UCP 600 (Art. 28) permits tender of an insurance document other than a policy. Parties agreeing on payment by letter of credit should always ensure that the documentary obligations under the sale contract and letter of credit are aligned.

[40] For a detailed analysis of such documents and their legal requirements see F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020); Chapter 7.

[41] *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm); [2018] 2 Lloyd's Rep 628.

[42] The United Nations Convention on Contracts for the International Sale of Goods (CISG, or Vienna Convention), 1980 does make a reference to "the observance of good faith in international trade" (Article 7). However, the Convention has not been ratified by the United Kingdom and does not apply when English law governs the contract. Moreover, the application of the CISG is normally expressly excluded in CIF or FOB contracts. For the text and status of ratification, see the UNCITRAL website at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.

[43] The contract may provide for specific duties relating to communications in given circumstances. This matter will be discussed further and in more detail in a forthcoming UNCTAD report.

demurrage[44]); samples may be collected on shore with the mutual understanding on the consequences of any non-conformity; or they could be collected by a certified crew member and handed over to the surveyor. Should the vessel be prevented from entering port, alternative loading ports and the necessary extension of the date of shipment may be agreed. Similarly, should the vessel be prevented to discharge at the agreed port, the parties could agree alternative instructions. All this comes at a cost and any agreement reached should provide for a clear allocation of the costs involved as well as an apportionment of liabilities between the parties.

However, in the absence of any such agreement the seller must do what it is required by the contract and the buyer is entitled to insist on the performance agreed upon.[45] This puts the CIF seller in a weaker position unless:

a. It has catered for such occurrence(s) in the sale contract;
b. It can rely on a force majeure clause in the contract;
c. It can rely on a general principle of force majeure contained in the law applicable to the contract; or
d. The contract is frustrated.

5.1.1 The 'event' has been catered for in the contract

It is often the case that the sale contract itself provides a clear solution for one or more specific events. CIF contracts may contain, for example, an extension of shipment clause[46] allowing the seller to delay shipment for a set number of days should a particular event occur.[47] CIF contracts in which the port of shipment is expressly agreed, may contain a clause giving the seller the liberty to ship from an alternative loadport[48] or region; or a clause expressly permitting discharging at an alternative destination.[49] Other clauses may allow the seller to skip one or more deliveries with the option of resuming them within a certain time.[50] And again, some contracts may give the parties the

[44] "Demurrage" is the technical name given to liquidated damages usually agreed for failure to load or discharge within the agreed time. The term is identical to that used in the context of chartering, but demurrage under sale contract may, and usually does, work differently; see C. Debattista, "Laytime and demurrage clauses in contracts of sale – links and connections" [2003] LMCLQ 508; P. Todd, "Laytime and demurrage provisions in sale contracts" [2013] LMCLQ 150; F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020), 8-044-8-045. The parties may be able to agree a time extension in exchange for an undertaking to reimburse or pay for all, or a proportion of, the demurrage accrued.

[45] English law, in contrast to most civil law systems does not recognize a general duty of good faith; documentary duties and time stipulations in commercial contracts are strict and entitle the innocent party to terminate the contract. However, unless contracting parties refrain from invoking some of their legal rights in some instances, performance delays and disruptions related to the pandemic may lead to significant losses and possibly business failures.

[46] E.g., the GAFTA Extension of Shipment Clause reads as follows: "The contract period for shipment, if such be 31 days or less, shall be extended by an additional period of not more than 8 days, provided that Sellers serve notice claiming extension not later than the next business day following the last day of the originally stipulated period. The notice need not state the number of additional days claimed. Sellers shall make an allowance to Buyers, to be deducted in the invoice from the contract price, based on the number of days by which the originally stipulated period is exceeded, in accordance with the following scale: 1 to 4 additional days, 0.50%; 5 or 6 additional days, 1%; 7 or 8 additional days 1.50% of the gross contract price. If, however, after having served notice to Buyers as above, Sellers fail to make shipment within such 8 days, then the contract shall be deemed to have called for shipment during the originally stipulated period plus 8 days, at contract price less 1.50%, and any settlement for default shall be calculated on that basis. If any allowance becomes due under this clause, the contract price shall be deemed to be the original contract price less the allowance and any other contractual differences shall be settled on the basis of such reduced price."

[47] See e.g., GAFTA 100, cl. 20; FOSFA 54, cl. 22.

[48] This is usually done by way of a general reference to the place of shipment as a country, a region or a range of ports: e.g., "North European" or "West Africa".

[49] See e.g., FOSFA 54, cl. 22.

[50] This is not uncommon in long term supply deals where the CIF seller agrees to ship or the FOB buyer to lift a certain quantity every year, in regular instalments which may retain considerable degree of flexibility.

option to cancel performance in full or in part.[51] Other provisions may be relevant in COVID-19 related scenarios, such as those dealing with material adverse change, price adjustment, liability limitations and exclusions, changes in law that may slow down the supply chain, etc. These options may come at a cost[52] but, if available, they should be made use of in order to minimise losses and unlock the situation.

5.1.2 The 'event' is a 'force majeure' event as provided in the contract

Contracts for the sale of goods invariably contain force majeure clauses[53] of varying degree of detail and may also attempt a contractual solution to the situation where the common law doctrine of frustration applies. There is no general principle of *force majeure* in English law and because of this, and the general *contra proferentem*[54] approach which English law adopts towards stipulations which seek to excuse performance-failure in commercial contracts, such clauses tend to contain a detailed list of events which the parties agree may be invoked to excuse a related failure to perform.[55] These typically include act of God, strikes, lockouts, riots, civil commotions and fires.[56] If a party seeks to rely on such a provision, the issue is one of fact to establish whether the event which occurred is covered by one or more of the express exclusions. Once ascertained that the actual occurrence falls within one or more of the listed force majeure events, the contract has to be construed to determine what effect the parties intended the event to have on the affected party's contractual obligation.[57] 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 provide for the contract to be cancelled.[58] 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. In the light of recent decisions, careful consideration by commercial parties of which events are to be relevant and what consequences should result is highly recommended.[59] This will be particularly important to bear in mind in the context of future contracts, the performance of which could be impacted by the ongoing pandemic and related measures.

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[51] Cancelling clauses are common in sale contracts and they are usually attached as optional consequences of some specific events.

[52] As it is the case in the GAFTA Extension of Shipment Clause seen above.

[53] ICC, Force Majeure Clause 2003, ICC Publication No.650, Paris 2004. See cl.19 of GAFTA 100 (Prevention of Shipment Clause) and cl.22 of FOSFA 54 for other examples of force majeure clauses. An example of 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 event specific to the deal concerned and the circumstances of the case. Further information on suitable force majeure clauses dealing with the pandemic is part of a forthcoming UNCTAD report.

[54] 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.

[55] *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.

[56] FOSFA 54 (2008 edn) l.214. See also BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products, 2015 edn, cl. 65; see also Shell International Trading and Shipping Company Limited General Terms & Conditions for Sales and Purchases of Crude Oil, 2010 edn, cl. 34.

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

[58] FOSFA 54 (2008 edn) l.217.

[59] Parties should be careful not to rely too heavily on general "sweep up" wording referring to '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 expressly exclude its application if they do not intend it to apply. 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).

COVID-19 may well be the root cause of the failure to perform, but it is unlikely that a supply contract concluded in 2018 contains an express reference to a coronavirus pandemic as a force majeure event. The list of force majeure events however often includes items such as *quarantine restrictions, acts of princes and rulers, failure of the upstream supply chain* and *other 'events'* which may be the cause of the specific non-performance concerned.[60] Although this list is just indicative of the possible expressions which may be or become relevant to the present COVID-19 pandemic, it is worth evaluating briefly whether any of these listed force majeure events could excuse performance-failure in the current circumstances.

- "quarantine restrictions": failure to ship on time due to the vessel being quarantined should be excused by this force majeure event;
- "acts of princes and rulers" or "act of authorities" are common expressions used to protect the parties from unforeseen restrictions imposed from local governments. This wording may also assist a seller unable to ship cargo from a port in lockdown;
- "failure of supply chain" is a common force majeure event in some trades: again, it may assist a seller unable to deliver cargo from a third party pipeline, should the operation of the pipeline be suspended due to the pandemic.

However, under English law these clauses may prove of little use if the party affected by the force majeure event could have performed its part of the contract notwithstanding the event. It may be difficult to be excused under the quarantine example above if another suitable vessel may have taken the cargo without restriction; or go exempt from liability for not loading at a locked port when the contract allows the seller a range of alternative loading ports. Should the dialogue between the parties not lead to a constructive solution, the party in default should explore with their legal advisors the possibility to rely on one of the listed force majeure events in the specific circumstances surrounding the case concerned. Contracts agreed upon after the beginning of the pandemic should contain carefully drafted force majeure clauses dealing specifically with pandemic events and providing tailor made solutions to this specific global problem.[61]

5.1.3 The law applicable to the contract contains a general principle of force majeure

While English law does not contain a general principle of force majeure,[62] 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-

[60] E.g. Clause 24 of FOSFA 11 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."

[61] At the time of writing, there is no generally accepted standard COVID-19 clause for sale contracts. Since 2015 BIMCO has adopted pandemic clauses for shipping contracts which may serve as inspiration to all those willing to address the issue expressly in their contracts. See e.g., the *BIMCO Infectious or Contagious Disease Clause for Time Charter Parties 2015*, available at https://www.bimco.org.

[62] 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.

performance or default is caused by *force majeure*.[63] It is however often the case that the law 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.

Parties to an international sale contract should not be too quick to rely on any general principle of force majeure they may be accustomed to, for two main reasons: (a) any such principle would only be available if the law applicable to the contract provides for it; the law of the country of shipment would not necessarily be relevant; (b) in any event it is for the court or arbitrator with jurisdiction to decide whether the force majeure principle can be applied.

5.1.4 The contract may be frustrated

In cases in which performance becomes impossible, the contract may be frustrated and both parties are released from their obligations. "[F]rustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract." [64] The global trend in commercial contracts and indeed the default position under English law however, is that in order for a contract to be frustrated, performance must have become absolutely impossible and that a simple difficulty, temporary impossibility or increased costs will simply not be enough.[65]

The general rule is that where the contract contains no provision as to the consequences of impossibility to ship goods as agreed in the contract, or purchase a relevant shipment of goods afloat, the circumstances surrounding the contract will determine whether or not the seller is discharged from its contract on the grounds of frustration. The question is whether, without any fault of either party, performance becomes a practical impossibility or the seller becomes unable to perform, because the circumstances render performance radically different from that which was agreed by the parties in the contract. As Lord Roskill said in *The Nema*,[66] however, "the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains".

Examples of situations where frustration may be considered are sales of perishable cargo where the only ports allowed in the contract are closed; longer term shutdowns affecting drastically specific production facilities; or border closures in cases where alternative supplies do not exist, and goods cannot be shipped within the contract period. But frustration is a remedy of last resort and can only be invoked in extraordinary circumstances: a pandemic – extraordinary as it is – will only be considered sufficient to frustrate a sale contract in very specific circumstances. Much will depend on

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[63] See for instance, the position under the United Nations Convention on Contracts for the International Sale of Goods, 1980, fn. 42, above, which provides in its Article 79 that "a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences." Note also the UNIDROIT Principles of International Commercial Contracts, 2016 (see M. J. Bonell. The law governing international commercial contracts and the actual role of the Unidroit Principles. Uniform Law Review, Volume 23, Issue 1, March 2018, 15–41). They deal with force majeure in the chapter addressing non-performance (Arts. 6.2.1 – 6.2.3), and with hardship in the chapter on performance (Art. 7.1.7.) Under these principles, a successful force majeure claim must prove total impossibility. Hardship alone is no excuse for non-performance, but compels renegotiation and authorizes courts to adapt the contract to take the hardship into account (see J. Perillo, Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts, 5 Tul. J. Int'L. & Comp. 5 (1997)).

[64] *Davis Contractors Ltd v Fareham Urban District Council* [1956] A.C. 696; per Lord Radcliffe.

[65] *J Lauritzen AS v Wijsmuller BV* [1990] 1 Lloyd's Rep. 1; *Atisa SA v Aztec AG* [1983] 2 Lloyd's Rep. 579.

[66] *Pioneer Shipping Co Ltd v BTP Tioxide (The Nema)* [1981] 2 Lloyd's Rep. 239 at 253; [1982] A.C. 724 at 752.

the facts of the case, which may be difficult to establish and be a matter for legal argument and formal or informal dispute resolution.

5.2 Failure of supply chain

Another known issue generated by the COVID-19 pandemic, is default on the part of the CIF seller due to failure of its own upstream supply chain. This may happen both in raw commodities and manufactured goods, although the complexity of some manufactured goods is such that the latter supply chain is naturally more vulnerable.

Some contracts contain provisions specifically dealing with the possibility of an impediment to or a temporary failure of the upstream supply chain. These clauses may allow the affected party to suspend performance downstream, give it the option of an extension on the time of delivery or more commonly simply exempt the party defaulting because of the failure of its upstream supply chain from any liability for such default.[67] Such clauses are usually enforced by arbitrators and courts. However, in the absence of such clauses, failure of supply chain would not normally amount to a force majeure event (unless specifically listed) as it is often possible to find alternative supplies on the market.

A good line of communication upstream and downstream should put all parties in better stead when dealing with unforeseen events such as a pandemic.

5.3 Delay in the availability of documents

In the performance of CIF contracts tendering documents may be as important as shipment of the goods themselves and COVID-19 is known to have affected the ready and timely availability of documents worldwide. Tender of negotiable bills of lading, normally required under CIF and FOB sales to enable the on-sale of the goods in transit, need to be provided in a timely manner to the buyer. In turn, such bills must be presented to the carrier at discharge in order to allow delivery. Should the negotiable bill be delayed at issue or in transmission, it may not be available at disport in good time to allow delivery.[68]

Other documents such as seawaybills (where contractually agreed), certificates of quality, quantity and origin, etc are crucial to a CIF seller who must usually present them for payment to its customer or their bank under a documentary letter of credit. They are also key to a CIF buyer who will need the original documents to clear the goods for import. While the timing to present documents to a CIF buyer can be agreed in the contract with words like “as soon as possible” or “when available” thus leaving the seller a flexible window to procure the right documents for tender, more stringent deadlines such as “latest three days from completion of loading” may not allow much flexibility at all.

In the likely event that banks are involved, the situation maybe even more inflexible with the concurrent deadlines of the stated date for the presentation of the documents and the expiry date

[67] E.g., the GAFTA Extension of Shipment Clause referred to above.

[68] 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.

of the letter of credit[69]. Banks issue letters of credit under the UCP 600,[70] which contain a large number of very detailed rules on how and when documents must be presented: a delay in the presentation or a non-conformity of one or more of the documents required under the letter of credit, could easily compromise the banking side of the transaction and jeopardise the deal altogether.

There have been reports of several cases in which certificates or bills of lading have been delayed significantly during the COVID-19 crisis: 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.

Once again, dialogue is key to resolve unforeseen difficulties on a global scale, and a good line of communication with the customer is essential. Under English law it is safe to assume that every document required by the contract for payment is essential to the seller. Where payment is agreed cash against shipping documents however, the parties are free to negotiate and vary all documentary requirements as well as the timing for documentary tender. In some cases, it may be possible that the inability to put the documents together is foreseen in the contract itself and alternatives are provided. In other cases, it may be arguable that the delay in the production of the necessary documentation is due to a listed force majeure event which would exempt the seller from liabilities arising out of the delay but not necessarily allow the seller to claim payment. Given the uncertainty of the current situation, parties to CIF contracts should consider inserting into their new deals a clause allowing for the possibility of a delay in the production of documents and catering for an appropriate solution should lockdowns happen again. Allowing tender of electronic alternatives to traditional shipping documents may prove decisive to preventing delays in the current pandemic: electronic bills of lading, electronic insurance records and e-certificates[71] have been available for some time.[72] The market reaction to paperless trade has been slow but the leap in security made possible by the advent of blockchain technology and the almost universal use of electronic communications has pushed more traders to opt for e-solutions. The pandemic has certainly offered the opportunity to reflect on the use of paperless transport documents and should accelerate their adoption.

The situation is more complicated when a bank is involved as technically the seller has no contractual agreement with the issuing or confirming bank and has no direct line of communication with them. Should payment be made under a letter of credit governed by the UCP 600 (or the e-UCP[73] for paperless trade), the seller must present all documents required under the LC to the confirming/advising bank by the deadline set out in the LC itself and within the expiry of the credit. The list of documents and the timing for presentation cannot be altered by the bank but must be requested by the buyer and agreed with the issuing and confirming banks. Banks in turn are obliged

[69] International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits (2007 Revision) UCP 600, (ICC Publication n. 600E), Art. 6(e).

[70] UCP 600, Article 14. See www.iccwbo.org. See also fn. 19, above.

[71] E.g., eCO System for Electronic Certificates of Origin, see https://iccwbo.org/resources-for-business/certificates-of-origin/electronic-certificates-origin/.

[72] Electronic bills of lading can be issued under the following systems, all approved by the International Group of P&I Clubs: essDOCS Exchange Ltd "essDOCS", Bolero International Ltd and E-Title Authority Pte Ltd. Most recently two more systems have been approved: Global Share S.A. edoxOnline platform ("edoxOnline") approved on 11 June 2019, WAVE on 23 December 2019, and CargoX Smart B/L™ ("CargoX") on 11 February 2020. See UK P&I Club Legal Briefing 2017 ; 2020 Update Part I , Part II. See also UNCTAD Briefing Note "COVID-19 implications for commercial contracts: carriage of goods by sea and related cargo claims", UNCTAD/DTL/TLB/INF/2021/1.

[73] See https://cdn.iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf

to examine the documents within a period of no more than 5 days.[74] Some banks have worked for months now at reduced capacity and will be subject to the national legislation of the place where the branch concerned is located. It is therefore possible that the law of the country in which the advising/confirming bank is located allows some departures from the strict timeframe imposed by the UCP 600, but this should be considered the exception rather than the rule. Should the seller fail to make a complying presentation within the deadline set by the bank, the bank will normally not honour the credit. Failure to tender documents in accordance with the letter of credit to the bank, may also place the seller in breach of the sale contract and may result in a claim for damages by the buyer. It must be noted that even if the buyer has agreed an amendment to the sale contract itself and agreed e.g., a later presentation of documents, the bank would not be bound by the extension and must honour the letter of credit. It is therefore imperative for the seller whose performance will be affected by COVID-19, to negotiate extensions of both the time of delivery under the sale contract and the time of presentation of document under the letter of credit.

It is worth recalling at this stage that in CIF contracts, any delay affecting the goods after loading is at the risk and responsibility of the buyer, and once the ship has departed her loadport, the seller has performed its obligation to deliver. However, in cases where the seller is also chartering the vessel or the container in which manufactured goods are carried, it may still have a vested interest in the discharge operations to run swiftly and smoothly in order to avoid demurrage (an agreed amount of liquidated damages), which may be due under the charterparty in cases where discharge operations exceed the contractually permitted time. Demurrage is usually recovered from the buyer under the terms of the CIF contract,[75] but the liability of the buyer for discharging within a certain time may also be affected by a force majeure clause or other contractual exclusion, and this may expose the CIF seller to the liability to pay large demurrage amounts to the vessel, while affecting its ability to recover the demurrage (payable under the charterparty) from its buyer.

Again, a good line of communication with both the buyer and the shipping company, may be the only way in which the parties may prevent serious issues in such an unprecedented situation. In fact, any clauses trying to reallocate the liability for delay in discharge in the circumstances would be hard to negotiate and likely to produce unfair results on the weaker party.

A balanced way to apportion such liability may be that of designing the force majeure clause to include declared pandemics and/or epidemics which are likely to occasion severe supply chain/shipping disruptions but ensure that the costs incurred to discharge to an alternative port and/or demurrage paid to the ship should be allocated and possibly shared between the parties. Container demurrage may also become an issue if the operations of a port or terminal are badly affected by the pandemic. Ports will hardly be liable for prolonged detention costs and the parties should consider discussing an alternative apportionment of such unforeseen expenses between themselves and agreeing appropriate terms.

[74] Former versions of UCP provided for banks to have a 'reasonable time' to examine documents. UCP 600 sub-article 14 (b) no longer refers to a reasonable time and limits the examination period to a maximum of five banking days following the day of presentation.

[75] A typical Laytime and Demurrage Clause in a CIF contract would contain two key provisions: (a) a duty to discharge within a certain time from the arrival of the ship; and (b) liquidated damages for breach of that duty. E.g., Cl. 32 of the Repsol General Terms and Conditions for Sales and Purchases of Chemical Products for LPG and Chemical Tankers (available at www.repsol.com) states: "The time allowed to the Buyer for discharge shall be specified in nomination and or Sales agreement between Buyer and Seller. […] If the cargo is not discharged within the time allowed, the Buyer shall pay demurrage to the Seller for the time in excess at the appropriate rate per day or pro rata."

6. FOB contracts

The key feature of FOB contracts is that delivery of the goods happens at the port of loading on board a vessel arranged by the buyer.[76] It is the FOB buyer who has the responsibility to procure the right vessel at the right time[77] and in the right port while the seller must deliver the agreed goods, at the agreed place and time in full conformity with the contract. This type of contract, in its most common variants,[78] requires a limited degree of the seller's involvement in the operational stages of the delivery process but, nonetheless, cooperation between the parties is essential for successful performance.[79]

COVID-19 has impacted on the performance of FOB contracts as much as it has affected CIF sales, but the different allocation of responsibility between the parties in the two different types of deal requires some further reflection.

Failure or delay of the upstream supply chain, delay in the availability of documents, factory and plant closures affect the physical and documentary performance of the CIF and FOB sellers in essentially the same way. Port or terminal closures, quarantine restrictions imposed on ships and crew, unavailability of tonnage for certain routes on the other hand affect the FOB buyer's ability to perform its part of the deal. Moreover, the FOB buyer/charterer will be the party facing the consequences of any delay in the supply of the cargo and/or port closures under the charterparty, at least in the first instance.[80]

Under English law, the respective obligations of the parties to an FOB contract are considered interdependent[81] as delivery can only happen if both seller and buyer cooperate fully to achieve it. The net result of this approach is that the seller will not be in default for failure to load the cargo unless the buyer has fulfilled its part of the deal and procured the right ship to do so, at the agreed place and time.

As discussed above, a pandemic is often not the 'event' preventing the nominated ship from sailing according to schedule: recent events show that vessels are much more likely to be delayed by

[76] Incoterms ® 2020, FOB, A2.

[77] FOB contracts often require the buyer to notify the seller of the nomination of the vessel intended for lifting the cargo according to a rigidly structured time frame. Expected time of arrival (ETA) is also often required to allow the seller to make the necessary preparations.

[78] FOB contracts are flexible instruments and the seller, in the exercise of its freedom, can agree to be more or less involved in the shipping arrangements: see *Pyrene v Scindia* [1954] 2 QB 402; *The El Amria and The El Minia* [1982] 2 Lloyd's Rep 28, and *Scottish & Newcastle Int Ltd v Othon Ghalanos Ltd* [2008] UKHL 11 at [34] where the House of Lords said that f.o.b. embraces: "(a) cases where the buyer arranges and nominates the ship, but the seller ships and takes the bill of lading in his own name as consignor, (b) cases where the seller arranges shipment and takes the bill in his own name as consignor and (c) cases where the buyer arranges and nominates the ship, and the seller ships but the buyer is named in the bill as consignor.… Further, in cases (a) and (b), the seller may be either the only party to the bill of lading or acting as agent for the buyer as a (more or less undisclosed) principal.… In either of cases (a) and (b) the seller may of course prepay the freight, and recoup himself by invoicing the buyer."

[79] This is not the case for a specific FOB variant: FOB with additional carriage services. In this type of FOB sale, it is the seller who makes the carriage arrangements and hence the responsibility for delay falls upon its shoulders. See F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn (London, 2020); at 9-030 – 9-042.

[80] It would be advisable to make contractual arrangements to tackle these issues in both agreements: the sale contract and the charterparty. See UNCTAD Briefing Note "COVID-19 implications for commercial contracts: carriage of goods by sea and related cargo claims", UNCTAD/DTL/TLB/INF/2021/1.

[81] *Tradax Export SA v Italgrani Di Francesco Ambrosio* [1986] 1 Lloyd's Rep. 112 at 117 where the court held that the duties of the parties are "designed to bring about a concurrence of the vessel provided by the buyers being ready to load the contractual goods and of the sellers' obligation to deliver the goods by loading them on board the vessel when so provided in accordance with the contract".

legislation imposing a temporary closure of some ports or parts thereof, strict quarantine restrictions, crew changes or simply severe congestion caused by limitations to port services. The net effect of the structure of an FOB deal is that if the vessel is not available for loading, failure to deliver under an FOB sale is not attributable to the seller, but to the buyer and default, termination and damages may well follow. In addition, while the seller may be entitled to terminate the sale contract if the vessel is not available for loading during the shipment period, the buyer may find itself left with significant costs and obligations related to chartering a vessel (e.g., significant freight).

Once again, prompt and constructive communication is necessary at the early stages of any issue which may prevent or impact on contractual performance. Should the vessel be prevented from entering port, alternative loading instructions together with a revision of the timeframe for performance may be discussed and agreed. Performance may be voluntarily suspended, and any affected lifting window can be rescheduled with or without price adjustments. However, in the absence of any such agreement the law requires the buyer to do what it is required by the contract and the seller is entitled to insist on the performance agreed upon. This puts the FOB seller in a weaker position unless:

- It has catered for such occurrence(s) in the sale contract;
- It can rely on a force majeure clause in the contract;
- It can rely on a general principle of force majeure contained in the law applicable to the contract; or
- The contract is frustrated.

The way in which force majeure and frustration operate in the context of a pandemic have already been discussed in the context of CIF sales. Suffice here to say that while in CIF sales all events preventing or delaying shipment of the cargo impact the seller alone, in FOB sales they impact both seller and buyer depending on the circumstances. Should the vessel be ready to load but the loading operations be impeded by a lockdown, the seller would be in default and hence the party seeking to rely on a force majeure clause. By the same token, should the cargo be ready for loading but the vessel not allowed to proceed to berth it would be the buyer to have an interest in the force majeure/frustration framework of the contract. The successful performance of the contract may depend on other matters, such as the issue of transport documents, export and import licences and/or certifications provided by public or private bodies. In FOB deals, the party responsible for performing these tasks varies from contract to contract and should be clearly identified in each agreement; should these parts of the performance be impeded or delayed by the pandemic, the party who has the duty to perform it, will be seeking to discharge its liability by way of a force majeure device.

The flexibility of FOB contracts and the vast array of variations currently in use in the global trade makes the drafting of the contract itself as well as the preparation of specific, balanced and detailed pandemic clauses particularly important. Even more so, because of the interdependency between the duties of seller and buyer and the consequential interdependency of their breaches which may make it more complex to reach a fair allocation of responsibility between them.

Example 4: B, an FOB buyer, has nominated the vessel V to lift the cargo. On arrival, V tenders the notice of readiness but is immediately quarantined following reports that the crew is infected. S, the FOB seller is ready to load but cannot do so as the vessel cannot berth. By the same token, S is unable to obtain from the master the bill of lading it needs to tender to its bank for payment. Time passes by and the loading window closes; a couple of days later the letter of credit expires. The vessel is released from quarantine and asks for permission to berth.

Traders using FOB terms should (a) carefully allocate between themselves all the duties required for correct performance of the deal; and (b) add a clear and balanced "Pandemic Clause" setting out in detail (i) what a 'pandemic' is for the purposes of triggering the operation of the clause;[82] (ii) what the effect of the pandemic is on the mechanics of the contractual performance; and (iii) the exact allocation of costs arising out of the pandemic between the parties to the contract. When drafting such clauses, the parties should remember that the shipping company operating the vessels involved in the performance of the contract is not a party to the sale contract and will not be affected by the clause.

7. Other trade terms

This briefing note is dedicated to CIF and FOB sales, i.e., sales of goods the delivery of which takes place on board seagoing vessels at the port of loading. The considerations underpinning it, however, apply to any form of international trade deal across the Incoterms®, from Ex Works (EXW) to Delivery at Point (DAP). What changes from term to term, is the point of delivery and the responsibility for arranging and paying for carriage and insurance. When performance is impeded in any way by a COVID-19 related event or measure, the parties must properly identify (a) the party who owes the specific obligation affected; and (b) the specific event which is creating the impediment. Once these two types of issues have been identified and agreed upon by the parties, it should not be difficult to identify the legal framework on which an appropriate solution can be found, and termination and potentially costly and lengthy litigation avoided.

The same event will impact different trade terms in different ways. For example, should an executive order of a government be issued to close down port X, all transit through port X becomes temporarily impossible. This is a significant issue in CIF and FOB sales because the agreed port of loading is considered part of the description of the goods and time of delivery is an essential term of the contract.[83] The same port closure however has a much less relevant impact on EXW or DAP terms, contracts in which the place of delivery is at the seller's or buyers' premises, respectively, and in which the route for the carriers to follow is not normally established in the contract. In the circumstances, an EXW seller would not be able to rely on the most accomplished force majeure clause simply because the closure of port X does not normally affect its ability to comply with its duty to lift the cargo from the seller's warehouse: the seller would have to do so going through a different port. The same cannot be said for the DAP seller whose performance to deliver at a specified place would be heavily affected if such place was port X and an alternative deliver would need to be agreed upon by both parties.

8. Insolvency

The COVID-19 pandemic has caused or significantly contributed to a large number of insolvencies so far, and more are likely to follow. It is therefore possible that one or more players in the supply chain have ceased or will cease trading within the timeframe of a long-term supply contract or even between the conclusion and the performance of a spot deal. This is nothing new and the fact that the pandemic and/or any form of governmental restriction may have had a role to play in the insolvency, does not change the impact of insolvency proceedings on the contract of sale.

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[82] E.g., should it be a proper pandemic or is an epidemic enough? Should there be a formal declaration by the WHO? Is the pandemic enough to trigger the clause or is it necessary for the pandemic to affect the contract, the parties, or else?

[83] In commodity trading it is possible for the buyer to lift cargo from more than one port, usually – but not necessarily – in the same country. Should one of the loading ports be affected by a total lockdown, performance may still be unaffected as delivery can be performed in full, from the other port(s). However, the exact wording of the delivery clause is crucial in the circumstances and legal advice must be sought on the relevant wording and its effects.

This raises the different but related issue of whether it is desirable as a matter of public policy to help avoid insolvencies arising at a large scale and the associated economic repercussions, particularly when the economic stress to the system is caused by governmental interventions designed to tackle a public health crisis. In the current pandemic, the economic effects of closures and restriction has been at the forefront of parliamentary discussions and financial support has been made available worldwide. This has not and will not be enough to salvage all businesses, but it may provide a small buffer in the short term. Both parties to the sale contracts should show restraint in exercising their contractual rights of termination and damages and show some degree of solidarity in a usually harsh and competitive environment.

Where feasible, governments should encourage such restraint and flexibility with tax breaks and/or financial support to ensure the preservation of small, medium, and large businesses alike. Insolvency is at times catered for in the contract as an 'event of default' and its contractual consequences between the parties may well be contained therein. However, the real cost of insolvencies can only be assessed against the commercial and social background of the company, its geographical location, and its market reach: solidarity at this difficult time, should be considered paramount.

9. Dispute resolution

In this briefing note, reference has been made on several occasions to the need of the parties to communicate and cooperate effectively between themselves making every effort to overcome the difficulty an event such as a pandemic may cause. It is believed that most of the issues which COVID-19 has generated in international trade can be resolved through open dialogue and responsible commercial practices. Should this fail, the parties should attempt resolving their differences through the services of a professional mediator who may ease dialogue and facilitate a reasonable outcome. Arbitration and litigation should be considered measures of last resort and not initiated lightly.[84] A global pandemic of this proportion is an unprecedented event in the history of modern trade.

The number, variety and complexity of today's global transactions make these disputes better solved among traders who have a deeper understanding of the market and the short, medium, and long-term consequences of the pandemic in today's trade trends.

10. Key points and conclusion

A large proportion of the world trade has been affected in some degree or form by the COVID-19 pandemic and both the cause and the effects of this disruption are likely to stay for some time. There is no general recipe capable of addressing all possible effects the pandemic may have on individual contracts; however, in this briefing note, a number of issues have been highlighted for the purpose of drawing the parties' attention to potential consequences and stimulate dialogue and discussion.

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

[84] Where legal or arbitral proceedings are initiated, their forum/seat may have an impact on progress, due to various restrictive entry and other measures that may be in place due to the COVID-19 pandemic. In these circumstances, parties could also consider arranging for witnesses to give evidence via video link or agreeing postponement to any hearing date/deadline subject to permission from the courts/tribunals and the applicable arbitral rules.

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. 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. While a clause suspending all time terms in the contract could be a solution in the metal business, it may not work with perishable cargo and so on.

Trade associations should consider using their position to provide advice to regional, national, and local governments as well as ad hoc mediation and advisory services for the industry, in an attempt to contain and manage some of the commercial effects of the pandemic. They have the resources and sectoral know-how to draft commodity specific clauses allocating the risks, costs and liabilities typically arising from business interruption in their sector. Trade associations, in fact, are best placed to understand the difference between legal obstacles and practical difficulties arising in their specific niche and are likely to produce more relevant codes of practice and advice. However, every company is different, and every deal is in many ways unique; business relationships are extremely important in international trade and must be preserved by each individual player.

One issue which has clearly come to the market's attention is that of delay in documentation which, it is hoped, will provide an impetus for the more widespread adoption by commercial parties of secure electronic solutions that are already available and accepted by the market.

Before rejecting late shipments and/or documents clearly affected by the pandemic or seeking to excuse performance-failure on the basis of force majeure or frustration a party should ask itself:

a. Is rejection/excusing performance the most appropriate remedy for this deal, or can the deal still work for me?
b. Is rejection/excusing performance the most appropriate way to deal with my provider/customer in the circumstances? Will it hurt my reputation?
c. Is my reaction precluding the application of tax breaks or other form of governmental support my company would otherwise be eligible for?

Banks should also be considering whether providing some degree of flexibility and/or lobbying governments for some intervention allowing them to support their customers, big and small, may be necessary and feasible.

All players should assess the costs and risks brought to light by this pandemic and increase their level of preparedness for the future. To this end, commercial parties may wish to consider taking the opportunity to adjust their practices, to make better use of modern technology to prevent disruptions and allocate fairly the risks arising out of unforeseen and serious events, thus helping to protect the essential flow of goods across all trade routes.