

GENERAL ISSUES

1. What is a force majeure event?

A force majeure (“FM”) event is generally defined as any unexpected event or circumstance which is outside the reasonable control of a party and which prevents or delays that party from performing its obligations under a contract. Under English common law, although some jurisdictions recognize the limited doctrine of contractual frustration or (more rarely) the doctrine of “supervening impossibility” which is similar in application to FM, there is no general concept of FM per se. Hence, for common law agreements, Force majeure is a contractual term that arises solely on the basis of the express (not implied) provisions included in the contract and their interpretation will be critical in defining the scope of its application. The situation differs under civil law because most jurisdictions have a codified concept of Force Majeure. Therefore, while contract interpretation remains important, Force Majeure may still be applicable to a civil law contract even if there is no contractual stipulation to this effect and will require an additional layer of analysis (more details in Section b below).

a. Mechanics of FM Clauses in Power Sector Projects

FM clauses in power sector contracts with governments/utilities (such as power purchase agreements (PPAs)) typically list events that qualify as force majeure. These clauses typically differentiate between political force majeure events (such as wars, frustrating government actions, embargoes) and other force majeure events (such as natural disasters and pandemics). Some of these clauses have catch-all language setting forth the criteria to assess whether a type of event not specifically listed under any FM category still qualifies as a force majeure. The clauses will also provide for a notice requirement with a specific deadline, a remedy specific to the length of the FM event, and a right to terminate the contract if the FM event continues for a specified prolonged period. Some clauses may also create specific exceptions for events which will not be recognised as FM events, such as a party’s inability to pay, economic hardship, or market downturns.

b. FM Variations in Civil Law Jurisdictions

Under civil law, FM is generally codified and three requirements must be met for an event to qualify as force majeure: exteriority (beyond affected party’s control), unforeseeability (could not reasonably have been foreseen at the time of the conclusion of the contract), and unavailability (the effects of the events could not be avoided by appropriate measures). As long as performance is possible, even if it would appear very costly for the affected party, it is unlikely that the event will qualify as FM.

Since FM is codified in civil law jurisdictions, FM might still be applicable to contracts which do not specifically have a FM clause. For example, some civil law jurisdictions, such as those of Portuguese tradition, codify both the FM regime and the supervening impossibility doctrine, although both regimes have different requirements and entail different contractual consequences. French civil law jurisdictions also codify the doctrine of *imprevision* (hardship), which may avail a party even if the relevant contract does not contain any FM or hardship clauses.

2. How are force majeure clauses applied?

A party's ability to claim relief for a FM event depends on the jurisdiction and the terms of the contract. Generally, for the FM clause to apply, an affected party must issue a FM notice to the other party detailing the event and the basis on which it qualifies as FM event. The notice will also show that the FM event caused the party's non-performance. A government/utility deciding to issue or respond to a FM notice must consider these conditions for applicability of a FM clause before taking further action.

Until the affected party properly invokes FM, it remains liable for any default in performance. The affected party will also have to prove that its inability or delay to perform its obligation(s) under the contract is in fact directly caused by the claimed FM event. Moreover, FM does not operate to end the contract immediately. If the FM clause is successfully invoked, the affected party's obligations under the contract will be suspended only until such time as the FM event (and its direct effects) has ceased to prevent or delay performance of the contract. The affected party's obligations remain operative, but such party will not be liable for penalties or damages associated with delayed performance or non-performance as long as the FM event continues. Deadlines may also be extended and alternate performance may be allowed as a result of the FM event. If the unaffected party has obligations which have arisen in the contract and are not contingent on the affected party's performance (which has been delayed or prevented by the FM event), the unaffected party's obligation to perform remains operative.

If the impossibility to perform the obligation continues for a prolonged period specified in the contract (usually 180 days cumulatively and 365 days on an aggregate of all FM events within the project life), it could lead to the termination of the contract. The affected party will be, in principle, released from its obligation and exempt from contractual liability. For governments and government-owned utilities, if a PPA or implementation agreement (IA) is terminated (either by the utility/government or the project company) on the basis of a prolonged force majeure event, the utility/government is usually required under the contract(s) to make significant termination payments and accept ownership of the power plant. The termination payments typically cover the project's outstanding debt and breakage costs, and in some cases, outstanding equity contribution and a reasonable return on equity.

FOR PROJECTS UNDER DEVELOPMENT

3. Should government utilities or agencies suspend or delay power project negotiations until the end of the COVID-19 crisis?

Amidst the COVID-19 crisis, development-phase projects at different stages of negotiation grapple with the decision of whether to suspend, delay or continue ongoing negotiations. While ultimately the decision will fall on all the parties sitting at the negotiation table, completely halting, suspending (or even canceling) negotiations for a project might not be in the best interest of any party involved. On a case by case basis, governments and power utilities should evaluate the merits and feasibility of continuing negotiations by technological means available, so as to minimize potential negative impacts and allow the project to fully resume its course once the COVID-19 crisis is tackled.

For projects in an advanced phase of negotiation, the best course of action may be to continue negotiations through online video conference (“VC”) platforms, which will allow parties to keep the momentum, while taking the opportunity to consider the implications of COVID-19 on the development of the project. Particular thought should be given to any force majeure clauses for project documents signed during the full outbreak of the pandemic, as some elements such as the unforeseeability of the pandemic might no longer be met. For projects under very early development phase, for which most studies have not yet been carried out, preliminary negotiations should be maintained as far as possible and appropriate. The decision to suspend negotiations may be considered where it is not feasible to undertake site visits for data collection and study development. In such cases, it might be advisable to agree to resume negotiations once currently imposed lockdowns and travel bans are lifted.

4. What considerations should a government take into account and reflect in agreements in the context of pandemics such as COVID-19?

The COVID-19 pandemic has far reaching effects on power project documentation right from the IA and PPAs to the construction and operation contracts. Where governments are conducting negotiations with counterparties in respect of power projects, it is important that risk be appropriately apportioned in light of the COVID-19 pandemic. Governments should take into consideration the impact that COVID-19 may have on certain risks such as currency and curtailment.

Ongoing negotiations of power project documentation should reflect lessons learned from COVID-19. Definitions of key terms such as FM, material adverse change and change in law as well as derivative clauses such as the termination clause should be sufficiently adjusted to reflect not only the pandemic but the effects thereof. It is also important for governments to ensure that dispute resolution mechanisms provided for in power project documentation envisage pandemics. Documents should expressly provide for peculiar dispute resolution mechanics during and shortly after a pandemic.

5. What are some of the key bankability issues related to the COVID-19 pandemic which government utilities should consider for development-phase projects?

"Bankability" refers to the extent to which a project is considered financeable by conventional lenders and encompasses an assessment of a project's collateral, future cash flows and probability of success. As lenders are highly sensitive to systemic shocks, the COVID-19 pandemic might negatively affect the bankability of certain development-phase projects. Governments' responses to the pandemic may entail the mobilization of significant resources to address the health crisis, which will put a strain on sovereign budgets and, if a certain threshold is reached, might have negative impacts on governments' ability to borrow (or guarantee borrowing) from the international capital markets. The reallocation of government finances might therefore impair its ability to guarantee certain payment obligations by power utilities, often the epicenter of bankability considerations, and thus render a project less likely to be financed.

Offtaker liquidity, cost-overruns, and curtailment risks are other issues that will affect many development-phase projects. For solar power projects, COVID-19 has negatively affected supply of modules and inverters, and a shortage of these installation components is pushing prices up in some markets. Lenders will likely become wary of cost overruns and how these are mitigated in the contract structure. Given the potential fall in electricity demand as a result of COVID-19, lenders will also carefully consider curtailment risk in the projects and how these are mitigated. With both the drop in demand and possible reduction in collection rates as a result of COVID-19, offtaker liquidity may be adversely affected. It is crucial that Governments and utilities sit at the (VC) negotiation table accompanied by trusted advisors that can structure their businesses to mitigate liquidity impacts of COVID-19, as well as ensure adequate protection as the COVID-19 crisis pushes the standards of risk allocation matrices and an ever more subjective concept of "bankability".

6. How should governments respond to a FM notice issued by a project company on the basis of COVID-19?

If governments/utilities receive a FM notice from a project company claiming to be unable to perform its obligations under the PPA due to the COVID-19 outbreak, they should carefully verify whether the PPA has a FM clause and the approach of the contract's governing law towards FM clauses. The governments/utilities should also thoroughly review the FM provisions to see whether COVID-19 qualifies as a FM event in the PPA and verify that the notice has been received within the stipulated period. The support of a lawyer with adequate expertise is recommended for such analysis.

Assessing whether COVID-19 is the direct cause of the project company's non-performance of its obligation, governments/utilities should insist that the project company provide evidence of the circumstances that are allegedly preventing performance and regular updates regarding its efforts to resume performance and/or mitigate the impact of non-performance. The utility should also consider the reliefs the project company may be entitled to during the FM event, which may include compensation and/or extension of contractual milestones. Other issues to consider include verifying whether insurance may cover any of the expected losses and reviewing the rules governing early termination if the FM event persists. Where appropriate, utilities should also consider negotiating a written amendment to the contract to reflect a commercially sensible resolution.

7. What should governments consider about change-in-law reliefs in the PPAs and how these may apply in the context of COVID-19?

Change in law provisions in PPAs or power sector IAs (or Concession Agreements) protect the project company from the effects of changes in laws, regulations, or directives from what the law was at the time of execution of the agreements. These effects may be an increase in costs or delays to achieving milestones in the PPA or IA. The goal is to put the project company in the same position it would have been had the change not occurred. If the change in law renders performance under the PPA impossible (typically called a "frustrating change in law"), the project company may be entitled to terminate the PPA with the compensation assessed as though it were a political FM event. Efforts by African governments to contain the spread of COVID-19 such as lockdowns, travel restrictions, and self-isolation measures may lead to delays in delivery of equipment or completion of milestones, as well as an increase in construction costs, and will be subject to much scrutiny post COVID-19 to assess the nature of relief for all the parties involved.

The reliefs that independent power producers (“IPPs”) or governments may seek (in terms of time or money) as a result of changes in the law arising from COVID-19 will depend on the specific provisions of the contract. However, utilities/governments should review their contracts to ensure that milestones such as mechanical completion dates or commercial operation dates can be automatically extended for delays arising from change in law. Utilities may incur payment obligations in the event that these milestones are delayed as a result of government actions related to COVID-19 which delay completion testing or commercial operations. If automatic extension provisions are lacking, governments/utilities may consider exploring amendments to these contracts in order to reduce their exposure.

FOR PROJECTS UNDER OPERATION

8. What should government utilities consider if there is a drop in electricity demand as a result of COVID-19 complete lockdowns? Should government utilities issue force majeure notices?

The increasingly stringent lockdown measures and the resulting global economic downturn are likely to slow down the operations of commercial and industrial electricity consumers in several African countries on the continent and will ultimately lead to a drop in their electricity demand. In turn, their utilities will likely experience a loss of revenue which is unlikely to be offset by the increase in household consumption among residential consumers who are working from home. The revenue loss will make it difficult for utilities to meet their payment obligations under PPAs signed with IPPs. Some utilities may consider commencing talks with the IPPs and finance parties to work out and agree on temporary payment structures or contractual waivers that will prevent a utility default event in the PPA while COVID-19 subsists.

Utilities that consider declaring FM to avoid payment obligations under some PPAs will have to weigh that option carefully. Some contracts specifically exclude inability to pay, economic hardship, or market downturns from FM events. When such exclusion language exists, a FM event based on a significant and unforeseeable reduction of the electricity demand, for example, is unlikely to succeed. Even when such exclusions are not specifically contained in the FM clause, utilities in most African countries should determine whether pandemics are expressly listed or are integrated in the list of force majeure events in the PPA. COVID-19 might automatically be deemed a FM event under local laws in some civil law countries although the relevant agreement does not expressly cover epidemics or pandemics or the agreement does not include FM clauses. For all systems though, the utility will need to show that there is a direct link between the outbreak and their impossibility to make PPA payments, as well as prove that it has taken all reasonable steps to mitigate or avoid the effects of the pandemic on its ability to pay.

Accordingly, the utility must consider the specific wording of the contract and the laws that apply in the relevant jurisdiction. A prolonged force majeure event will also typically lead to termination of the contract which will trigger a bulk payment obligation by the government/utility. The impact of this obligation must be considered by the utility, especially since it is difficult to predict when normal business operations will be restored.

9. What should government utilities consider if collection rates have significantly reduced as a result of COVID-19?

Either as a result of regulatory directives or corporate decisions by the utilities, utilities are unlikely to disconnect end-users who are unable to pay utility bills on time or completely during the COVID-19 period. Prepaid customers in some countries may also be unable to top up their credit as a result of the lockdown situation, while postpaid customers may not get their bills delivered if utility workers are not available to deliver such bills. This may lead to reduction in collection rates for utilities. As a result, utilities should consider strengthening their business continuity measures to reduce collection losses while protecting the health and safety of their employees. They may also consider offering alternative or deferred payment arrangements to their customers. On a case by case basis, utilities should establish mechanisms for collecting any deferred electricity payments. Utilities will also have to determine how such alternative payment arrangements are reported in their accounts and make certain estimates in their financial reporting as regards the collectability of receivables. Bespoke advisory services will be needed by utilities to examine the impact of COVID-19 on their liquidity and establish strategies to reduce any impact.

10. What are some key considerations for Government-Owned Single Buyers in the context of COVID-19?

It is necessary for single buyers to support mutual collaborative measures, or lead the establishment of such measures, among stakeholders in their various markets to ensure security of supply in the COVID-19 period. Single buyers will (or work with grid operators to) assess the impact of COVID-19 on their grid and establish critical response measures to deal with these impacts. Other measures may include exploring least-cost scheduling and dispatch arrangements which will not compromise supply security. On a case by case basis, single buyers may also evaluate their contracts with generators and distributors respectively, to assess the real impacts of COVID-19 on each entity's revenue stream and devise temporary alternative payment structures (with regulatory approval) that will mitigate the impacts of COVID-19. The ALSF is available to assist state-owned single buyers with assessing their contractual positions and proposing measures to manage the effects of COVID-19 on these contracts.

11. What are some Currency Exchange Rate Issues relating to PPA Payments in the COVID-19 Period?

Some PPAs and/or IAs contain an obligation on the government or utility to make foreign currency available to the IPP at the rate assumed in the PPA to enable the IPP to meet its obligations to finance parties (i.e., debt service). It may be premature to predict with certainty how COVID-19 will affect exchange rate obligations in agreements signed with IPPs. Some local currencies are pegged to foreign currencies in which the project debt is denominated. Some lenders may also agree to deferring principal payments for a period of time. Thus, the currency exchange impact may be minimal in some jurisdictions but far reaching in others. For instance, some countries may be experiencing depletion in their foreign reserves and, with the fall in commodity prices, these countries may be at risk of defaulting in currency exchange obligations under PPAs or IAs. Therefore, governments and utilities would want to consider the extent of the difference, if any, between the local currency to foreign currency exchange rate assumed in the PPA and the current exchange rate as a result of COVID-19. This assessment will enable the government and the utility to assess their exposure and explore response measures to deal with any significant adverse change.

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