



Covid-19 Pandemic as *Force Majeure*: Its Enforceability on the Failure to Fulfill Contractual Obligations in Letter Of Credit

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Abstract

The performance of contractual obligations holds an important role in the fulfillment of sales contracts. Therefore, each party involved would be done their best to complete them. The existence of the COVID-19 pandemic affected the trade sphere and could bring impediments in the form of *force majeure*. This research aims to determine the enforceability of COVID-19 as *force majeure* on the performance of sales contracts and the enforceability of COVID-19 according to UCP 600 on failure to presents complying documents. This research was conducted by using a normative method and qualitative method. The latter was used to analyze the secondary data collected by literature study of relevant materials. The result of this research shows that the enforceability of COVID-19 as *force majeure* depends on the way sales contracts are worded and the tribunal's interpretation of the laws and practices in international trade. The UCP 600's *force majeure* clause phrasing open up the interpretation on the possibility of COVID-19 as *force majeure*. However, the clause cannot be enforced on the failure to presents complying documents, caused by COVID-19 or not, as it concerns the matter of the Bank's responsibility in the case of *force majeure*.

I. Introduction

International trade transaction, also known as export-import, is similar in principle to domestic trade in the way that there is an interaction of sales of goods in the both of trades. Hartono Hadisoeparto defined international trade as a sales agreement between seller and buyer in which the two of them are geographically separated or reside in different countries. The difference between international and domestic trade, is that in the former, seller and buyer do not see each other in the flesh, so they pose the risks to encounter problems related to information, communication, difference of currencies, political risks, trust issues, and financing ([Hadisoeparto, 1991](#)).

According to Kasmir, a seller demand guaranteed payment for the goods they are going to sell, as for without said guarantee, the seller does not have confidence to send off their goods on the buyers' way. On the other hand, a buyer need guarantee that they are going to get the goods they bought in the quality and quantity that fit to their wishes ([Kasmir, 2005](#)). The solution to that problem is to use a payment method that can be used to fulfill the buyers' and sellers' need. According to Ramlan Ginting ([Ginting, Transaksi Bisnis dan Perbankan Internasional, 1990](#)), these are some form of international payment method that can be of use:

1. Letter of Credit (L/C)
2. Non-Letter of Credit:
 - a. Advance Payment;
 - b. Collection;
 - c. Open Account;
 - d. Consignment.

L/C is the most used payment method in international trades. Its popularity can be attributed to its characteristic that provides guaranty of safety and sales facility to exporter and importer. As long as the exporter could presents documents as required by the L/C, payment is guaranteed. With the issuance of L/C, bank is going to take over the role from buyer as the party who gives trust and certainty to the seller that is bank is going to complete the payment as per the requirements listed in the L/C. The trust issue that occurred between sellers and buyer hence could be resolved by using L/C as the payment method ([Hutabarat, 1990](#)).

L/C is a service given by bank to the people with the aim to expedite the stream of goods, both domestic (inter islands) and international (export-import). The purpose of L/C is to facilitate and to resolve the problems occurred in sales of goods transaction that rise from the buyer (importer) and the seller (exporter). L/C gives a guaranteed swift payment and shipment of goods as per the agreement made by the good faith of both exporter and importer ([Ginting, Letter of Credit-Tinjauan Aspek Hukum dan Bisnis, 2002](#)).

L/C mechanism is a quite complicated matter, therefore a uniformed rules that accepted universally was made by the *International Chamber of Commerce* (ICC) in 1933 called *The Uniform Customs and Practice for Documentary Credit* (UCP). UCP has been revised a few times since its creation, in 1951 by UCP Revised No. 151, 1962 by UCP Brochure No. 222, 1974 by ICC Publication No. 290, 1983 by ICC Publication No. 400, 1993 by ICC Publication No. 500, and lastly in 2007 effective on July 1st 2007 by ICC Publication No. 600 also known as UCP 600. UCP's aim is to create international uniformity of L/C practices.

UCP 600 consisted of 39 Articles which regulate the matter of L/C transaction. In essence, there are nine characteristics of L/C as pronounced by the UCP, that is: bank's affair is limited to the documents; L/C is separate from sales contract; L/C cannot be issued by appointing the applicant as the drawee in draft; partial shipment matter in L/C; partial withdrawal in L/C; matter of things that is beyond bank's responsibility; and the matter of *force majeure*.

Force majeure become relevant and important in the wake of *coronavirus disease 2019* (COVID-19). The virus has been declared as global emergency by the World Health Organization's (WHO) Emergency Committee in 30th January 2020 ([Velavan & Meyer, 2020](#)). To contain the virus' spread, vast number of countries in the world enforced strict measures such as lockdown, travel restriction, and border shutdown. Those measures affected the transnational trade relations, including the performance of sales contracts, as they contributed to the companies' performance in production and other operational which could result in delay or failure to fulfill contractual obligations. ([Stancu, 2020](#))

Prior studies as those of Kiraz and Üstün ([Kiraz & Üstün, 2020](#)) and Wijerathna and Jayasekera ([Wijerathna & Jayasekera, 2020](#)) suggest the possibility of invoking *force majeure* claim using the COVID-19 pandemic in relation to contractual obligations, yet the study on the possibility of invoking the COVID-19 pandemic as *force majeure* claim in an L/C transaction. Even though an L/C is a separate contract from the sales contract, it is undeniable that L/C is still intricately close to the latter, as sales contract is the basis to the issuance of L/C. Hence the impediments faced by the seller in fulfilling contractual obligations could affect the performance of the seller's or beneficiary's obligations required by the L/C. The importance of the aforementioned issues stand as the reason to discuss the enforceability of COVID-19 as *force majeure* on the failure to fulfill contractual obligations as per sales contract and the enforceability of COVID-19 as *force majeure* according to UCP 600 on the failure to presents complying documents as required by L/C.

II. Research Methods

The method used in this research was juridical normative method, a study on the rules or norms used in the realm of positive law related to L/C ([Ibrahim, 2006](#)). Qualitative approach was used in this research to analyze the data that had been collected by researching and describing the research's result logically to norms, rules, and legal theory related to L/C ([Waluyo, 2002](#)). The data in this research is secondary data collected by literary research, which is obtained by collecting, compiling, and studying the legal materials related to L/C. Both primary legal material and secondary legal material were used as legal sources in this research. Primary legal material is legal rules related to L/C, which is *the International Chamber of Commerce - Uniform Customs and Practice for Documentary Credits* (UCP 600). Secondary legal material is all information that had or had not been formalized as law, such as books, research papers, and articles related to L/C.

III. Research Result

A. The Enforceability of COVID-19 Pandemic as *Force majeure* on The Failure to Fulfill Contractual Obligations as per Sales Contract

Documentary credit or L/C as trade payment has been used for a long time by the ancient Egyptian, the Babylonian, and the ancient Greek. The payment method persisted to the middle age and continue to be used widely to this day. Most experts agree that the modern form of L/C existed by the middle

of 19th century as response to the need of the trade sphere of more developed form of credit. History told us that the legal development and regulation of documentary L/C was based on custom, which the most of it is now provided by the ICC through codification of customs as UCP. The ICC added other regulations beside the UCP such as Uniform, Rules for Demand Guarantees, and International Standby Practices for Independent Guarantees and Standby Documentary Credits or ISP98 ([Alavi, 2016](#)) transportation risk, customer risk and etc. Documentary Letters of Credit (LC).

According to Article 2 of UCP 600, L/C means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation ([International Chamber of Commerce, 2007](#)). Ec Warsidi stated that L/C is any kind of agreement or commitment or promise from issuing bank that cannot be broken unilaterally to carry out the payment for the beneficiary after receiving the documents that are fit to the terms and conditions of the L/C ([Warsidi, 2009](#)). Black's Law Dictionary defined L/C as:

An instrument under which the issuer (usually a bank), at customer's request, agrees to honor a draft or other demand for payment made by third party (the beneficiary), as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied (Garner, 2009).

L/C in the motion require quite a lot of parties, at least it involves applicant, issuing bank, advising bank, and beneficiary, as explained more detailed below:

1. Applicant

Applicant or opener is the party which applies to the issuing bank to issue an L/C on their behalf in favor of the seller or exporter. Applicant who could applies L/C issuance application to the issuing bank had to possess an L/C issuance facility in the issuing bank first. After receiving application from the applicant, the issuing bank going to issue an L/C and forward it to the advising bank so it can be forwarded to the beneficiary ([Warsidi, 2009](#)).

2. Issuing Bank/Opening Bank

Issuing bank or opening bank is a bank where the applicant is being the customer of. The applicant applies an issuance to the issuing bank to issue an L/C in the interest of exporter. L/C is issued when all the L/C issuance requirements have been satisfied by the applicant ([M.S., 1991](#)).

3. Advising Bank

Advising bank is a bank that is asked by the issuing bank to advice the L/C, either directly to the beneficiary or through beneficiary's bank. Hence advising bank is also known as notifying bank ([Warsidi, 2009](#)).

4. Nominated Bank

Nominated bank is a bank that is given the power to do three things by the issuing bank, they are: to honours on sight if the L/C available by sight payment, said bank is called as paying bank; when doing deferred

payment undertaking (DPU) or to guarantee the payment and to pay it on the due date if the L/C available by negotiation, in which the bank is called as negotiating bank; when accepting drafts and honours on the due date if the L/C available by acceptance.

5. Confirming Bank

Confirming bank is the second bank aside from issuing bank that takes part in guaranteeing the L/C payment or to guarantee to honours the draft that had been issued on the behalf of the L/C. Confirming bank going to confirm the L/C that has been issued by the issuing bank if only the issuing bank has the confirm facility in the confirming bank ([Hadisoepipto, 1991](#)).

6. Beneficiary

Beneficiary is the exporter which received the L/C issuance and is given the right to draw payment from the available L/C fund (M.S., 1991).

7. Presenter

Article 2 of the UCP 600 defined presenter as beneficiary, bank or other party that makes a presentation. Presentation referred to in the previous sentence means the action of presenting the documents to the nominated bank, confirming bank, or to the issuing bank.

L/C is the realization of buyer's obligation to make payment for the price of purchased goods. Buyer going to applies an L/C issuance application to issuing bank in their country in the favor of the seller. Once the seller has satisfied all the requirements, bank is going to close the currency contract with the importer and issued an L/C on the behalf of the importer. The L/C issuance is carried out by one of its overseas correspondence bank. Correspondence bank that acts as intermediary to the issuing bank is called advising bank or notifying bank. Advising bank then notified the exporter (beneficiary) about the issuance. If the advising bank also given the power to buy drafts that is drawn by the exporter of the L/C then the advising bank is also called as negotiating bank ([M.S., 1991](#)). Those set of acts are part of the first step of L/C payment called the issuance.

After issuance, comes the step that is called presentation. Presentation starts as the beneficiary received a notification from the advising bank. The beneficiary will then carry out the shipment of the goods within the period that had been agreed upon along with the documents as required by the L/C and presents the documents to the advising bank/confirming bank once the shipment had been concluded ([Hadisoepipto, 1991](#)).

The nominated bank on its nomination, and the confirming bank if any, and the issuing bank must then examine the documents that had been presented. If a presentation is determined as complying, the nominated bank honours or negotiates and it must forward the documents to the confirming bank or issuing bank. When the confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank. When the issuing bank determines that a presentation is complying then it must

honour. Later, the issuing bank will forward the documents to the applicant after they paid the credit that had been issued by the issuing bank. The step is called honour.

With the formidability of L/C mechanism in mind, it is of no one's wonders that L/C becomes the customary payment method in international trade. The use of L/C could bring out the balance between the fulfillment of the buyer's and the seller's rights and obligations and to avoid the risks and problems that could hinder the contract's fulfillment. In the principle, L/C is a separate contract from the sales contract, however, it cannot be said that an L/C is an entirely unrelated to a sales contract ([Ginting, Transaksi Bisnis dan Perbankan Internasional, 1990](#)). A sales contract contains the matter of parties' rights and obligations, such as the amount of goods and its specification, prices, payment venue, shipment date, port and city wherein the goods will be unloaded, risks and title, insurance, documents, invoice, claim, repudiation, *force majeure*, bankruptcy, choice of law and arbitration.

When the sales contract is carried out, external obstacles beyond the party control could occur. In that regard, each legal systems have their own views on the consequences brought by those circumstances. Generally, international trade practitioners tend to set their own terms on the matter of unexpected circumstances into their contract, the arrangement is called *force majeure* clause ([Fontaine & De Ly, 2006](#)).

Force majeure is an event beyond the affected party's reasonable control which made the performance of their contractual obligations is impossible to be performed. *Force majeure* is different from hardship, in which the latter, it is still possible to perform the contractual obligations even though the occurrence of an event prior made it more onerous for them to carry it out. If the *force majeure* clause successfully triggered, the affected party will be relieved of contractual sanctions, liability in damages or any other contractual remedy for breach of contract, while the hardship clause intended for renegotiation and revision of contractual terms to allow the performance of contractual duties in spite of the consequences of prior event.

The defense made by invoking *force majeure* claim is not an easy task, even if it was done in the midst of a turmoil like the COVID-19 situation. Augenblick and Rousseau's research shows that the success of invoking *force majeure* claim depends on the arbitral tribunal's interpretation of: 1) the foreseeability of the event; 2) the availability of alternate way to perform the contract that should have been taken by the affected party; 3) the party's compliance with the notice requirements in the *force majeure* clause. The failure to invoke the *force majeure* claim primarily caused by the tribunal's strict interpretation on the foreseeability of the event, the inability of the affected party to demonstrate the impossibility to perform the contractual duties in any ways, and the failure to give timely notice as per the requirements of the *force majeure* clause ([Augenblick & Rousseau, 2012](#)).

As noted by Augenblick and Rousseau's research, the matter of enforceability of an event as *force majeure* is important as it is one of the parameters to measures whether the *force majeure* claim could be invoked. Furthermore, within the trade sphere that had been and still is impeded by the COVID-19 pandemic, the performance of contractual obligations undoubtedly also implicated by it. The publications on the customs and practices of international trade could provide an insight on the *force majeure* clause and what events are commonly considered as *force majeure*. The ICC *Force majeure Clause and Hardship Clause 2003* lists the *force majeure* events as follows (International Chamber of Commerce, 2003):

In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1[a] and [b] of this Clause in case of the occurrence of one or more of the following impediments:

1. war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation;
2. civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;
3. act of terrorism, sabotage or piracy;
4. act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;
5. act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
6. explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;
7. general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises.

According to the publications, if an event as listed occurred, in the absence of proof to the contrary and is allowed by the contract between parties, then the party who invoked the *force majeure* clause is considered to have established that their failure to perform contractual obligations was caused by an impediment beyond their reasonable control, that the impediment is reasonably unforeseeable at the time of the contract's conclusion, and that the consequence of the impediment could not reasonably avoided or overcome.

The ICC *Force majeure* and Hardship Clauses is renewed in 2020 following the need of balance on the expectation of contractual obligations performance with the reality of changing condition which impedes and thus making the contractual obligations performance very difficult to be carried out. The ICC *Force majeure* and Hardship Clauses 2020 defines *force majeure* as the occurrence of an event or circumstance ("*Force majeure* Event") that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment ("the Affected Party") proves that such impediment is beyond its reasonable control, that it could not reasonably have been foreseen at the time of the conclusion of the contract, and that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party ([International Chamber of Commerce, 2020](#)). *Force majeure* events as listed by the publications are:

1. war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation;
2. civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy;
3. currency and trade restriction, embargo, sanction;
4. act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;
5. plague, epidemic, natural disaster or extreme natural event;
6. explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy;
7. general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

Based on the *force majeure* clause from The ICC *Force majeure* and Hardship Clauses 2003 and The ICC *Force majeure* and Hardship Clauses 2020 it is found the *force majeure* events that are explicitly listed in both publications are meant for the ease of the contracting parties, as more definite *force majeure* clause is easier to invoke when the impediments occur. The events that are qualified as *force majeure* in The ICC *Force majeure* and Hardship Clauses 2003 and The ICC *Force majeure* and Hardship Clauses 2020 are nearly identical, although the latter is simpler as to match with the need of more straightforward presentation and a wider option for the companies to choose. Both publications listed plagues and epidemic as events that presumed as *force majeure*.

Aside from ICC's publications, reference to *force majeure* clause could be drawn from the United Nations Commission on International Trade Law (UNCITRAL)'s project that is the United Nations Convention on Contracts for the International Sale of Goods (CISG). The *force majeure* or exemption clause is found in the Article 79 (1) CISG as follows ([UNCITRAL, 2015](#)):

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.

Based on Article 79 of the CISG above, it can be seen that the article does not state plague and epidemic as presumed *force majeure* event. In fact, the way of the article is articulated does not specifically refer to any event, including plagues and epidemic. However, the article's phrasing leaves the room to interpret the COVID-19 pandemic as *force majeure* event.

The assessment of COVID-19 as *force majeure* as done by Kiraz and Üstün based on the examination of the Convention on Contracts for the International Sales of Goods (CISG), the Unidroit Principles of International Commercial Contracts (PICC), and the International Chamber of Commerce's 2020 *Force majeure* Clause (ICC's 2020 FMC shows that the ability to invoke COVID-19 as *force majeure* depends on the phrasing of the parties' contract, of which whether the parties' agreed beforehand that plagues and epidemic as *force majeure* event. Upon the examination, the qualification of COVID-19 pandemic as *force majeure* event according to CISG, PICC, and ICC's 2020 FMC shows that there is a possibility to invoke *force majeure* claim as it could be considered as an act of God and an impediment that is caused by the strict efforts of the governments to contain COVID-19. ([Kiraz & Üstün, 2020](#))

Wijerathna and Jayasekera concluded that based on the judicial precedent from CISG's Article 79, the failure to perform contractual obligations caused by the COVID-19 pandemic could be used as reason to invoke *force majeure* clause only if the requirements as the Article calls have been met. Although based on the previous precedents, Article 79 of CISG does not relieve the affected party's from their contractual obligations if the contracts concluded after COVID-19 declared as global pandemic by the WHO ([Wijerathna & Jayasekera, 2020](#)).

The research done by Kiraz and Üstün and Wijerathna and Jayasekera only examines COVID-19 claim as *force majeure* event in the sphere of sales contract. It is dire that an examination of COVID-19 as *force majeure* event in the sphere of payment contract, primarily L/C, as it related to the performance of contractual obligations of sales contract even though they do stand as separate contracts. Generally, L/C follows on the rules set out by the ICC, called the UCP, with its latest revision on 2007 known as ICC Publication No. 600 or commonly referred as UCP 600.

B. The Enforceability of COVID-19 Pandemic as *Force majeure* According to UCP 600's *Force Majeure* Clause on the Failure to Presents Complying Documents as the Consequence of COVID-19 Pandemic

Receiving payment from the importer for the goods they have sold is an exporter's major concern. The duty to make payment rest on the buyer's shoulder, in an L/C transaction, however, bank takes over the importer's duty to pay. The

payment is done once the exporter has presented the required documents to the issuing bank and is determined that the documents comply by the L/C's terms and conditions and UCP 600 regulations, also known as requirement of complying presentation ([Jones, 2019](#)).

The examination to determine complying documents could be done by examining the documents on the face or by its substance. Examination based on the face is done by checking the documents compliance to the requirements set by the L/C, while substance examination is done by checking on the documents consistency with each other. The decision to determine the documents compliance entirely rest on result of the bank's examination and not any other party interpretation ([Warsidi, 2009](#)). A presentation is deemed noncomplying if:

1. The presenter could not presents the required documents;
2. There is discrepancy in the presented documents;
3. The documents presented past the due date.

A noncomplying presentation, in which there happens to be some discrepancies in the presented documents, relieves the nominated bank on its nomination, confirming bank (if any), and the issuing bank from the duty to honor or negotiate.

That being the case, beneficiary should be cautious when administering documents management as to ensure that the required documents have complied to the L/C's terms and conditions considering the considerable amount of documents that is required. The kind of the documents that is required itself depends on the wishes of the parties, though it is common to request commercial invoice, bill of lading, and insurance document, in the least. The parties could request to add some additional documents to be included in the L/C's terms and conditions, such as consulate invoice, certificate of origin, certificate of quality, and warehouse receipt ([Ginting, Letter of Credit-Tinjauan Aspek Hukum dan Bisnis, 2002](#)).

Some details that a beneficiary should pay attention to when preparing documents are:

1. Presentation date;
2. The complete set of the required documents;
3. The consistency of the required documents with one another.

Expiry date is a date wherein a beneficiary could no longer perform presentation to obtain honor or negotiation. An expiry date should span a reasonable amount of time, enough for the beneficiary to be able to produce goods, ship the goods, and presents the documents as a proof to the appointed bank as determined by the place of expiry ([Jones, 2019](#)). A presentation that is done past the expiry date is considered as discrepancy and the beneficiary will lose their right to receive payment. On that note, a presentation should be done on or before the due of the expiry date except for certain things as stated by Article 29 of the UCP.

The exception applies to an expiry date or the last presentation date that fall on a date in which the bank where the presentation takes place is closed for the reasons other than those referred in article 36. In this case, the expiry date will be extended to the first following banking day. Nominated bank should provide a statement for the issuing bank or confirming bank on its covering schedule that the presentation was made within the time limits extended in accordance with sub-article 29 (a) of UCP if the presentation is made on the first following bank day. Presentation made by the beneficiary to the nominated bank or confirming bank, if any, or to the issuing bank, had the L/C does not state otherwise, must be done not later than 21 calendar days after the date of shipment and not later than the expiry date of the L/C ([International Chamber of Commerce, 2007](#)).

Latest date of shipment is the latest date for the beneficiary to send the shipment. It is considered as discrepancy if the shipment is made past the latest date of shipment. Based on article 29 (c) of UCP 600, the exception referred by the article does not apply to late shipment, in other words, the latest shipment date still follows the date stated by the L/C and could not be extended to the following bank day if it falls on the day the appointed bank is closed ([Warsidi, 2009](#)). Latest shipment date that is stated by the L/C is not a requirement, if an L/C only state an expiry date the beneficiary then the latest shipment could be made and the latest documents could be presented due at the expiry date. Thus gives more flexibility to the beneficiary ([Jones, 2019](#)).

Based on the matters described above, it is important for the beneficiary to make sure that the L/C has not expired, the shipment was done within the constrain of the agreed date, the documents are presented at the correct time, and that the shipped goods have complied to the L/C's terms and conditions. The urgency of it tied to its relation to contractual obligations of the sales contract. An impediment obstructing the fulfillment of contractual obligations takes its toll on the exporter capability to carry out the shipment, vital as it is the only way the exporter could obtain the documents required for their payment. The significance of this situation is highlighted by the tumultuous times left by the COVID-19 pandemic, which left impediments in its wakes. Those impediments implicate the exporter by the way of limiting their ability to perform production and shipment.

The happenings of an unexpected situations could hinder the exporter/beneficiary, to produce and ships the goods and to presents the documents so it is made later than the expiry date, latest shipment date, and presentation date as stated by the L/C, consequently making the beneficiary unable to obtain their payment. The event as described before could be classified as *force majeure*. The UCP 600 referred *force majeure* on its Article 36 which stated as follows ([International Chamber of Commerce, 2007](#)):

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 events that listed as *force majeure* in the Article does not specifically refers to plagues or epidemic, however, the phrase "... or any other causes beyond its control" made the room for an interpretation that allows the COVID-19 pandemic as *force majeure*. Accordingly, the enforceability of COVID-19 pandemic as *force majeure* depends on the legal jurisdiction of the parties' choice. Supposing that the parties' wishes for more defined list of *force majeure* events in the L/C contract, it is entirely possible to draft an L/C contract with more detailed *force majeure* clause. Bear in mind that Article 1 of UCP 600 stated that the UCP 600 rules applies as long as it is expressed in the L/C's text and binds to the parties unless expressly modified or excluded by the L/C. It is the nature of ICC's UCP as one of the source of *lex mercatoria*.

Lex mercatoria is a multinational law of international trade which was created by international trade and in international trade. As a non-state law, *lex mercatoria* is known in various treaties and state judges. *Lex mercatoria*, also known as law merchant, an autonomous non-state legal order with its own rules and distinctive judicial institutions, particularly arbitration ([Ginting, Transaksi Bisnis dan Perbankan Internasional, 1990](#)). *Lex mercatoria* as an autonomous non-state legal order is as in Schmitthoff's modern *lex mercatoria* theory. Schmitthoff based the theory on autonomous will of parties in contract law. The autonomous will is used as the basis to build autonomous international trade law, therefore modern *lex mercatoria* was made from national law that is developed by international trade law on the parts which of no interest to the national sovereigns and thus is left to the contracting parties to regulate their own rules in the confine of boundaries set by *lex fori* and international public policy. Henceforth, *lex mercatoria* is made of uniform law acknowledged by national sovereigns that is developed by international trade customs with its definitive content given by the policy making institutions ([Mert Elcin, 2012](#)).

Lex mercatoria could be applied to contracts in international trade in the case of an incomplete contract and/or incomplete rules in the contract. Another condition that is needed to enforce *lex mercatoria* in contract is the presence of an ability of the choice maker to take a binding final choice (a business judgement rule). As the basis of L/C, sales contract is something that is undeniably related to L/C. There are minimum four kinds of contract that are involved with L/C, that is sales contract, L/C's issuance contract, L/C, and agency contract. Each one of those contracts are linked in the business sense but separate with its own set of rules. The principle of separate contracts is needed for the ease of L/C performance itself, as the L/C performance is going to be hindered had it connected to the other three contracts ([Ginting, Transaksi Bisnis dan Perbankan Internasional, 1990](#)). *Lex mercatoria* then could not be separated from the doctrine of freedom of contract from the classical contract theory. The freedom of contract is the rights of contracting parties to decide their own choices in their own terms and conditions ([Epstein et al., 2020](#)).

ICC's UCP is one of the source of *lex mercatoria* that has been harmonized to international degree. UCP is not a legal product in the way of statutes or international conventions, as it is a compilation of customs and international practices regarding L/C hence it is sometimes said as codified practices. UCP is used to avoid gaps in national law or the confusion that emerges from the national regulations that clashes against one another, for the ease of international trade. UCP consisted of a set of particular rules that regulates the issuance and the use of L/C which is based on the parties' agreement. Therefore if the parties willing to submit to UCP 600's rules, whether in parts or full, then there has to be a statement in the L/C that declared so.

That being the case, on the matter of the enforceability of *force majeure* clause on the failure to presents complying documents to the appointed bank, the *force majeure* clause of UCP 600 as stated in Article 36, refers to the matter of bank's responsibility in the event of *force majeure*, in which a bank is not burdened by liability or responsibility for the consequence of *force majeure*. A bank will not honours or negotiate the presentation of documents which past its expiry date in the time the bank is closed. In consequence, the *force majeure* clause of UCP 600 is not enforceable to the failure to presents complying documents as per the terms and conditions of the L/C albeit the cause is the COVID-19 pandemic, which is an event beyond the beneficiary's control. Negotiating bank still considers the documents presented by the beneficiary as discrepancy.

The issue above is not unrelated to the characteristic of L/C as separate transaction from the sales contract or any other contracts as stated before. A bank has no association or binds to the sales contract despite of any reference said contract has on the L/C. A bank's willingness to honour, accept, and negotiate and/or to fulfill any other duties are based on the L/C, not subjected to the applicant's claim as the consequence of their relation to an issuing bank or the beneficiary ([M.S., 1991](#)). A bank's responsibility limited to documents, as stated by Article 5 of UCP 600 as follows ([International Chamber of Commerce, 2007](#)):

"Banks deal with documents and not with goods, services or performance to which the document may relate."

The essence of an L/C realization is compliance of documents to the L/C's terms and condition. A bank should honours the presented documents as long they are determined to have been complied by the L/C standard after conducting an examination based on the international standard banking practices. On the contrary, if a bank finds that there is discrepancy in the presented document then it may refuse to honour or negotiate.

In the face of an occurrence of discrepant documents, a nominated bank (if not doubles as confirming bank) is given a full right to refuse to honour, but it is common for the issuing bank, based on its sole judgement, to approach the applicant for a waiver of the discrepancies. The bank then sends advice of refusal to beneficiary with the details of the discrepancies which made the issuing bank

refused to honour, so the length of proceeds depends on the amount of time the applicant takes to reach a decision (Warsidi, 2009).

The applicant choice to waive those discrepancy or not depends on the discrepancies themselves. If those discrepancies are minor in their nature, such as mismatched document name, usually the applicant going to choose to waive them. However, if those discrepancies are of something major, the parties could made some amends as to handle the discrepancies. An amendment means additional terms on the L/C that is meant to fix or add to the terms agreed prior. Hence, one of the alternate way that could be taken by the beneficiary that failed to presents complying documents is to communicate the onerous condition that made it impossible for them to presents complying documents, and ask for an amendment. If the applicant is amenable to that, then an amendment to the related terms on the L/C could be made and the beneficiary could receive their payment.

IV. Conclusions

The enforceability of COVID-19 pandemic as *force majeure* depends on the phrasing of *force majeure* clause in the sales contract and tribunal's interpretation on the rules and practices in international trade, such as ICC's *Force majeure and Hardship Clauses* and the *Convention on Contracts for the International Sales of Goods*.

The Article 36 of UCP 600 does not specifically list plagues and/or pandemic as *force majeure* condition, yet its phrasing leave a room to interpret that the COVID-19 pandemic could be enforced as *force majeure*. However, the UCP 600's *force majeure* clause could not be enforced on the failure to presents complying documents caused by the pandemic as the clause regulates on the matter of bank's responsibility in the case of *force majeure* occurrence.

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