

When Can Parties in Energy Projects Claim Force Majeure Due to the COVID-19 Coronavirus?

As the energy industry faces the growing impact of the coronavirus disease 2019 (COVID-19), commonly known as the “coronavirus,” or COVID-19, outbreak, questions arise about whether *force majeure* provisions may be invoked to delay performance or terminate contracts.

Force majeure provisions, also referred to as “Act of God” clauses, are commonly included in project contracts to relieve parties from performing their contractual obligations upon the occurrence of an event beyond their control.¹

Energy projects are facing reduced demand and disrupted supply chains, as governments and businesses tell people to stay home in an effort to stem the spread of the virus.² Contracting parties in the energy industry are growing concerned about the impact those disruptions will have on contract schedules and their ability to meet their contractual obligations.³

Those disruptions concern not only project owners, but also investors and lenders, who may be relying on agreed upon project schedules to support the project’s eligibility to receive tax incentives and credits. For example, parties to US renewable projects may be at risk of losing tax credits if they are unable to meet start-of-construction or placed-in-service deadlines as a result of schedule delays.⁴ Newer energy industries, such as battery storage, may be particularly susceptible to manufacturing disruptions as their supply networks tend to be less developed than more established industries.⁵ Regardless, parties to energy project contracts are facing “an immediate and dramatic business concern for the industry as a whole.”⁶

Contracting parties are beginning to consider avenues by which they (or their counterparties) may be able to suspend or terminate all or part of their performance obligations under the terms of their project contracts.⁷ One of the most relevant provisions to review in this regard is the *force majeure* clause. *Force majeure* provisions excuse a party’s performance for unforeseeable events outside of that party’s control.⁸ Unlike civil law jurisdictions, which may apply a concept of *force majeure* even if not written expressly into the contract, in

common law jurisdictions like the US, the so-called “devil is in the details” with respect to *force majeure* provisions.⁹ In other words, enforceability is highly dependent on the specific language used in the contract.

In determining whether a contracting party is entitled to relief under a *force majeure* provision, many US courts will assess whether the event qualifies as a *force majeure* event under the express language of the contract, whether the risk of non-performance was foreseeable or able to be mitigated, and whether performance is truly impossible because of the event.¹⁰ However, blanket statements cannot be made about when a *force majeure* event will excuse a contracting party’s performance. Rather, a close reading and careful analysis must be done on a contract-specific and fact-specific basis.

Force majeure events. Contracting parties should first study the events specifically listed in the *force majeure* provision in question, though the specifically listed categories and events may give rise to a number of interpretive questions.¹¹ For example, consider a provision that lists public health crises as *force majeure* events. Whether or not the COVID-19 outbreak satisfies this language may depend on how you define the term public health crisis. Does a public health crisis have to be of a certain severity or affect a particular region to rise to the level of a *force majeure* event? Without further definition in the project contract, a contracting party’s ability to claim *force majeure* for the COVID-19 outbreak as a public health crisis may be debatable. On the other hand, if the provision specifically lists pandemics as *force majeure* events, then the World Health Organization’s (WHO) classification of the COVID-19 outbreak as a pandemic would more clearly satisfy the language of the *force majeure* provision.¹² Other *force majeure* provisions may specifically list quarantines as *force majeure* events, but that raises a question of whether the quarantine must be government imposed, or whether it also includes the policies of self-imposed isolation that many businesses are currently implementing in the US. An even more fundamental consideration is whether the virus itself is the cause of a party’s delayed or hindered performance, or are secondary factors, like government and health organization recommendations, the actual impediment to performance.¹³

1 <https://www.ft.com/content/d3569255-6d4c-488f-a658-7013a36a1aa4>

2 <https://www.wsj.com/articles/how-a-virus-upended-the-business-world-11584150596?mod=searchresults&page=1&pos=12>

3 <https://www.utilitydive.com/news/an-immediate-and-dramatic-business-concern-how-covid-19-is-disrupting-th/574262/>

4 <https://www.greentechmedia.com/articles/read/clean-energy-assistance-wont-be-part-of-massive-coronavirus-stimulus-bill>; <https://www.utilitydive.com/news/one-easy-fix-to-covid-19-disruption-of-advanced-energy-development/574737/>

5 <https://www.utilitydive.com/news/an-immediate-and-dramatic-business-concern-how-covid-19-is-disrupting-th/574262/>

6 <https://www.utilitydive.com/news/an-immediate-and-dramatic-business-concern-how-covid-19-is-disrupting-th/574262/>

7 <https://www.ft.com/content/b3d2cc2e-637a-11ea-a6cd-df28cc3c6a68>

8 <https://www.constructiondive.com/news/force-majeure-clauses-take-center-stage-in-contractors-coronavirus-respons/574135/>

9 <https://www.ft.com/content/d3569255-6d4c-488f-a658-7013a36a1aa4>

10 14 Corbin on Contracts § 74.19 (2019)

11 <https://www.constructiondive.com/news/force-majeure-clauses-take-center-stage-in-contractors-coronavirus-respons/574135/>

12 <https://www.natlawreview.com/article/coronavirus-and-force-majeure-clauses>; <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

13 <https://www.ft.com/content/8e644cbe-5719-11ea-abe5-8e03987b7b20>

Level of interference. Most *force majeure* provisions require a specific level of interference that a *force majeure* event must cause with respect to the performance of a contracting party before such party may claim relief due to *force majeure*. For example, some *force majeure* provisions require that a party's performance must be either prevented, hindered or delayed before relief under the *force majeure* provision can be claimed.¹⁴ If the standard is that performance must be "prevented," then a party may need to prove that performance under the contract is objectively impossible as a result of the *force majeure* event.¹⁵ Regardless of the standard, contracting parties should also consider whether all of their obligations under the contract may be suspended or terminated, or only those directly related to the effects of the COVID-19 outbreak, and whether their counterparty's obligations are also suspended or terminated.¹⁶

Foreseeability of COVID-19. Contracting parties should then consider whether the COVID-19 outbreak was foreseeable at the time of contract execution. With respect to contracts that are entered into now that the COVID-19 outbreak has disrupted transportation and supply chains and shut down businesses in the US, arguably the risk of such disruptions are known and accounted for in the price and schedule agreed to by the parties.

Notice requirements. Many *force majeure* provisions contain notice requirements that must be met before a party can claim *force majeure*, which require an affected party to notify the other party upon it becoming aware of a triggering event within a required time period. Depending on how the agreement is worded, this triggering event may require the affected party to actually experience a material delay or impediment to performance as a result of the *force majeure* event, or it may merely require the occurrence of the event itself.¹⁷ If it is former, then a party may be forced to bear some of the effects of the *force majeure* event before it can issue notice and attempt to claim relief under the *force majeure* provision. If it is the latter, then contracting parties must consider when the COVID-19 outbreak began and whether it was a known event in relation to contract execution. A failure to issue notice upon the appropriate triggering event may result in the forfeiture by a contracting party of its ability to claim relief under a particular *force majeure* provision.

Duty to mitigate. Additionally, many *force majeure* provisions impose on contracting parties the duty to mitigate the effects of a *force majeure* event.¹⁸ If this is the case, contracting parties should consider alternative avenues for performance, such as substitute transportation and suppliers, to prepare for this duty to mitigate the effects of the COVID-19 outbreak.¹⁹

Conclusion

The foregoing indicates that whether a contracting party may be entitled to *force majeure* relief from performance due to the COVID-19 outbreak depends on an extremely nuanced analysis of the language of the *force majeure* provision. Contracting parties should review such provisions in each of their project contracts and consider some of the questions raised in this article. Parties should seek legal counsel if they are considering seeking relief under a *force majeure* provision for the COVID-19 outbreak, or if they expect to receive or have received such a claim for relief from a contractual counterparty, to assess the merits of such claim under the particular *force majeure* provision.

Even if a contracting party is not currently considering a claim of *force majeure*, it is important to understand what may qualify as a *force majeure* event, and whether there are any other requirements before the contracting party can claim relief, such as notice or mitigation obligations. Furthermore, it is particularly important to understand when and how a contractual counterparty may claim relief for a *force majeure* event, and to prepare for such possibility. Contracting parties should also evaluate their supply chains, transportation systems and construction schedules for potential vulnerabilities to COVID-19 interference, and identify possible alternatives, so that they may efficiently mitigate the effects of the COVID-19 outbreak if and when it becomes necessary.

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¹⁴ <https://www.natlawreview.com/print/article/coronavirus-and-force-majeure-clauses>

¹⁵ <https://www.law360.com/articles/1026220/crafting-robust-force-majeure-clauses>

¹⁶ <https://www.natlawreview.com/print/article/coronavirus-and-force-majeure-clauses>

¹⁷ <https://www.natlawreview.com/print/article/coronavirus-and-force-majeure-clauses>

¹⁸ <https://www.natlawreview.com/print/article/coronavirus-and-force-majeure-clauses>

¹⁹ <https://www.constructiondive.com/news/force-majeure-clauses-take-center-stage-in-contractors-coronavirus-respons/574135/>