# COVID-the solar industry March 2020



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# Introduction

The outbreak of the novel coronavirus (**COVID-19**), and the possibility of prolonged quarantine and mitigation responses, will impact manufacturing and supply of key equipment and materials used in the construction of solar energy facilities in Australia.

Contractors under Engineering, Procurement and Construction Contracts (**EPC Contracts**) are currently dealing with the delay or disruption in procurement of the necessary equipment and materials, with PwC aware of some EPC Contractors notifying Project Owners of delays to construction timelines, milestones and completion dates. For other projects currently in the development phase, parties are hurriedly revisiting their contracts to understand (and possibly renegotiate) the impending legal and financial implications.

This article considers how Project Owners and EPC Contractors can:

- respond to delays caused by COVID-19, including the challenge of characterising the outbreak as an force majeure event under the EPC Contract and the likely flow-on effects to other key project agreements, including Operation and Maintenance Agreements (O&M Agreements), Power Purchase Agreements (PPAs) and Connection Agreements (together, Project Agreements); and
- use different measures to protect themselves and to reach financial outcomes in the face of delays.



# Executive summary

Project Owners and other solar industry participants will need to adopt a measured approach in the face of supply chain disruptions caused by COVID-19, culminating in a commercial, whole of project resolution to ensure projects progress to completion and generation.

The following steps may be appropriate:

- Develop a mitigation plan Parties should identify the supply chain, labour requirements and operational needs of current projects, assess what consequences may occur and manage risks that may materialise.
- Assess contractual options If Project Agreements have been executed, review the relevant clauses to determine the contractual rights of all parties. These clauses should be consistent given a gap analysis would have been undertaken prior to financial close. If Project Agreements have not been executed, consider what amendments may be necessary to ensure parties are not exposed to unreasonable risk.
- Negotiate to manage risk Engage with counterparties as soon as possible. Despite the possibility of different contractual rights arising, past experiences have illustrated that it is possible to navigate these types of unusual circumstances by engaging in open discussions to sensibly and commercially mitigate and address issues.



## The supply chain disruptions of COVID-19

The outbreak of COVID-19 in the Hubei province of China is having a significant impact on solar projects worldwide given approximately 63 per cent of all solar modules required by these projects, as well as associated hardware such as inverters and trackers, are supplied by China.<sup>1</sup>

Chinese authorities have required suppliers in the key solar equipment manufacturing areas of Jiangsu, Zhejiang, Guangdong and Anhui to impose periods of extended leave<sup>2</sup>, and some populations in affected areas have also been directed to self-quarantine for at least 14 days. Accordingly, factories are operating at low utilisation rates (if operating at all).<sup>3</sup> Due to the gravity of the outbreak and the resulting response measures, normal production levels are unlikely to recommence for at least several months.<sup>4</sup>

This is having a ripple effect for other manufacturers in South-East Asia and the US which are reliant on Chinese suppliers of hardware such as frames, backsheets and junction boxes.<sup>5</sup> In addition, government authorities in Vietnam, Malaysia and the Philippines have imposed visa restrictions on persons travelling from affected areas, creating labour shortages at key manufacturing facilities.<sup>6</sup>

In Australia, solar projects are experiencing delays in the supply of key equipment, as well as short term price increases.<sup>7</sup> It also remains a possibility that Australian authorities will impose quarantine restrictions or import bans on supplies coming from affected areas.

# Extension of time regimes under EPC Contracts

An EPC Contract is the most common form of construction contract in the Australian solar market. It is often referred to as a 'turnkey' contract, with the EPC Contractor responsible for, and bearing the risk of, the engineering, procurement, construction and commissioning of the solar facility by a fixed Date for Commercial Operation, with a liability to pay Delay Liquidated Damages to the Project Owner if that date is not met.

A caveat to this obligation is the extension of time regime which entitles the EPC Contractor to claim an extension to the Date for Commercial Operation if certain pre-agreed events cause delay (**Delay Events**). If a Delay Event occurs, the EPC Contractor can make a claim in accordance with prescribed processes, and the Project Owner may grant an extension to the Date for Commercial Operation and no Delay Liquidated Damages will be payable.

#### EXAMPLE DEFINITION

Delay Events entitling an EPC Contractor to claim an extension of time vary from contract to contract. Common inclusions for solar projects (as discussed throughout this article) are:

- force majeure events;
- change in law;
- delay by authorities; and
- delay by the Project Owner and its officers, contractors and consultants.

# Delay caused by Force Majeure

'Force Majeure' refers to the occurrence of a significant, unavoidable event that is likely to prevent or impact performance of a party to the contract (**Force Majeure Event**).

Most EPC Contracts provide an express regime for the definition and management of the consequences of Force Majeure Events by:

- classifying them as Delay Events, which enables the EPC Contractor to claim an extension of time to extend the Date for Commercial Operation and avoid a liability for Delay Liquidated Damages is avoided;
- suspending both parties' performance obligations until the impact of the Force Majeure Event has ceased; and
- providing a right to terminate the contract if the Force Majeure Event continues for an extended period of time.

On first impression, the COVID-19 outbreak and its consequential disruptions to solar equipment supply chains look like a classic Force Majeure Event, i.e. an event beyond the reasonable control of the EPC Contractor which will significantly impact the EPC Contractor's ability to meet its obligations under the EPC Contract, particularly its obligation to complete by the Date for Commercial Operation.

The question for the Project Owner and EPC Contractor is, does the supply chain disruption caused by COVID-19 qualify as a Force Majeure Event under the terms of the EPC Contract?

## **Definition of Force Majeure Event**

The definition of Force Majeure Event differs from agreement to agreement. However, three qualifying requirements are uniformly accepted as the basis of most definitions:

- the event or circumstance must be beyond the reasonable control of the affected party;
- the event or circumstance could not be reasonably foreseen by the affected party; and
- the affected party could not reasonably have been expected to prevent or avoid the event or circumstance or its consequences.

Many definitions will also set out an exhaustive list of events or circumstances which meet these qualifying requirements and constitute Force Majeure Events. Others will contain an inclusive list, meaning that other events or circumstances not listed may also qualify as Force Majeure Events.

#### SCENARIO

Consider the following list of events or circumstances expressed as an exhaustive list of Force Majeure Events:

- 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; or
- 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.

# Application to COVID-19

Whether COVID-19 qualifies as a Force Majeure Event will depend on its characterisation under the definition in the EPC Contract.

Classifying COVID-19 as a form of 'physical natural disaster' may strain the ordinary meaning of this phrase given its apparent limitation to geological events (e.g. earthquakes, fires) and hydrological events (e.g. floods). Further, COVID-19 may not qualify as 'natural' but rather the product, to some extent, of human activity.

A more broadly drafted definition of Force Majeure Event may include 'epidemic', 'national emergency' or 'biological contamination'. Here, the classification by the World Health Organisation of COVID-19 as a 'Public Health Emergency of International Concern' may be influential in making the argument that COVID-19 is a Force Majeure Event.<sup>8</sup>

We expect to see a greater emphasis on the categorisation of such outbreaks in definitions of Force Majeure Event going forward. Clearly defined objective criteria will provide greater certainty over generic references and subjective terminology.

# Government responses to COVID-19 and jurisdictional considerations

A Force Majeure Event definition or indeed a Delay Event definition may also include various types of government actions, e.g. 'quarantine', 'trade restrictions' or 'embargo'. However, these actions (or indeed any listed Force Majeure Event) may be qualified by location or jurisdiction.

#### **EXAMPLE DEFINITION**

Consider a definition of Force Majeure Event or Delay Event which includes 'trade restrictions imposed by an Authority'.

In the above example definition, the definition of 'Authority' will be critical. Firstly, the parties should consider whether it is limited only to government and governmental departments, or whether it includes other administrative entities, agencies and authorities. A narrower definition may exclude quasi-judicial bodies such as port authorities and thus an order by such a body to cease shipping operations to attempt to contain the COVID-19 outbreak would not be captured.

Further, it should be considered whether the definition of Authority (or the broader definition of Force Majeure

Event) is limited to the jurisdiction of the solar project or whether it is not limited in respect of location. This will be another critical distinction. For example, an export ban in a foreign jurisdiction may be treated differently to an import ban ordered by an Australian authority.



Trade restrictions imposed by authorities become more relevant for Australian projects if Australian authorities impose quarantine restrictions or import bans on supplies coming from COVID-19 affected areas.

## Exhaustive or inclusive?

Many definitions of Force Majeure Event will expressly state that the events or circumstances listed as part of that definition are *exhaustive*.

If the list is expressed to be *inclusive*, the definition of Force Majeure Event is broadened and it is likely that supply chain disruptions caused by COVID-19 will be captured given they ostensibly satisfy the three qualifying requirements.

## **Mitigation?**

Many Force Majeure regimes will require the affected party to mitigate the consequences of a Force Majeure Event before any relief can be claimed.

For ordinary supply chain disruptions, EPC Contractors would be expected to investigate and/or engage an alternative supplier. However, given the breadth and severity of the supply chain impacts caused by COVID-19 on solar equipment manufacturers in China, alternative and timely supplier options are likely to be limited.

# Change in law regimes – an alternative to Force Majeure?

EPC Contracts usually contain a 'Change in Law' regime which entitles the EPC Contractor to seek relief from its obligations if compliance with a Change in Law will cause delay to the Date for Commercial Operation and/or additional costs to the EPC Contractor. Change in Law is generally confined to changes that have a material effect on either party's performance of their obligations and which could not have been reasonably anticipated.

If government action in response to COVID-19 results in changes to laws and causes supply chain disruptions, this may constitute a Change in Law and offer an alternative avenue of claim for the EPC Contractor. Current examples may include changes in quarantine measures, import/export bans or visa restrictions with respect to goods or persons leaving or arriving from affected areas.

#### **EXAMPLE DEFINITION**

Consider a definition of Change of Law limited to 'the enactment, adoption, promulgation, modification or repeal of any Law after the Execution Date'.

In the above example, the interpretation of 'Law' will be critical. EPC Contracts usually adopt a definition which sets out an exhaustive list of categories of law, including for example, 'statutes', 'regulations' and 'subordinate legislation'. This list of categories may not extend to 'orders', 'directives', 'by-laws' and 'approvals' of bodies or authorities other than State or Commonwealth legislatures.

## Legal implications under EPC Contracts

As discussed, an EPC Contractor is responsible for, and bears the risk of, the engineering, procurement, construction and commissioning of the solar facility by a fixed Date for Commercial Operation, with a liability to pay Delay Liquidated Damages to the Project Owner if it does not.

The fundamental principle is that the EPC Contractor is appointed due to its experience and ability to deliver and is best placed to address the challenges associated with projects of this nature. However, for certain unforeseen events completely outside the EPC Contractor's control, it may be appropriate for the Project Owner to grant adequate relief.

## **Delays to Commercial Operation**

#### SCENARIO

Consider the scenario where an EPC Contractor is forced to suspend work and delay the construction program of a solar facility because they cannot procure the necessary equipment and materials as a result of supply chain disruptions caused by COVID-19.

If the supply chain disruption caused by COVID-19 falls within the definition of Force Majeure Event under the EPC Contract and provided that a Force Majeure Event constitutes a Delay Event, the EPC Contractor will be entitled to claim an extension of time to the Date for Commercial Operation.

If an extension of time is granted, the original Date for Commercial Operation will be extended and the EPC Contractor will not be liable to pay Delay Liquidated Damages for that extended period.

If an extension of time is not granted (e.g. because the supply chain disruptions from COVID-19 are not covered by the definitions of Force Majeure Event and Delay Event), the EPC Contractor will continue to bear the risk to achieve the original Date for Commercial Operation and for Delay Liquidated Damages. In some EPC Contracts, the Project Owner will also have a right to terminate the EPC Contract when Delay Liquidated Damages reach a specified liability cap.



## **Termination for Force Majeure**

Given the breadth and severity of the COVID-19 outbreak, it will be difficult for an EPC Contractor to accurately predict the likely delay to the construction program caused by supply chain disruptions.

#### SCENARIO

Consider the scenario where an EPC Contractor is forced to suspend work and delay construction timelines on a solar facility for a prolonged period because they cannot procure the necessary equipment and materials as a result of supply chain disruptions caused by COVID-19.

If the supply chain disruptions caused by COVID-19 constitute a Force Majeure Event, various obligations under the EPC Contract will be suspended. If this suspension continues for a prolonged period (e.g. 6 to 12 months), a right to terminate the EPC Contract will often arise, exercisable by either party.

The right to terminate in these circumstances provides a level of certainty for all parties, ensuring the EPC Contract cannot be suspended indefinitely. It also provides the Project Owner with some control to manage its liabilities under the other Project Agreements.

#### Frustration

Unless the EPC Contract provides otherwise, the common law doctrine of frustration (recognised by statute in some Australian jurisdictions) may also provide the parties to the EPC Contract with a right to bring the contract to an end. This doctrine will apply where a change in circumstance results in the performance of work becoming impossible (e.g. because of the unavailability of equipment) or being radically different from that originally contemplated (e.g. because of the impracticality of sourcing alternate equipment).

# Flow-on effects to other Project Agreements

## **O&M Agreement**

The EPC Contract and O&M Agreement operate 'back-toback' so that the operation and maintenance services and payments do not start until the solar facility has reached Commercial Operation. The Project Owner will issue a Notice to Proceed (**NTP**) to the O&M Provider specifying the Services Commencement Date following successful commissioning and certainty of the Date of Commercial Operation under the EPC Contract.

#### **Delay to Commercial Operation**

The main exposure for the Project Owner is therefore whether the achievement of Commercial Operation under the EPC Contract is delayed after the NTP is issued to the O&M Provider. In this case, the O&M Provider is entitled to claim costs and expenses due to that delay (e.g. the cost of revising staffing and maintenance plans). However, this risk can be managed. Current Project Owners who have not yet issued a NTP may need to hold-off until there is more certainty in supply chains.

#### Termination

The Project Owner will typically have the right to terminate the O&M Agreement if the EPC Contract is terminated prior to Commercial Operation. In this case, an O&M Agreement will often provide that neither party is liable for Consequential Loss, meaning the O&M Provider will be unable to claim for loss of opportunity or profit if this right is exercised.

The O&M Agreement may also specify a 'sunset date' by which the NTP is to be issued. Failure to issue the NTP by this sunset date may entitle either or both parties to terminate the O&M Agreement.

## PPA

A PPA is an agreement providing for the offtake of electricity generated by the solar facility. In essence, an Offtaker (e.g. an electricity retailer or large electricity consumer) undertakes to pay the Project Owner an agreed price for the quantity of electricity generated and sent out by the solar facility.

These agreements are critical to the bankability of solar projects as they insulate the Project Owner from the volatility of market spot prices.

#### **Delays to Commercial Operation**

The definition of Commercial Operation under a PPA typically requires the solar facility to be capable of generating and exporting electricity, meaning the EPC Contract works must be complete (satisfying Commercial Operation under the EPC Contract) and the facility must be connected to the grid (satisfying Final Commissioning under the Connection Agreement).

#### **SCENARIO**

Consider the scenario where Commercial Operation of the solar facility is delayed by supply chain disruptions to the EPC Contractor caused by COVID-19.

If the Project Owner does not achieve Commercial Operation by the Date for Commercial Operation under the PPA, it may be liable to pay Delay Liquidated Damages to the Offtaker.

As with the EPC Contract, a Force Majeure Event under the PPA will typically entitle the Project Owner to claim an extension of time to the Date for Commercial Operation and therefore avoid liability for Delay Liquidated Damages.

However, it is insufficient to simply point to force majeure under the EPC Contract as evidence of an Force Majeure Event under the PPA. Rather, the Project Owner will need to demonstrate that a Force Majeure Event has occurred under the definition in the PPA. Some PPAs expressly provide that a failure of another supplier or contractor to the Project Owner is excluded from the definition of Force Majeure Event unless that failure is, or would be, considered a Force Majeure Event affecting that supplier or contractor under the PPA itself (had the supplier or contractor been a party to the PPA).

It is critical to understand any inconsistencies between the definitions of Force Majeure Event under the PPA and the EPC Contract. The differences may be significant given the strong negotiating power of Offtakers in the current PPA market. But if the definition of Force Majeure Event under the PPA is wider than it is under the EPC Contract, that will ostensibly work in favour of the Project Owner.

#### **Termination and Sunset Dates**

#### **SCENARIO**

Consider the scenario where Commercial Operation of the solar facility is delayed for a prolonged period by supply chain disruptions to the EPC Contractor caused by COVID-19.

A right of termination may arise in favour of the Offtaker if delay to Commercial Operation under the PPA extends beyond a specified 'sunset' date. The sunset date is typically capable of being extended for a Force Majeure Event but is often capped at a six to 12 month 'longstop' period. Therefore, if there is a prolonged Force Majeure Event, it may ultimately lead to the termination of the PPA.

Whether a reciprocal right of termination exists for the Project Owner to terminate the PPA will depend on what is agreed between the parties. Some PPAs do not contain such a right, so if the Offtaker does not terminate the PPA, the obligations of the Project Owner will simply be suspended indefinitely while the Force Majeure Event occurs or until the common law doctrine of frustration applies.

## **Connection Agreement**

The implications under a Connection Agreement are less certain and more problematic.

A Connection Agreement has two distinct sets of obligations (and often the agreement may be split into multiple contracts).

- First, the transmission network service provider (TNSP) undertakes to construct the connection assets for the solar facility by a fixed Date for Practical Completion.
- Second, the TNSP undertakes to maintain those connection assets and provide connection services over the life of the solar facility.

Although these obligations may be viewed as separate work streams, the TNSP typically recoups the costs of constructing the connection assets through the annual fee charged to the Project Owner for the ongoing maintenance and connection services. This complicates how each obligation (or separate agreement) can ultimately be terminated.

#### **Delay under the Connection Agreement**

#### SCENARIO

Consider the scenario where a TNSP is forced to suspend work and delay the construction program of the connection assets because they cannot procure the necessary equipment as a result of supply chain disruptions caused by COVID-19.

The Force Majeure regime under a Connection Agreement largely operates in favour of the TNSP. Given TNSPs are typically state-based monopolies with significant negotiating power, the scope of the definition of Force Majeure Event may be wider than under the EPC Contract or PPA.

As with the EPC Contract, if the supply chain disruption caused by COVID-19 falls within the definition of Force Majeure Event under the Connection Agreement, the TNSP may be entitled to claim an extension of time to the Date for Practical Completion or a variation of the construction program to the extent necessary because of the Force Majeure Event.

If the TNSP successfully claims an extension of time and, as a result, the Date of Commercial Operation under the PPA does not occur on or before the Date for Commercial Operation under the PPA (because of the lack of grid connection), the Project Owner will be exposed. The Project Owner would have no recourse to Delay Liquidated Damages from the TNSP under the Connection Agreement (even if the TNSP provided for Delay Liquidated Damages), but may be obligated to pay Delay Liquidated Damages to the Offtaker under the PPA. Further, the Project Owner would not receive any payments from the Offtaker given the lack of grid connection during the period of delay.

#### **Termination of the Connection Agreement**

#### SCENARIO

Consider the scenario where a TNSP is forced to suspend work and delay construction timelines on the connection assets for a prolonged period because they cannot procure the necessary equipment as a result of supply chain disruptions caused by COVID-19. As with the EPC Contract, if the supply chain disruptions caused by COVID-19 constitute a Force Majeure Event, performance obligations under the Connection Agreement will be suspended. If this suspension continues for a prolonged period (e.g. 12 months), a right to terminate the Connection Agreement will often arise, exercisable by either party.

In some instances, this right of termination is subject to additional criteria such as the materiality of the Force Majeure Event.

However, if a solar facility is likely to reach Practical Completion under the EPC Contract, the TNSP may not want to terminate the Connection Agreement in the hope that the Event of Force Majeure will be resolved. In this respect, there is often no time limit under which the TNSP must exercise this right of termination.

#### SCENARIO

Consider the scenario where Practical Completion of the solar facility under the EPC Contract is delayed for a prolonged period by supply chain disruptions to the EPC Contractor caused by COVID-19, but the TNSP is able and willing to complete Commissioning of the connection assets unaffected.

The Project Owner is typically liable to commence payments to the TNSP at the Date of Practical Completion under the Connection Agreement, even if the connection services have not yet commenced.

In this case, if delay to Practical Completion of the solar facility under the EPC Contract continues and the Project Owner determines that Practical Completion is unlikely to be achieved, the TNSP's services will not be required and the Project Owner may consider terminating the Connection Agreement.

If the Connection Agreement is terminated prior to the expiry date, the Project Owner will often be required to pay an Asset Stranding Charge – a pre-agreed amount which amortises over the period during which the TNSP provides the connection services. This Asset Stranding Charge will be significantly higher if the Connection Agreement is terminated in the early stages of the term to ensure the TNSP recoups the costs of constructing the connection assets.

# Guidance for solar industry participants

The above discussion highlights the serious ramifications of COVID-19 on key Project Agreements underpinning the viability of upcoming and ongoing solar facility projects in Australia. The consequential financial, legal and commercial implications arising from COVID-19 are significant and should be treated accordingly.

Solar industry participants must undertake a thorough and considered assessment of the risks of COVID-19 for their individual circumstances.

## Develop a mitigation plan

Solar industry participants may find the following 'mitigation plan' process useful in assessing the risk to their own operations and identifying the necessary actions:

- 1 Identify Identify the key areas where COVID-19 may have a detrimental impact on your business. Examine the supply chain, labour requirements or operational needs of current projects or the plans for projects which are under negotiation. Depending on your role in the solar industry (i.e. as a developer, contractor, debt lender or possible investor), there may be specific risks that may apply to you.
- 2 Assess Assess the impact of COVID-19 on your business by considering the probability of certain events occurring and the possible consequences arising from those events. Consequences may be to cost, schedule, technical performance and capability. You should also consider the various contractual liabilities that may arise under the range of Project Agreements that have either been agreed or are in the process of being negotiated.
- 3 Treat Implement actions to reduce the impact of COVID-19 on your business and mitigate (to the extent possible) the risks where you can. This may involve seeking external legal advice to determine the risk under the various project agreements and conducting commercial discussions with other parties or subcontractors.
- 4 Stay informed The ramifications of COVID-19 are yet to be fully seen or understood. It is important to stay informed of any developments with respect to COVID-19 (e.g. supply chain issues, visa restrictions and/or trade restrictions that may be implemented by government authorities). The situation is in a state of flux and parties are encouraged to continually assess and triage the various impacts of COVID-19 on their business.



## Assess contractual options

Where Project Agreements have been agreed and progress has already been made, affected parties are encouraged to review the wording and scope of the relevant clauses in their own Project Agreements to determine the impact of COVID-19 to their individual circumstances.

If the EPC Contractor and Project Owner are seeking to further negotiate the terms of the EPC Contract (or other Project Agreement) prior to execution, it may be worth considering the following to inform those negotiations:

- add an additional condition precedent specifying that the EPC Contractor must make enquiries as to the availability of solar panels from the intended supplier to inform the construction program and next steps;
- expand the definition of Force Majeure Event to explicitly include any of the following terms:
  - a 'health crisis within Australia';
  - an 'epidemic';
  - a 'health crisis declared to be a Public Health Emergency of International Concern by the World Health Organisation occurring within Australia or internationally'; or
  - a 'pandemic'; and
- expand the definition of Force Majeure Event to explicitly include Australian authority directives which

impact the import of goods from international suppliers and directives from international authorities preventing the exporting of goods to Australia.

If the parties execute the EPC Contract, but it becomes apparent after execution that the procurement of solar equipment is likely to be significantly impacted, the Project Owner should consider whether:

- to exercise its rights under the Force Majeure regime including granting an extension of time or suspending obligations;
- to order the EPC Contractor to suspend performance of its obligations under other provisions of the EPC Contract;
- the achievement of Commercial Operation by the Date for Commercial Operation is possible in light of current circumstances;
- to grant an extension of time under the Project Owner's general discretion;
- raise any anticipated issues related to adhering to the original program as an issue with the EPC Contractor as early as possible. The Project Owner should note that failure to provide sufficient materials to perform and complete the works at a rate of progress that gives reasonable assurance to the Project Owner that the EPC Contractor can achieve Commercial Operation by the Date for Commercial Operation may be grounds for the Project Owner to give the EPC Contractor a default notice;



- to call a meeting of senior representatives under the dispute clause of the EPC Contract; and
- to terminate the EPC Contract on the basis that the EPC Contractor has failed to progress the works.

# Learning from the past

Finally, we need to remember that circumstances similar to COVID-19 have been seen before during the SARS outbreak of 2003. SARS was first reported in Asia in early 2003 and over the next few months, spread to more than a dozen countries in North America, Europe and Asia before the outbreak was contained.<sup>9</sup>

Although the ramifications of COVID-19 in 2020 may turn out to be more complicated, it is important to remember the lessons to be learned from similar experiences. During the SARS outbreak, parties resisted terminating contracts where possible and instead navigated the epidemic by engaging in discussions to sensibly and commercially mitigate and address issues.

# Conclusion

It is anticipated that parties will navigate the maelstrom of COVID-19 through a similar process as that undertaken during the SARS outbreak, by commencing discussions as opposed to terminating contracts through the application of Force Majeure. These discussions should be guided and informed by a thorough understanding of the underlying legal position, which may be assisted by engaging external legal advice with a particular expertise in Project Agreements in Australia.

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