



## Notes: New York Green Coffee Contract Terms and Conditions

1) The website of the GCA publishes the November 2018 version of its Contract. The clause on Force Majeure reads:

### ***Force Majeure***

*Seller and Buyer shall not be liable for delay in delivery, or delay in the performance of other acts required hereunder, when solely resulting from cause(s) wholly beyond his control. Such causes shall include, but not be limited to, acts of God, acts of government, wars, revolutions, strikes, pestilence, floods, droughts, perils of the sea, or unavoidable interruption of transportation. Notice to this effect shall be given in writing as soon as commercially practicable (sic) upon discovery of the cause or causes relied upon by Seller or Buyer in claiming relief under Force Majeure. Delay in delivery, or delay in the performance of other acts required hereunder, shall be permissible only for as long as the cause or causes reasonably persist(s), and delivery or performance obligations shall resume immediately upon resolution of such cause or causes.*

### ***Specific Force Majeure Rulings***

*(a) Force Majeure shall not apply when Seller's inability to export is due to Seller's lack of export quota.*

*(b) No arrival, no sale, terms shall apply to coffees actually shipped but lost in transit, provided advice of shipment, with name of vessel, has been given to buyer, otherwise, delivery must be made. Partial loss in transit does not affect balance of contract.*

*(c) Advice of shipment, if erroneous, shall be sufficient for all purposes, if any mistake occurs through no fault of the seller.*

On the 2<sup>nd</sup> April 2020 the GCA issued some guidance which included the text of the Force Majeure clause. The wording on Specific Force Majeure Rulings read as above, however the first paragraph of the guidance read:

*Seller and Buyer shall not be liable for delay in delivery, or delay in the performance of other acts required hereunder, when solely resulting from cause(s) wholly beyond his control, provided coffee is at specified point of embarkation ready for shipment. Such causes shall include, but not be limited to, acts of God, acts of government, wars, revolutions, strikes, pestilence, floods, droughts, perils of the sea, or unavoidable interruption of transportation. Notice to this effect shall be given in writing at once. In no case shall the Seller be excused by any such causes intervening before the arrival of the affected portion of the coffee at the point of embarkation of original shipment.*



Clearly there is some confusion. The November 2018 version as published on the website is the most likely valid version. It could be argued that it is the version agreed by the parties. The significant difference between the versions is that the November 2018 version does not require the coffee to be at the specified port of embarkation for a force majeure claim to be valid.

Further, it is emphasized in the November 2018 version that performance of the contract can only be delayed whilst the impediment reasonably persists. By contrast, it is noteworthy that the ESCC allows for a delay of 45 days for performance and if the impediment still exists the contract shall be cancelled (unless of course the parties agree otherwise).

Unlike the ESCC, the GCA Contract lists examples of force majeure but makes it clear that causes are not limited to those listed. It would appear that New York law requires valid causes of force majeure to be stipulated and any catch-all phrases could be interpreted as the cause having to be of the same general kind. As “pestilence” is specifically mentioned it is likely therefore that a viral pandemic would come under the same general kind. Lockdowns would come under the heading of “acts of government”

**The actual wording of the GCA 2<sup>nd</sup> April 2020 bulletin read:**

*While the Association feels that the Force Majeure clause speaks for itself, additional consideration should be given based upon the questions that have been asked of the association, and under common law, courts look to whether:*

- (1) the event qualifies as force majeure under the contract;*
- (2) the risk of nonperformance was foreseeable and able to be mitigated; and*
- (3) performance is truly impossible.*

*It is suggested that something like a port closure is distinct (shipping is impossible) from a stay-at-home order (shipping is difficult i.e. impracticable). Force Majeure should apply only when performance is impossible and not merely difficult. It is also recommended that a seller be careful not to invoke Force Majeure due to simple transportation delays. It should be a clear Force Majeure situation.*

It is worth noting that the contractual wording adopted by the ESCC and the GCA Contract hardly overlaps. There are no references in the GCA Contract to the cause of the delay occurring after the contract date or that the cause was unforeseeable. Presumably the authors considered these requirements patently obvious and indeed necessary legally.

The ESCC uses the word “insurmountable” whilst the CGA Contract stipulates “wholly beyond his control”.

Claims under the ESCC need to be made “without delay” and under the CGA Contract “as soon as commercially practicable”



**SUCAFINA**

Whilst the wording of the GCA bulletin fits comfortably overall there is some intrigue as to the statement that the courts would “look to whether.... the risk of nonperformance was foreseeable .....” . This appears to make a distinction between the cause of nonperformance being unforeseeable and the risk of nonperformance being unforeseeable at the time of making the contract.

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