



Notes: European Standard Contract for Coffee and Coronavirus Force Majeure, Shipment section ESCC

1) Article 23 of the Shipment Section of the current ESCC states:

Force Majeure

(a) Total or partial non-performance, or delay in performance of the contract, can only be justified as a result of unforeseeable and insurmountable occurrences, in which case force majeure must be pleaded at the time the impediment to performance arises by the party prevented from performing the contract. The other party must be advised without delay and furnished within a reasonable time with supporting documents, to prove that the cause of impediment or delay arose after the date of the contract and before the expiry of the time allowed by the contract.

(b) In the event of force majeure, the period of performance shall be extended until the impediment has ended but not beyond 45 calendar days. If performance is still impossible on expiry of this period, the contract shall be deemed to be discharged without allowance, unless the parties agree otherwise.

(c) In case of dispute, the validity of the force majeure plea will have to be determined by arbitration.

The ESCC omits examples of force majeure. In fact, since the inception of the old shipment, European standard contract examples have deliberately been omitted.

For a party to successfully claim force majeure, it must prove that the impediment to perform:

- Arose after the date of the contract and
- Was unforeseeable and insurmountable.

In effect, that the impediment could not be factually foreseen and that the contract became impossible to perform either legally or physically. It does not mean that a party found it difficult or uneconomic to perform.

Some parties have been requesting their suppliers to suspend shipments and/or wash out outstanding contracts primarily because of government lockdowns and legal regulations which have effectively ceased or curtailed their operations.

In such circumstances (lockdowns), can a buyer justifiably claim force majeure under Article 23?

In my opinion, the answer is no simply because there is no impediment to the seller passing title to the buyer and the buyer making payment.



Buyers requesting a pause will probably have cash flow problems. A decision not to agree to a pause would possibly lead to a default in payment, which would entitle the seller to close out all other open contracts (ESCC General Article 6 – Insolvency).

Can a seller justifiably claim force majeure under Article 23?

Numerous lockdowns at origin have now been imposed with various effects. It is perhaps relatively early days yet, and the situation is bound to get very much worse. As a general principle, a claim of force majeure would be successful. However, it is a question of degree. Clearly, the severity and the length of any lockdown would be prime considerations to take into account.

It is important to note that claims must be made “without delay”. Some shippers have been warning their clients of potential delays well in advance of the contractual shipment period. Equally, the larger manufacturers will be anxious not to be caught without supplies and will doubtless reconsider their just in time tradition.

2) Force Majeure, Spot/Delivery Section ESCC:

There is no article in the Spot/Delivery Section, which refers to Force Majeure. For spot coffee sales, one would, of course, seriously consider the potential pitfalls in the terms of the sale, e.g., on a DDP basis.

For sales for future delivery, it is very important to note Article 3(b)(i) which states:

For coffee for delivery, the duty of the sellers to tender coffee at the agreed time and place is paramount. The failure of any plans or attempts to obtain the coffee shall not release the sellers from their obligation to make the tender.

The meaning is clear. No excuses at all. Deliver or suffer the consequences.

From Sucafina SA’s advisory, April 23, 2020.

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