European Aviation Disruption – Effect on International Trade: Will I get my goods? Will I get paid?

The current disruption to European air transport caused by the Icelandic volcano eruption is likely to have a serious impact on the people and the logistics involved in international trade. Goods transported by air in the European “no fly” zone will obviously be affected. However, parties may also have difficulties in complying with their payment obligations where documents required in order for payment to be made would usually be sent by air courier. In this alert we set out some questions and answers dealing with problems that may arise.

How will the disruption affect air freight?

Air freight will, to the same degree as passenger traffic, be widely affected throughout Europe. In many cases, the situation will be dealt with in your contract and may fall under the force majeure provisions meaning that a seller may in some circumstances be excused from performing to the extent that the air transport disruption prevents performance.

What if a Seller says that he cannot get the original shipping documents to the bank and they are due to be presented in the next few days?

If your contract provides for electronic transmission of copy documents rather than physical delivery of originals then this should not be a problem. Your contract might provide for issuance of a letter of indemnity to be tendered in the event of the seller’s inability to produce original documents. If so, this may also avoid any difficulty due to the air transport disruption.

However, if original documents are required (for example to make a presentation under a cash against documents transaction with a specific time limit) and there is no provision for a letter of indemnity, then this may present a more difficult problem. You may have no option but to negotiate with your counterparty to agree either an extension of time for presentation of the documents or come to an agreement that a letter of indemnity can be provided in place of the documents. It is important that such negotiations are started as soon as possible, particularly if the disruption continues or returns after a resumption of flights.

If the parties are cooperative, one further option may be to take the documents to a bank at a location which you can get them to and involve them in the process if that makes your counterpart more comfortable.

What is the position in a letter of credit transaction?

If payment is to be made by a letter of credit, under UCP 600 a seller is required (Article 14) to present original transport documents no later than 21 calendar days after the date of shipment and in any event not later than the expiry date of the credit. Once the letter of credit has been issued this obligation becomes part of the contract between buyer and seller.

If the seller cannot comply, the parties can cooperate to agree an extension of time or to provision of a letter of indemnity in place of the documents which will usually require an amendment to the letter of credit.

If the expiry date of the letter of credit is imminent, you will need to act quickly to get in touch with your counterparty to try to resolve the issue and if necessary extend the expiry date. In the event that the documents are successfully presented to the negotiating bank in accordance with the letter of credit, then the seller will have performed its obligation and will get paid even if the documents cannot reach the issuing bank. If that happens, then under Article 35 of UCP 600 the liability of the issuing bank to the negotiating bank will still be triggered and the buyer’s account will probably be debited by the issuing bank, whether or not the documents ever reach the issuing bank. In this case the buyer may have paid but will not have received the original documents – see below. Article 36 of UCP 600 deals with force majeure events affecting the bank’s own business.
It has been indicated that the ICC (which publishes the UCP 600) may circulate guidance to documentary credit users to try and promote standard practice among banks during the current disruption.

What if a seller is uncooperative and still says he can’t perform the contract?

In a contract where the seller will be presenting documents before physical delivery of the goods to the buyer, an uncooperative seller may try to avoid performance of the contract and may seek to rely on a force majeure clause, if he cannot present the documents in the manner envisaged in the contract. Whether or not the force majeure clause applies, is entirely dependant on the terms of your contract. Usually force majeure clauses deal with an inability to make physical shipment rather than an inability to deliver documents to extract payment but you should check the individual contract to be sure.

A party would normally be under a duty to try to avoid or mitigate a force majeure event. If a buyer made a reasonable proposal to accept a letter of indemnity in place of the documents or indeed to extend time for presentation, then it would usually be difficult for a seller to rely on a force majeure clause as an excuse for non-presentation of documents even if such an event came within the clause.

I am a buyer and I have paid for the goods, but I have not yet received the original documents. What are my options?

If not already agreed, you may need to negotiate with the shipper to allow release of the goods against a letter of indemnity for release without original documents. The shipper may require this to be countersigned by the bank which may come at a cost which will not always be recoverable from your seller.

Is there anything else I should consider?

- It is worth checking whether any insurance cover you have will compensate/indemnify you for any loss or extra cost incurred. Even if there is some doubt as whether you have cover for disruption losses you should notify the underwriters as to a potential claim just in case.
- If the documents are already in the hands of a courier the terms of the courier company will probably seek to exclude liability for losses caused by an event such as the current air traffic disruption.
- Even if there is no specific date in a contract for the presentation of documents, in certain situations a delay in presentation can still result in a breach of contract.

What can I do to avoid similar problems in future?

There are a few steps you can take:

- Avoid agreeing that you have to present documents somewhere you (and the documents) have to fly to;
- Try and agree that a letter of indemnity (with or without a bank countersignature) is acceptable in place of original documents;
- Negotiate a provision for an automatic extension of the time for presentation of documents in the event of a disruption to air transport services.

In all cases, it is important to get in touch with your counterparties to try to resolve any potential problems as soon as possible.
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