

General

19 Key issues for force majeure

Investing in Energy Transition Projects
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Introduction

Force majeure (**FM**) clauses have long been used in contracts; however, the COVID-19 pandemic has brought their operation into renewed focus.

The purpose of this paper is to explain the operation of FM clauses in major projects and contrast them with the operation of extension of time clauses.

Anatomy of a force majeure clause

A typical FM clause will consist of the following elements:

- the definition of the events and circumstances that can give rise to FM (**FM Events**)
- the requirement that the occurrence of the FM Event is beyond the control of the party asserting FM
- the process required to initiate the FM relief
- the consequences of the FM
- the requirement to re-commence the affected activities after the cessation of the FM.

FM Events

FM Events are particular events or circumstances that are beyond the control of the party affected whose effects have not been priced or programmed in the contract metrics. Hence, if they occur, they are beyond the scope, price and timing basis on which the contractual relationship is based.

FM Events can be defined by reference to a closed list of specific events or an open list, being examples of circumstances that are 'beyond the reasonable control of the party affected'.

The former approach is preferable in major projects. It provides certainty to all stakeholders and permits them to price and programme an accurate risk profile from the outset of the project.

The FM Events should be considered in the specific context of the project.

For example, rather than referring to weather events in general, it may be more appropriate to refer to:

- specific rainfall or wind levels
- particular levels of rainfall over a specified period
- fires that do not emanate from the site or a site where work or fabrication is being undertaken.

It should also be considered whether the event or circumstance must occur in the city, region, state or country in which the project is being undertaken, or whether the location of the event is immaterial.

Control

The occurrence of the FM Event must be beyond the actual control of the party affected and, in some cases, must also be beyond the control of a competent person in the position of the affected party.

Process

The process should require a written notification setting out:

- the FM Event
- the effect of that FM event
- why the FM Event is beyond the control of the affected party
- the measures being implemented to mitigate the FM event.

It is also desirable that the notice be delivered within a specified time and updated at regular intervals.

Consequences

In general, the effect of FM clauses is to relieve the affected party from the performance of its obligations to the extent that their performance has been detrimentally affected by the FM Event.

This is a complex concept and can lead to confusion and disputes when applied in practice.

The first issue is the factual enquiry as to:

- the effect of the FM Event and the extent and nature of the detrimental effect on the party's performance
- the extent to which the affected party has mitigated the impact.

The detrimental effect of an FM Event will usually impact on the time, cost or availability of a specified matter, such as a particular material, item of equipment or construction method.

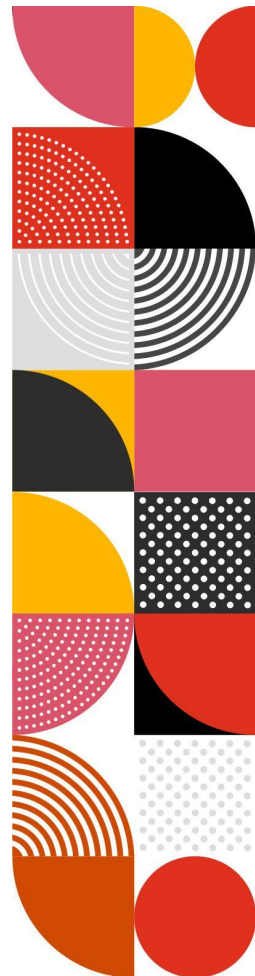
That being so, it can be more effective to deal with the occurrence of an FM event as part of the delay, delay cost and intervening event provisions in the contract, rather than through a separate FM clause. The FM Event becomes one of the grounds for an EOT, delay costs or, in the case of a services contract, such as an O&M agreement, the intervening event regime.

If the FM Event has a catastrophic effect on the performance of the contract, it might be that the contract has been frustrated.

Re-commencement

The affected party will be obliged to re-commence the affected part of its activities as soon as practicable after the cessation of the FM Event. This might not be straightforward. For example, a natural disaster might cause delays well after the event itself has ceased.

It might also be the case that the FM Event has caused the parties, especially the Principal, to fundamentally re-consider how to develop the project or, indeed, whether to proceed with the project. In those circumstances the FM provisions will overlap with clauses such as those dealing with variations, suspension and termination.



How to contact us



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