

Introduction

The coronavirus disease 2019 (COVID-19) pandemic is significantly affecting the construction industry in Japan and delaying or suspending major construction projects. It has raised a number of questions about standard construction work contracts commonly used in the industry, including: How is a *force majeure* event defined? Does the COVID-19 pandemic constitute a *force majeure* event? What are the legal consequences of a *force majeure* event? This article discusses these questions. Please contact us if we can assist with the analysis of these or similar issues related to construction contracts or other commercial agreements related to your business in Japan.

MLIT's Standard Agreement for Private Construction Work Contracts

The Ministry of Land, Infrastructure, Transport and Tourism of Japan (MLIT) has published standard construction form contracts, including (i) "*Minkan Kouji Hyojun Ukeoi Keiyaku Yakkan (kou)*" (Standard Agreement for Private Construction Work Contracts (A))¹, which has been used for relatively large construction projects; and (ii) "*Minkan Kouji Hyojun Ukeoi Keiyaku Yakkan (otsu)*" (Standard Agreement for Private Construction Work Contracts (B))², which has been used for small construction projects (e.g., individual houses) between private contractors and clients in Japan (collectively, the "Standard Agreements for Private Construction Work Contracts"). In the Standard Agreements for Private Construction Work Contracts, a *force majeure* event is defined as "a natural disaster, or other natural or artificial event that is not attributable to either the owner or the contractor."³

The *force majeure* clauses in the Standard Agreements for Private Construction Work Contracts grant the rights to the contractor to request the owner to extend the time for completion, suspend the works and terminate the contract.⁴ It should be noted that the owner cannot cancel the contract "with cause" based on the delay in performance of the contractor if such delay is caused by a *force majeure* event.

On March 19, 2020, the MLIT notified the major construction companies that "difficulties in procurement of materials or equipment, infection of personnel, etc. arising out of the current COVID-19 situation are deemed to constitute '*force majeure*' under the Standard Agreements for Private Construction Work Contracts, unless the constructions have been willfully or negligently hindered by either of the owner or the contractor," and that "the contractor may request the owner to extend the time for completion and the burden of increased expense associated with such delay shall be determined through mutual discussion between the owner and the contractor."⁵ This MLIT's interpretation seems consistent with the natural interpretation of the relevant provisions, as well as court precedent regarding *force majeure* events. Although the MLIT's interpretation is not binding at court, the notice will likely constitute evidence in favor of parties relying on the *force majeure* clause.

GCCCC's Standard Construction Form Contracts

The General Conditions of Construction Contract Committee (GCCCC), consisting of seven public groups in the construction industry, has published a standard construction form contract called "*Minkan (Shichikai) Rengou Kyotei Kouji Ukeoi Keiyaku Yakkan*" (General Conditions of Construction Contract), which has been commonly used for construction projects for buildings in Japan. It provides for the same definition of *force majeure* as the MLIT's Standard Agreements for Private Construction Work Contracts.⁶

Under the GCCCC's General Conditions of Construction Contract, the Contractor has the same rights as those in the MLIT's Standard Agreements for Private Construction Work Contracts.⁷

Although the MLIT's notice dated March 19, 2020, did not mention the GCCCC's General Conditions of Construction Contract, its *force majeure* clause would likely be construed in the same manner as that of the MLIT's Standard Agreements for Private Construction Work Contracts. However, similar to any other contract provision, the effect of the *force majeure* clause will depend on the underlying facts.

1 <https://www.mlit.go.jp/totikensangyo/const/content/001331102.pdf> (Japanese only).

2 <https://www.mlit.go.jp/totikensangyo/const/content/001331104.pdf> (Japanese only).

3 Article 21(1) of the Standard Agreement for Private Construction Work Contracts (A); Article 14(A) through Article 14(C) of the Standard Agreement for Private Construction Work Contracts (B).

4 Article 31(5), and Article 35(1) and (4) of the Standard Agreement for Private Construction Work Contracts (A); Article 21 of the Standard Agreement for Private Construction Work Contracts (B). Note that the Standard Agreement for Private Construction Work Contracts (B) does not include a suspension or termination clause for *force majeure*.

5 <https://www.mlit.go.jp/common/001335244.pdf> (Japanese only).

6 Article 2(1) of the General Conditions of Construction Contract.

7 Article 21(2), Article 28(5), and Article 32(1) and (4) of the General Conditions of Construction Contract.

ENAA's Model Form of Plant Construction for Japanese Domestic Projects

The Engineering Advancement Association of Japan (ENAA), a Japanese non-profit organization established for the advancement of technological capabilities and promotion of technical development, has published a Model Form of Plant Construction for Japanese Domestic Projects (Domestic Model Form), which is not covered by the GCCCC's General Conditions of Construction Contract.

The ENAA's Domestic Model Form uses the term *force majeure* but lacks its definition. Consequently, it is unclear whether COVID-19 is construed as *force majeure* under the Domestic Model Form.

In the event of *force majeure*, the contractor may request the owner of the plant to extend the time for completion, suspend its works and terminate the contract.⁸ Either party may request the other party to change the contract price.⁹ Note that Article 21 provides for an exhaustive list of certain events (e.g., war, nuclear crisis and earthquake), occurrence of which triggers the contractor's right to seek damages. The list does not include an event corresponding to a pandemic like COVID-19.

ENAA's Model Form of International Contract for Process Plant Construction

The ENAA has also published a Model Form of International Contract for Process Plant Construction (International Model Form). The International Model Form defines *force majeure* as events beyond the reasonable control of the parties with a non-exhaustive list of events such as war, strikes and earthquakes.¹⁰ The non-exhaustive list does not include an event corresponding to a pandemic like COVID-19.

In case of occurrence of a *force majeure* event, either party is entitled to terminate the contract and extend the time for completion.¹¹

In summary, although the MLIT's notice dated March 19, 2020, fails to mention the ENAA's Domestic Model Form or International Model Form, a court may consider the MLIT notice as support for a party's claim that COVID-19 has triggered the *force majeure* clause in a construction contract based on the ENAA's Domestic Model Form or International Model Form. It is advisable to consult with lawyers and carefully analyze the relevant facts related to a potential claim of *force majeure*, based on COVID-19 for such contracts.

Authors

Kazuya Yamamoto

Partner, Tokyo Office

E kazuya.yamamoto@squirepb.com

Yuichiro Yasutomo

Associate, Tokyo Office

E yuichiro.yasutomo@squirepb.com

⁸ Article 28(3) and Article 32(1) and (4) of the ENAA's Model Form of Plant Construction for Japanese Domestic Projects.

⁹ Article 29 of the ENAA's Model Form of Plant Construction for Japanese Domestic Projects.

¹⁰ GC 37.1 of the ENAA's Model Form of International Contract for Process Plant Construction.

¹¹ GC 37.6 and GC 40.1 of the ENAA's Model Form of International Contract for Process Plant Construction.