

Investing in Infrastructure | International Best Legal Practice in Project and Construction Agreements | January 2016

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Force majeure clauses – Revisited



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Introduction

Although *force majeure* clauses in project agreements are common, the amount of time spent negotiating those clauses is often minimal. Generally, the assumption appears to be that the risk will not affect us or the *force majeure* clause is merely a legal necessity and does not impact on our risk allocation under the contract. Both of these assumptions are inherently dangerous and, particularly in the second case, incorrect.

This paper follows from the previous article on *force majeure* clauses and considers the drafting of those clauses.

Risk allocation

The appropriate allocation of risk in project and construction agreements is fundamental to negotiations between the Project Company and its Contractors. Risks generally fall into the following categories:

- risks within the control of the Project Company
- risks within the control of the Contractor
- risks outside the control of both parties.

The negotiation of the allocation of many risks that are beyond the control of the parties (eg, latent site conditions and change of law) is usually very detailed, to ensure that it is clear which risks are borne by the Contractor. The same approach should be adopted in relation to the risks arising from *force majeure* events.

Operation of force majeure clauses

There are two aspects to the operation of *force majeure* clauses:

- the definition of *force majeure* events; and
- the operative clause, which sets out the effect on the parties' rights and obligations if a *force majeure* event occurs.

Definition

The events that trigger the operative clause must be clearly defined. Given the common law meaning of the term *force majeure* is not certain and is open to interpretation of the courts, it is in the interests of both parties to ensure that the term *force majeure* is clearly defined.

The preferred approach for a Project Company is to define *force majeure* events as being any of the events in an exhaustive list set out in the contract. In this manner, both parties are aware of which events are *force majeure* events and which are not. Clearly, defining *force majeure* events makes the administration of the contract and, in particular, the mechanism within the contract for dealing with *force majeure* events simpler and more effective.

Operative clause

An operative clause will act as a shield for the party affected by a *force majeure* event because that party can rely on the clause as a defence to a claim that it has failed to fulfil its obligations under the contract.

An operative clause should also specifically deal with the rights and obligations of the parties if a *force majeure* event occurs and affects the project. This means the parties must consider each of the events that it intends to include in the definition of *force majeure* events and then deal with what the parties will do if such an event occurs.

Drafting force majeure clauses

Definition

An example of an exhaustive definition of *force majeure* is:

An event of force majeure is an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which by the exercise of reasonable diligence the party affected was unable to prevent provided that event or circumstance is limited to the following:

- (a) *riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not), acts of terrorism, civil war, rebellion, revolution, insurrection of military or usurped power, requisition or compulsory acquisition by any governmental or competent authority*
- (b) *ionising radiation or contamination, radioactivity from any nuclear fuel or nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive assembly or nuclear component*
- (c) *pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds*
- (d) *earthquakes, flood, fire or other physical natural disaster, but excluding weather conditions regardless of severity*
- (e) *strikes or industrial disputes at a national level, or strikes or industrial disputes by labour not employed by the affected party, its subContractors or its suppliers, and which affect an essential portion of the works, but excluding any industrial dispute which is specific to the performance of the works or this contract.*

The list of events to be included in this type of definition is a matter for negotiation between the parties and, as noted above, ought to be exhaustive. In general, it is preferable for a Project Company to have a short list of events since the Contractor is the party most likely to be affected by *force majeure* events. The actual process of negotiating this list must clearly identify the risk allocation between the parties.

Operative clause

An example of an operative clause is:

- [].1 *Neither party is responsible for any failure to perform its obligations under this contract if it is prevented from, or delayed in, performing those obligations by an event of force majeure.*
- [].2 *Where there is an event of force majeure, the party prevented from, or delayed in, performing its obligations under this contract must immediately notify the other party giving full particulars of the event of force majeure and the reasons for the event of force majeure preventing that party from, or delaying that party in, performing its obligations under this contract and that party must use its reasonable efforts to mitigate the effect of the event of force majeure upon its or their performance of the contract and to fulfill its or their obligations under the contract.*
- [].3 *Upon completion of the event of force majeure the party affected must, as soon as reasonably practicable, recommence the performance of its obligations under this contract. Where the party affected is the Contractor, the Contractor must provide a revised programme rescheduling the works to minimise the effects of the prevention or delay caused by the event of force majeure.*

[]4 *An event of force majeure does not relieve a party from liability for an obligation which arose before the occurrence of that event, nor does that event affect the obligation to pay money in a timely manner which matured prior to the occurrence of that event.*

[]5 *The Contractor has no entitlement to, and the Project Company has no liability for:*

(a) *any costs, losses, expenses, damages or the payment of any part of the contract price during an event of force majeure*

(b) *any delay costs in any way incurred by the Contractor due to an event of force majeure.*

In addition to the above clause, it is important to appropriately deal with other issues that will arise if a *force majeure* event occurs. For example, it is common practice for a Contractor to be entitled to an extension of time if a *force majeure* event impacts on its ability to achieve timely completion of the works. For this reason, *force majeure* is usually referred to in the extension of time mechanism as an event which will entitle the Contractor to an extension of time.

Another key clause that relates to *force majeure* type events is the Contractor's responsibility for care of the works and the obligation to reinstate any damage to the works prior to completion. A common example clause is:

[]1 *The Contractor is responsible for the care of the site and the works from when the Project Company makes the site available to the Contractor until 5.00pm on the date of practical completion.*

[]2 *The Contractor must promptly make good loss from, or damage to, any part of the site and the works while it is responsible for their care.*

[]3 *If the loss or damage is caused by an event of force majeure, the Project Company may direct the Contractor to reinstate the works or change the works. The cost of the reinstatement work or any change to the works arising from a direction by the Project Company under this clause will be dealt with as a variation except to the extent that the loss or damage has been caused or exacerbated by the failure of the Contractor to fulfill its obligations under this contract.*

[]4 *Except as contemplated in clause []3, the cost of all reinstatement works will be borne by the Contractor.*

Conclusion

It is important for a Project Company and its Contractors to carefully consider the definition of *force majeure* and how an event of *force majeure* will affect their rights and obligations under the contract.

The drafting of *force majeure* definitions and operative clauses (including related clauses) should clearly define the risk allocation between the parties. The above example clauses have been used to demonstrate some options available for dealing with events of *force majeure*. The specific issues that need to be considered when drafting *force majeure* clauses will depend on a variety of factors, such as:

- the desired allocation of risks between the parties
- the geographical location of the project
- other project specific factors.

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