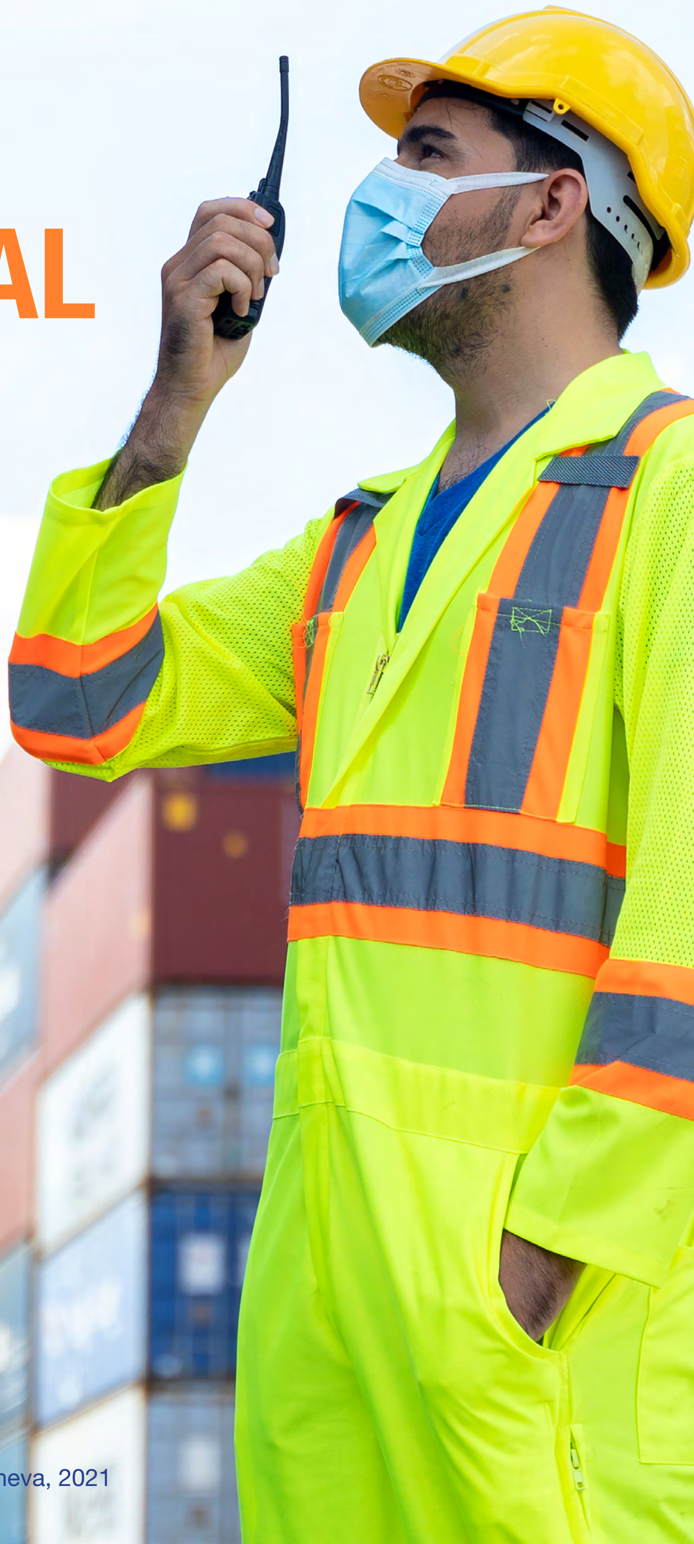
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

COVID-19 IMPLICATIONS FOR COMMERCIAL CONTRACTS

INTERNATIONAL SALE OF GOODS ON CIF AND FOB TERMS



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RESPONSE

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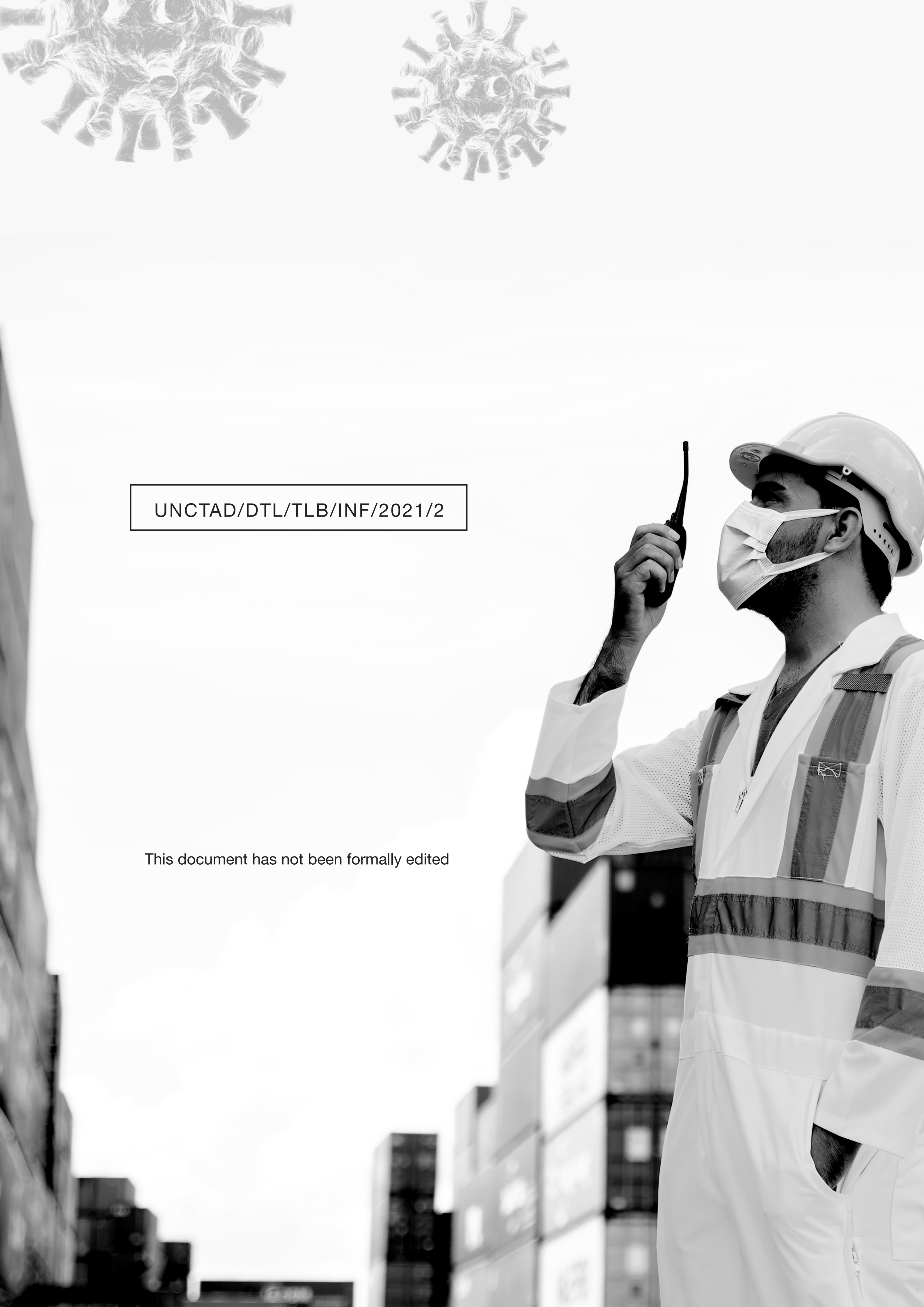

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Note

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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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Contents

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

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[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