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CoronAdvice



covid-19 from a Trade Finance perspective

By the same author:

UCP 600 Transport Documents (2012)
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In Danish language:

Remburs -en introduktion (2012)
Anfordringsgaranti og Standby Remburs -en introduktion (2013)
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Jepper Depper - Tristan og Den Blå Bold (with Ketty Sindberg) (2016)
Der Er Et Fort Her (2019)
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Under the name Kim Christensen:

Svimmelhedstid, poesi (2006)

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1: Introduction

A novel coronavirus outbreak was first documented in Wuhan, Hubei Province, China in December 2019, and has since spread globally, resulting in the 2019-2020 coronavirus pandemic.

The pandemic has had severe consequences. Many countries went into various kinds of lockdown. Businesses went bankrupt. Governments tried to support their country with different kind of aid programs. The consequences of the pandemic cannot be underestimated - and many people have not - and hopefully will never again - experience anything like that in their lives.

Also, in respect of the Trade Finance products i.e. the Documentary Credits, Collections and Guarantees the pandemic has had consequences. Beginning April, the International Chamber of Commerce (ICC) even published a 17 pages guidance document for the purpose of offering guidance to the Trade Finance industry describing the effects of the situation based on the applicable rules, i.e. UCP 600, URDG 758, URC 522 and ISP98 - and well as the ICC e-rules eUCP v 2.0, eURC v 1.0 and URBPO¹. This document is included in this book as appendix 1.

In fact, within the Trade Finance industry the ICC rules have been heavily debated; and in that regard much insight and knowledge has been shared between the practitioners. On a personal level, I started publishing the “Icviews CoronAdvice” in the Icviews blog². I must admit, that when writing this blog, I felt that my knowledge and experience really mattered, and that I actually was able to help people in the different kind of situations that arose during the pandemic. In other words; in some strange way, this horrible

virus offered a new dimension and meaning for me personally; and make no mistake: I learned a lot from the process. Although the blog posts were aimed at the coronavirus pandemic, the information actually apply equally to other situations.

This is the foundation on which this book has been written: Between the blog posts, I decided to collect them as well as some of the articles published in the LCM Newsletter and include them into this book. Of course, the book also contains previously unpublished material, just as I am proud to include 2 guest chapters; i.e. chapter 17 and 18. In that respect I would like to thank A.T.M. Nesarul Hoque and Vinod Elambilan Padinhere for allowing their fantastic articles to be included into this book. Their insights and knowledge add great value to the book and complete the overview of the covid-19 crisis from a Trade Finance perspective.

Also, I would like to extend a “thank you” to the ICC Banking Commission, in particular Olivier Paul³, for allowing the two ICC guidance documents regarding covid-19 and UCP 600 article 35 to be re-published in this book.

The already published articles have of course been edited to fit the purpose and flow.

I would also like to point the attention to chapter 16: The covid-19 Chronicles, which aims to capture some of the main covid-19 events in some kind of chronological order seen from a Trade Finance perspective

Although I hope the world will never experience anything like the coronavirus pandemic again, I do hope that the Trade Finance community will benefit from the knowledge gained during the pandemic. This being when issuing Documentary Credits and Guarantees, when advising

customers, when doing Trade Finance training – and not least when the relevant rules are being revised. It is my hope that this book will help in this regard.

Kim Sindberg, Køge, August 2020

Ps. The picture on the cover of this book is taken by Martin Henriksen 2 April 2020. Martin lives in the heart of Copenhagen. During March and April, he posted a number of pictures on Facebook showing the empty roads and squares in Copenhagen. Basically, Copenhagen looked like a ghost town during that period. I would like to thank Martin for allowing his picture to be on the cover of this book.

¹ https://iccwbo.org/publication/guidance-paper-on-the-impact-of-covid-19-on-trade-finance-transactions-issued-subject-to-icc-rules/?_cldee=a2ltQGtpbXNpbmRiZXJnLmNvbQ%3d%3d&recipientid=contact-218bca396f30e911a9a7000d3ab38ab1-a1cabf87d7364a1b9e1ad1c1329f62fe&esid=412e4c4f-c795-ea11-a811-000d3abaad31

² www.lcvIEWS.com

³ Director and Finance for Development until his retirement end June 2020

2: Force Majeure part 1

Originally published under the title: [Icviews CoronAdvice #1: Is this Force Majeure?](#)⁴

The intention of this chapter and the following is to discuss whether or not the covid-19 situation is a Force Majeure situation.

Force Majeure means “superior force” and is broadly used to describe an event or effect that cannot be reasonably anticipated or controlled.

However, for the purpose of trade it is a clause in an agreement or contract describing the consequences of Force Majeure events (defined in the agreement) for the purpose of the agreement. This means that a party claiming Force Majeure would need to prove that their ability to meet the contract was “impaired” or made “impossible” due to an event described in the contract.

For that reason, Force Majeure takes the outset in 1) what has happened and 2) what has been agreed. This is the case for agreements between the buyers and the sellers. However, it is also the case for Trade Finance transactions, as each of the Trade Finance practice rules (UCP 600, URDG 758, URR 522 and ISP98) include articles that address Force Majeure situations.

The Million Dollar question is if the covid-19 virus is a Force Majeure situation. There is no doubt, that the situation is generally seen as a Force Majeure event. It is even reported that (as an example) China has issued a record number of “Force Majeure certificates” in an attempt to exempt local

exporters from fulfilling contractual agreements with overseas buyers due to the coronavirus outbreak.

However, for the purpose of the agreements, contracts – and Trade Finance rules it will depend on the consequences for the actual transaction.

All of the Trade Finance rules (UCP 600, URDG 758, URR 522 and ISP98) include articles that address Force Majeure situations. ISP98 takes a bit different approach as it addresses the situation where on the last business day for presentation the place for presentation stated in a standby is – for any reason – closed.

Common for all, is that they assume that the business of the affected bank is interrupted and/or that the bank is closed for business. There is only little practice regarding this. However, it should at least be so that the effect of the interruption is that presentation of documents / demands, examination of the documents / demands as well as payment are prevented by the situation.⁵

The potential consequences of a Force Majeure event for the purpose of the Trade Finance rules vary a lot. For documentary credits (subject to UCP 600) a bank that has been closed due to a Force Majeure event, will not, after it re-open for business, honour or negotiate under a documentary credit that expired during the Force Majeure event. The other extreme is Standby Letters of Credit (subject to ISP98) where the last day for presentation is automatically extended to the day occurring thirty calendar days after the place for presentation re-opens for business. For Documentary Collections the issue is a bit different, as there is no undertaking by a bank. Graphically it could look like this:



In the covid-19 situation most banks, if not all, have activated their contingency plans to support the customers business. This is the logic and reasonable approach. Likewise, even in the situation where a country is in lockdown (India as an example), the banks often continue to operate, as banking is considered critical services.

As long as a bank is still operational, it is not likely that such bank would be able to successfully call Force Majeure.

Whether or not the covid-19 situation is a Force Majeure event according to the Trade Finance rules is unclear - and will most likely only be answered if a case affected by the lockdown is taken to a court of law.

Takeaways:

- All of the Trade Finance rules include articles that address Force Majeure situations.
- The Trade Finance rules all assume that the business of the affected bank is interrupted and/or that the bank is closed for business.
- The potential consequence of a Force Majeure event for the purpose of the Trade Finance rules varies a lot.

- Whether or not the coronavirus is a Force Majeure event according to the Trade Finance rules is unclear – and will most likely only be answered if a case affected by the lockdown is taken to a court of law.

⁴ http://www.lcvviews.com/index.php?page_id=782

⁵ This at least is the practice for demand guarantees subject to URDG 758. See “Guide to ICC Uniform Rules for Demand Guarantees URDG 758” (2011) by Dr. Georges Affaki and Professor Sir Roy Goode QU. Chapter 26.4, page 373.

3: Force Majeure part 2

Originally published under the title: [Icviews CoronAdvice #2: Is the coronavirus a Force Majeure event?](#)⁶

The intention of this chapter and the previous is to discuss whether or not the covid-19 situation is a Force Majeure situation.

As explained in the previous chapter all of the Trade Finance rules (UCP 600, URDG 758, URR 522 and ISP98) include articles that - in one way or the other - address Force Majeure situations. Those - in broad terms - list the events in scope for the relevant articles.

What are listed in the rules are the following:

	UCP 600	URDG 758	URR 522	ISP98
Acts of God	X	X	X	
Riots	X	X	X	
Civil commotions	X	X	X	
Insurrections	X	X	X	
Wars	X	X	X	
Acts of terrorism	X	X		
Any strikes or lockouts	X		X	
Any other causes beyond its control	X	X	X	
Place for presentation is closed on the last business day for presentation (Any reason)				X

As can be seen, pandemics (as the coronavirus has been labelled by the World Health Organization) are not on the list of events mentioned.

For ISP98 there is no doubt that if a bank is closed on a business day due to the coronavirus, then rule 3.14 will apply as it refers to “any reason”.

For the UCP 600, URC 522 and URDG 758, the good question is if pandemics can be classified as “any other causes beyond its control”.

As with anything relating to Force Majeure, there is no black and white answer.

However, it must be assumed that:

1. The fact that the coronavirus has been labelled and pandemic by the World Health Organization and
2. that there are in place governmental regulations intended to contain the covid-19 outbreak, will make it easier by a bank to invoke a Force Majeure clause referring to “any other causes beyond its control”.

The above question however, will most likely only be answered if a case affected by the lockdown is taken to a court of law

Takeaways:

- All of the Trade Finance rules include articles that address Force Majeure situations, and in broad terms list the events in scope for the relevant articles.
- For ISP98, if a bank is closed on a business day due to the coronavirus, then rule 3.14 will apply as it refers to “any reason”.
- For the UCP 600, URC 522 and URDG 758, the question is if pandemics can be classified as “any other causes beyond its control”.

⁶ http://www.lcvviews.com/index.php?page_id=783

4: ICC Rules on Force Majeure

Originally published in the “LC Monitor – Trade Services Update” – Volume 22, Issue 1, January-March 2020.⁷

The purpose of the below is to outline the potential consequences of a Force Majeure event for the purpose of the ICC rules applicable to the Trade Finance products.

In general, the Force Majeure articles in the ICC rules are disclaimers (with the exception if ISP98) – meaning that the bank affected by the Force Majeure event assumes no liability or responsibility for the consequences arising out of the Force Majeure event.

Naturally the rules are drafted to match the product in question. Common for all is that – in order for Force Majeure to be “activated” the business of the affected bank must be interrupted. This is generally understood so that the affected bank is closed for business due to a Force Majeure event.

The extreme consequence of a Force Majeure event is that the affected bank does not honour, negotiate or pay – where it is otherwise obligated to do so.

Disclaimers and notes:

Whether a bank can call Force Majeure under the applicable ICC Rules will rely on a legal judgement, based on the actual facts of the case. In other words, if the below is tested in a court of law the outcome could potentially be different than listed below.