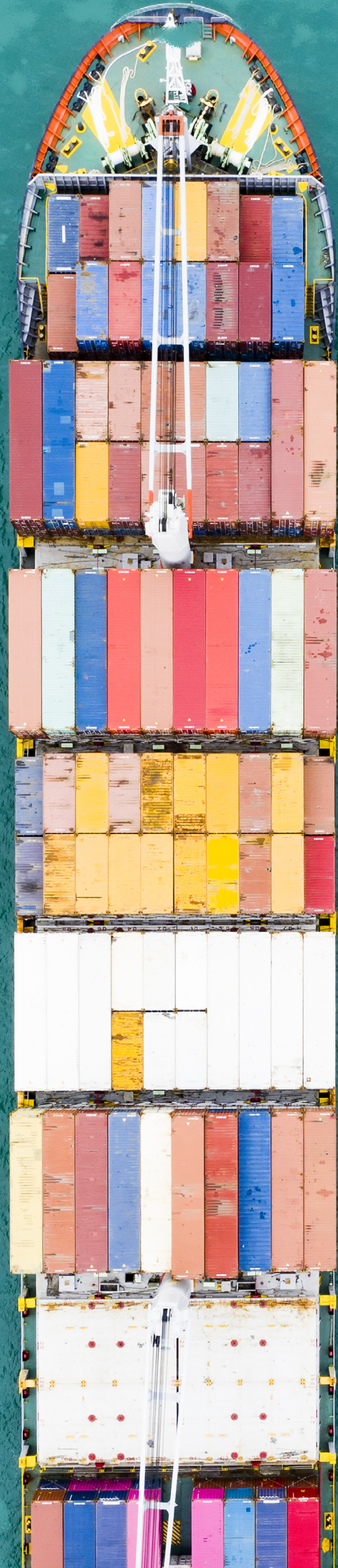
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

COVID-19 IMPLICATIONS FOR COMMERCIAL CONTRACTS

CARRIAGE OF GOODS BY SEA AND RELATED CARGO CLAIMS



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COVID-19 RESPONSE

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Note

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A related briefing note on "*COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms*" (UNCTAD/DTL/TLB/INF/2021/2), 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
ICC	International Chamber of Commerce
MSC	Mediterranean Shipping Company
P&I Club	Protection and Indemnity Club

1. COVID-19 and the carriage of goods: background and context

The smooth flow of international trade depends entirely on the transport chain: adequate and timely supplies to manufacturers and efficient capillary distribution chains are essential ingredients of any successful business model. The recent and ongoing Coronavirus outbreak, together with the measures many countries are adopting to bring the pandemic under control, are creating significant impediments to transport systems and supply chains which are facing unprecedented challenges on a global scale.

This challenge hits the global trading system at a juncture in which efficiency is imperative and movement of goods and provision of services on a "just-in-time" basis are the cornerstones of success for public and private service providers alike.[1] While the pandemic and related measures are clearly temporary in nature, the effects on international trade are potentially important, with longer-term repercussions. Paperless transactions are already possible but not yet fully accepted in large sections of the transport industry while automation and robotics in port services are not yet playing a sufficient role to secure the network from interruption. It is likely that the pandemic will boost the development of technology and increase its use in the very short term, and collaboration, coordination, and cooperation among public and private stakeholders at all levels is improving, but for the time being significant related challenges remain.

The purpose of this briefing note is to illustrate some of the implications of the Coronavirus pandemic for commercial contracts on carriage of goods by sea and related cargo claims, and to identify a number of common legal and commercial issues arising from it. Some approaches to addressing these issues will also be suggested with the purpose of encouraging discussion between the affected parties and stimulating preventive measures for future deals.

2. The complex structure of carriage arrangements

International trade in commodities at the current scale is only possible because of modern shipping and a well organised logistics chain.[2] The availability of the right type of tonnage at the right time and in the right place is crucial for cargo to travel seamlessly between continents and the proper management of the chain is a matter of paramount importance for traders[3], trade associations[4] and national authorities alike.

When the cargo sold is to be carried by sea, performance of a sale contract does require complex transport arrangements which either the seller or the buyer must necessarily plan and organise. For instance, where the sale is made on FOB terms[5], the buyer must make or procure a contract of carriage to enable the loading of the cargo within the agreed shipment period on board a vessel

[1] For a recent example of the European effort towards the efficiency of port services see the Sea Traffic Management Project on which M. Tsimplis, F. Lorenzon, *"Just in time" and ahead of its time: the BIMCO Sea Traffic Management Clause for Voyage Charterparties* [2018] LSTL 18 (10) pp. 1-4.

[2] See also "COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms", UNCTAD Briefing Note UNCTAD/DTL/TLB/INF/2021/2.

[3] Traders of all sizes are affected by the pandemic, from major players to small exporter and importer.

[4] Trade organisations such as GAFTA (the Grain and Feed Trade Association, www.gafta.com), FOSFA (the Federation of Oils, Seeds and Fat Associations, www.fosfa.org) and the many other industry trade groups, business associations, sector associations or industry bodies in the market.

[5] F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn. (London, 2020); see also "COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms", UNCTAD Briefing Note UNCTAD/DTL/TLB/INF/2021/2.

capable to reach the port of loading and receive the agreed cargo.[6] Depending on the type and size of the cargo this means either booking space on board a container vessel or hiring a whole ship fit and staunch to receive the cargo in question; this often requires lengthy negotiations through specialist brokers using complex standard forms and exposes the FOB buyer to duties and liabilities arising out of charterparties and the law applicable to them. When the cargo is sold on CIF terms, very similar duties and responsibilities arise for the CIF seller, who must arrange the shipment of the cargo on board a suitable vessel bound for the agreed port of discharge. This may at times require one or more transhipment stops or even ship-to-ship transfers, all risky and complex shipping operations.

Should the contract be agreed on DAP (Delivery at Place) terms, the seller would also need to organise on-carriage from the port of discharge to the agreed point of delivery, including all formalities and logistical issues in the country of delivery.[7] Often the vessel is only needed for one voyage,[8] sometimes for a series of voyages and more rarely for a period of time to allow the fulfilment of large supply contracts.[9] This translates into the use of different types of charterparties, tailormade to fit the need of the charterer and its downstream market. The same ship may indeed be performing different charterparties at the same time: she may have been let on a long-term time-charterparty, then chartered out on shorter time charters deals, and then again sub-chartered on voyage and sub-voyage charters, to carry a particular shipment or a number of smaller consignments.

Whichever the arrangement between owners and charterers, shipowners will invariably issue a bill of lading[10] for every cargo loaded onto any ship. Similarly, in the context of liner carriage, typically used for the carriage of containerized manufactured cargo, where no charterparty is in place, a bill of lading will be issued by the carrier upon receipt and shipment of the cargo. The bill of lading is an extraordinary document[11] as it performs three functions:[12] it is a receipt for the goods shipped, a record of the terms of the contract of carriage and a document of title at common law, providing the lawful holder of the document with the exclusive right to demand delivery of the goods from the carrier upon their arrival at the discharge port. It is the document of title function of the bill of lading, which makes it a key document in international trade, enabling documentary sale of goods and embodying the exclusive right of access to the goods. It is against tender of the bill of lading (in accordance with the contract) that the seller is able to claim payment,[13] and the buyer/receiver

[6] See International Chamber of Commerce, *Incoterms 2020: ICC Rules for the Use of Domestic and International Trade Terms* (ICC 2019), ICC publication n. 723E, CIF Term, A2; F. Lorenzon, Sassoon on CIF and FOB Contracts, 7th edn. (London, 2020); M. Bridge (Ed.), Benjamin's Sale of Goods, 10th edn. (London, 2017).
[7] Incoterms 2020, DAP Term, A2.
[8] This is usually achieved by chartering the vessel under a single-voyage charterparty or under a time-trip charterparty for