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ICC Banking Commission

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Subject: Force Majeure under documentary credits subject to UCP 600

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The term 'force majeure' is French in origin, literally meaning 'greater force'. It refers to unexpected events, outside the control of the parties to an agreement, which prevent performance of part or all of the required contractual obligations.

Force majeure events encompass unforeseen and uncontrollable circumstances such as natural disasters, political unrest, or other events beyond the control of the bank which interrupt its business within the meaning of UCP 600 article 36. In electronic presentations and hybrid environments, additional considerations may arise under eUCP article e14, which expressly addresses interruption arising from inability to access data processing systems, or failures of equipment, software or communications networks beyond the control of the bank.

UCP 600 article 36 addresses such disruptions, relieving banks of liability or responsibility for consequences arising from events beyond their control.

Nevertheless, questions often arise as to the extent to which banks remain liable under such circumstances.

INTRODUCTION

Force Majeure was first introduced in article 13 of UCP 82 in 1933. The latest version, UCP 600 article 36, states that banks assume no liability for force majeure events preventing them from fulfilling their obligations:

"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."

Provided that stipulated documents are presented, this directly impacts upon UCP 600 article 7 (Issuing Bank Undertaking), article 8 (Confirming Bank Undertaking), and article 12 (Nomination).

It is important to note that the enforceability of article 36 depends on the willingness of courts to give it effect under applicable local law. There is no reason to consider that article 36 would not be given legal effect by a court or tribunal in a suitable case, subject to applicable law and the facts of the particular circumstances.

Article 36 operates to suspend a bank's obligations during an interruption of business, not to invalidate a presentation already made. Where presentation has occurred before the force majeure event, the bank's duties resume upon recommencement of business, subject to the protections expressly provided by article 36.

In this context, where a nominated bank has honoured or negotiated a complying presentation prior to or during the interruption of the issuing bank's business, the issuing bank's reimbursement obligation is not extinguished by article 36, but may be suspended until resumption of operations. The precise legal enforceability of such reimbursement, including any entitlement to interest, remains subject to applicable law.

ANALYSIS

Article 36 applies exclusively where a bank's own business is interrupted by events beyond its control. It does not, however, give the beneficiary the right to suspend presentation of documents within the time and validity requirements of the credit merely because commercial activities are disrupted. Where a beneficiary is unable to obtain or submit documents due to external events (whether Acts of God, government restrictions, or similar disruptions), but the bank's operations continue uninterrupted, article 36 does not operate to suspend or extend the credit. If a bank is unable to process a documentary credit due to force majeure, it is not held liable for resulting delays or non-performance.

Force majeure events may give rise to disputes in commercial and contractual contexts more broadly. However, relatively few disputes appear to have arisen specifically concerning the application of UCP 600 article 36. The application and legal effect of UCP 600 article 36 must be considered in accordance with the wording of the article itself, interpreted in the context of international standard banking practice and the applicable law governing the credit relationship. In some jurisdictions, particularly civil law systems, statutory force majeure doctrines may also be relevant in determining the legal effect or enforceability of article 36 in the circumstances of a particular case.

In practice, events such as the COVID-19 pandemic highlighted operational and interpretative questions concerning the scope of UCP 600 article 36, particularly in distinguishing between disruption affecting document transit or commercial activity, and genuine interruption of a bank's own business operations. As noted in the ICC Guidance Paper of October 2020, disruption affecting the movement of documents or reduced operational capacity does not, of itself, necessarily constitute force majeure within the meaning of article 36 where banks remain open for business.

It should also be noted that systems failures, cyberattacks, and inability to access data processing systems are not expressly referred to in UCP 600 article 36, but are specifically addressed in eUCP version 2.1 article e14, which extends the scope of protection to cover the inability of a bank to access a data processing system, or a failure of equipment, software or communications network, caused by events beyond the control of the bank.

In considering the application of eUCP article e14, it should be recognised that the article does not replicate the second paragraph of UCP 600 article 36 concerning credits expiring during interruption of business. The legal and operational effect of that distinction may therefore require consideration in the context of a particular transaction and applicable law. Furthermore, whether a systems failure, cyberattack or similar event is genuinely beyond the control of a bank will depend upon the facts and circumstances of the individual case, including the bank's operational preparedness, resilience measures and continuity arrangements.

In the context of UCP 600, banks must carefully assess whether a force majeure event has genuinely prevented performance or whether alternative solutions exist.

In considering such alternatives, parties should refer to the terms of the credit to determine whether presentation may be effected through another nominated bank, a confirming bank (if any), or directly to the issuing bank, where permitted. Parties should also determine whether the credit permits presentation through electronic means, including under eUCP or other agreed electronic channels."

While force majeure may affect performance of the underlying sales contract, UCP 600 article 36 is concerned solely with whether a bank's own business has been interrupted by events beyond its control and does not suspend or extend the presentation period. Where documents are presented after expiry or after the applicable presentation period because of events affecting the beneficiary or the movement of documents, but the bank's business has not been interrupted, article 36 provides no relief. Where a bank's operations are not interrupted, article 36 does not apply, even if external events prevent the beneficiary from presenting documents in time. For example, during the 2010 Icelandic volcanic eruption, the inability to transport documents by air did not constitute an interruption of bank business under UCP 600, and credits that expired during this period remained expired notwithstanding the subsequent resumption of normal conditions.

SUMMARY

Whilst parties to a documentary credit should maintain appropriate operational continuity and contingency plans, events such as transport disruption, reduced operational capacity, or wider market difficulties do not constitute force majeure events within the meaning of UCP 600 article 36 where banks remain open for business.

Operational disruptions may nevertheless create practical challenges to the execution of documentary credits under UCP 600, affecting banks, buyers, and sellers alike. While article 36 provides a degree of protection to banks in circumstances involving interruption of their business arising from causes beyond their control, it does not fully resolve the complexities that may arise when documentary credits cannot be processed. Similarly, beneficiaries may be exposed to the risk of delayed or non-payment, while applicants may face difficulties in ensuring contractual obligations are met.

Whether a particular event constitutes force majeure, and the legal effect of UCP 600 article 36 in a given case, may ultimately depend on applicable local law and the willingness of courts or tribunals to give effect to its provisions.

With the growing opportunities presented by digitisation and electronic trade documentation, there is potential to mitigate certain operational risks associated with interruption of business by reducing reliance on physical presentation and manual processes. Nonetheless, legal and regulatory considerations must still be carefully assessed to determine the appropriate course of action in situations involving interruption of business or force majeure.

In an eUCP environment, similar considerations arise where a bank is unable to access electronic records due to failure of its data processing systems, equipment, software, or communications networks. As with UCP 600 article 36, such circumstances must be beyond the control of the bank. Routine technical issues, inadequate maintenance, or internal system deficiencies would not typically fall within this scope.

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