

Trade Finance, the coronavirus And Force Majeure



This Trade Finance Newsletter aims to view the consequences of the coronavirus from the perspective of the Trade Finance rules and practices.



There is currently a tragic outbreak of respiratory illness caused by the coronavirus, now affecting all parts of society in most countries.

For the purpose of the Trade Finance products (Documentary Credits, Collections, Guarantees and Standby Letters of Credit) there are various consequences – and questions relating to the situation. The purpose of this Trade Finance Newsletter is to address these consequences – and questions.

Kindly note that the information given in this Trade Finance Newsletter is based on the information currently available; taking into account that situation changes and evolves from day to day.

About Force Majeure

Many of the questions asked relate to whether or not the coronavirus 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 one of the events agreed in the contract – and otherwise based upon the “Force Majeure clause” in the contract. In other words – Force Majeure takes the outset in 1) what has happened and 2) what has been agreed. This applies to both the agreement between the buyer and the seller. However, it applies equally to the applicable Trade Finance rules based upon the relevant product.

Force Majeure or not – and why is it important?

A Force Majeure clause (in an agreement or rules) is often a “disclaimer clause”; i.e. a clause describing a situation where the party may disclaim liability or responsibility for the consequences of the Force Majeure event.

For that reason it may make a significant difference if there is “Force Majeure for the purpose of Trade Finance”.

We will look at some specific case studies.

However, first of all an evaluation if the coronavirus is Force Majeure for the purpose of Trade Finance.

Is this Force Majeure for the purpose of Trade Finance?

As indicated in the opening, whether or not there is Force Majeure for the purpose of Trade Finance will depend on the applicable rules.

First of all it is important to understand that also for Trade Finance transactions subject to ICC rules, it will require a court of law or a government or regulatory authority to “declare” Force Majeure.

However, for the relevant rules there are Force Majeure (or “Closure on a Business Day”) provisions. Those are drafted to support the product in scope and consequently vary greatly and will yield different results for bank undertakings. Common for UCP 600, URR 522 and URDG 758 is that they all take outset in an interruption of the business of the affected bank for the purpose of the Force Majeure events described in the article.

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.

Here is a short overview.

UCP 600 – Documentary Credits

UCP 600 Article 36 (Force Majeure):

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.

A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.

The last paragraph is important to mention as it states that upon its (the banks’) resumption of business (following the Force Majeure situation), the bank would not be obligated to honour or negotiate a Documentary Credit that expired during the interruption.

URDG 758 – Demand Guarantees

Excerpt from URDG 758 Article 26 (Force Majeure):

a. In this article, "force majeure" means acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor or counter-guarantor that interrupt its business as it relates to acts of a kind subject to these rules.

b. Should the guarantee expire at a time when presentation or payment under that guarantee is prevented by force majeure:

[...]

URDG 758 Article 26 (Force Majeure) has a similar approach to Force majeure as UCP 600. A main difference is that it covers more detailed scenarios (e.g. where a complying demand under the Guarantee is presented before the Force Majeure but not paid because of the Force Majeure) and provides for a time extension for presentation of up to thirty days from the Guarantee's expiration date.

URC 522 – Documentary Collections

URC 522 Article 15 (Force Majeure):

Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars, or any other causes beyond their control or by strikes or lockouts.

As can be seen from the above, the content is much like the first paragraph of UCP 600 article 36. Logically it does not describe the issue of "expiry" (as there is no expiry date in a Documentary Collection). Likewise, it does not touch upon the banks obligation to honour or negotiate (as Documentary Collections obligation does not obligate banks to do that).

ISP98 – Standby Letters Of Credit

ISP98 Rule 3.14 (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation)

a. If on the last business day for presentation the place for presentation stated in a standby is for any reason closed and presentation is not timely made because of the closure, then the last day for presentation is automatically extended to the day occurring thirty calendar days after the place for presentation re-opens for business, unless the standby otherwise provides.

b. Upon or in anticipation of closure of the place of presentation, an issuer may authorise another reasonable place for presentation in the standby or in a communication received by the beneficiary. If it does so, then i. presentation must be made at that reasonable place; and

ii. if the communication is received fewer than thirty calendar days before the last day for presentation and for that reason presentation is not timely made, the last day for presentation is automatically extended to the day occurring thirty calendar days after the last day for presentation.

ISP98 does not specifically address the issue of "Force Majeure". Rather, ISP98 addresses any situation whereby a bank is closed on a day it would otherwise be open.

Rule 3.14 provides the beneficiary the opportunity to present documents within 30 days following the bank's reopening. This regardless if the coronavirus could be considered a Force Majeure situation.

On the basis of the above, the question that is relevant to ask is if the affected banks have been closed for business.

As banks are generally seen as critical services, they have – so far – been exempted from the lockdowns. What we have seen so far are problems in getting documents to and from the affected banks (e.g. due to interruption of courier services). We have seen delays in payments. We have seen delays in delivering the ordered goods (e.g. in India a main part of transport has been suspended). What we have not seen so far (and hopefully will not) is that banks have been closed due to the corona virus.

In other words: So far there is no intel suggesting that any of the articles have been "activated".

Trade Finance scenarios

Although the coronavirus situation is not (or may not be) Force Majeure, the situation is still troublesome – to say the least, and of course has different consequences. Below are some cases for the purpose of describing the consequences based on the current situation.

Case #1	Guarantee issued by a bank in a country in lockdown – advised by Nordea
<p>The first case is a Guarantee issued by a bank in a country in lockdown – and advised to the beneficiary via Nordea. In this case, if there is a demand, such must be made to the Guarantor – at the place of issue – on or before expiry. In essence, if it is not possible to present the demand to the guarantor timely – the demand may be rejected.</p> <p>If the Guarantee is silent as to whether an electronic or paper demand must be made – then a paper demand must be presented.</p>	
<p><i>Issues to consider for the Guarantee beneficiary:</i></p> <p>1: Consider the required content and form of the demand. If there is, or may be, a problem in presenting the demand within expiry, check if it is possible to amend the Guarantee so that it is possible to make an electronic demand and/or</p> <p>2: Consider if it is possible to extend the validity of the Guarantee.</p>	

Case #2	Guarantee issued by Nordea – advised to a beneficiary in a country in lockdown via their bank
<p>The second case is a Guarantee issue by Nordea – and advised to the beneficiary in a country in lockdown via their bank. In this case, if there is a demand, such must be made to Nordea on or before expiry. In essence, if it is not possible to present the demand to Nordea timely – the demand may be rejected.</p> <p>If the Guarantee allows for an electronic demand, then such electronic (complying) demand will obligate Nordea to pay.</p>	
<p><i>Issues to consider for the Guarantee applicant:</i></p> <p>Connect with the counterpart (Guarantee beneficiary) to discuss the potential consequences caused by the coronavirus situation.</p>	

Case #3	Export Documentary Credit issued by a bank in a country in lockdown
<p>The third case is a Documentary Credit issued by a bank in a country in lockdown – and advised to the beneficiary via Nordea (who is nominated bank).</p> <p>If a complying presentation is made to the nominated bank (in this case Nordea) – then the risk of documents lost or delayed in transit is on the issuing bank.</p> <p>This means that if a complying presentation is made to the nominated bank (=Nordea) then the issuing bank must honour even if the documents have been lost in transit (or delayed) between the nominated bank and the issuing bank. There may be a problem in forwarding the documents to the issuing bank. Nordea will do its best to agree with the issuing bank on how to solve that. In essence, if the instructions in the Documentary Credit on how to forward the documents do not work, then the issuing bank must provide fresh instructions.</p> <p>If the presentation is not complying, then the risk of getting the documents to the issuing bank is on the beneficiary.</p>	

If the Documentary Credit is confirmed by Nordea a complying presentation to Nordea will obligate Nordea – regardless if Force Majeure called by the bank in a country in lockdown.

Issues to consider for the Documentary Credit beneficiary:

- 1: Before goods are shipped – connect with the buyer and carrier to ensure that it is possible to deliver the goods.
- 2: Check carefully Documentary Credit availability; and avoid having export Documentary Credits that expire in a country in lockdown.
- 3: Ensure that documents comply with the Documentary Credit.

Case #4	Import Documentary Credit issued by Nordea – advised to a beneficiary in a country in lockdown via their bank
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The fourth case is an import Documentary Credit – i.e. issued by Nordea and advised to the beneficiary in a country in lockdown via their bank.

IF a complying presentation is made to the nominated bank then Nordea must honour even if the documents have been lost in transit (or delayed) between the nominated bank and Nordea.

However, if the beneficiary cannot present the documents to the nominated bank it has the option to present directly to Nordea, and if the presentation is timely and comply – Nordea is obligate to pay.

Issues to consider for the Documentary Credit applicant:

Connect with the seller (Documentary Credit beneficiary) to discuss how the coronavirus situation may affect the delivery of the goods. Bear in mind that a complying presentation will obligate Nordea, regardless of the fate of the goods.

Case #5	Export Documentary Collection
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The fifth case is an Export Collection, where Nordea is the remitting bank and a bank in a country in lockdown is the collecting bank.

In Collections there is no undertaking by an bank. The involved banks will act based on the collection instruction.

This means that if Nordea is not able to forward the documents to the collecting bank in a country in lockdown, Nordea may have to inform the principal that it will not be able to handle the Collection.

If the documents never reaches the collecting bank in a country in lockdown, that bank never receives the collection instruction and will therefore of course not be able to handle it.

If the documents reaches the collecting bank in a country in lockdown, payment under the collection will depend of whether or not the drawee pays. Of course, if the drawee does not pay or accept (as the case may be) he will not get the documents sent for collection.

Issues to consider for the principal to the Documentary Collection:

- 1: Before shipping the goods - connect with the buyer and carrier to ensure that it is possible to deliver the goods.

2: Consider if it is possible to get the documents to the collecting bank.

3: Consider if it is possible to use an “alternative” collecting bank (e.g. the head office of the buyers bank).

Case #6	Import Documentary Collection
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The sixth case is an import collection, where a bank in a country in lockdown is the remitting bank and Nordea is the collecting bank.

In Collections there is no undertaking by an bank. The involved banks will act based on the collection instruction.

This means that if Nordea never receives the collection instruction and documents it will of course not be able to handle it.

If the documents reaches Nordea, payment under the collection will depend of whether or not the drawee pays. Of course, if the drawee does not pay or accept (as the case may be) he will not get the documents sent for collection.

Issues to consider for the drawee to the Documentary Collection:

1: Before shipment of the goods - connect with the seller to ensure that it is possible for them to deliver the goods.

2: Consider if payment is to be made considering the fate of the goods.

The above are case studies covering some basic transaction scenarios. However, other structures and conditions may provide different results. Therefore, do not hesitate to reach out to your local Trade Finance department should you have questions regarding specific transactions.

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