

COVID-19: EUROPEAN & MALAYSIAN PERSPECTIVE ON *FORCE MAJEURE* IN ENERGY CONTRACTS



Europe

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At first glance, the answer seems obvious.

According to a commonly accepted definition, *force majeure* is an unforeseeable and irresistible event - at the time of the conclusion of the contract - which prevents the performance of an essential obligation of the contract, for example, the supply of electricity, gas, oil or the transportation or distribution of energy.

Cases of *force majeure*

Energy contracts almost always contain a definition or explicit reference to *force majeure*. Some of these contracts may attempt to describe exceptional circumstances - beyond the control of the parties and unmanageable – which can be "assimilated" to *force majeure*.

For the lucky ones, their contract may list the circumstances of "epidemic, famine, quarantine or plague". But these cases are rare. Typically, the only "viruses" included in the contracts are - "computer viruses", which is not very helpful.

For the less fortunate, it will be necessary to check whether, due to factual, geographical, political or epidemiological circumstances, the party intending to rely on COVID-19 in invoking *force majeure* is confronted with an epidemic or pandemic, which wholly prevents it from performing the contract (unlike hardship or contingency clauses, which only make performance more onerous but does not prevent performance of the contract).

The laws and regulations applicable to the energy sector are generally silent on this subject.

Hence certain countries have resorted to issuing "certificates of *force majeure*" or presenting a decree declaring *force majeure* in order to protect their nationals. The effect of this is simply that this measure can be assimilated to the "fait du Prince" principle (mandatory act of government). However, the burden of proof remains with the person invoking it.

A further restriction related to *force majeure*, stems from the fact that the person who invokes *force majeure* must not be in default of performance of its contractual obligations by reasons other than *force majeure*. Most contracts would typically preclude the use of *force majeure* under such circumstances.

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Finally, unpredictability is assessed "at the time of the conclusion of the contract". The utmost caution is therefore required for the contracts being currently concluded and where a serious or proven risk of epidemic is known: in this case, the parties could arguably be considered as having concluded the contract with full knowledge of the facts and therefore of the risks of an epidemic.

The Consequences of Force Majeure

The main consequence is the suspension of obligations (to deliver, to transport, etc...). But a careful reading of the contract is necessary as even in cases of *force majeure*, certain obligations - often linked to the payment of a fixed term - remain in force.

Another consequence is the obligation of the party invoking the *force majeure* clause to "report" this situation to its counterparty promptly under the terms of the contract. In addition, the party claiming *force majeure* will have to take all reasonable measures at its disposal to minimize the negative consequences for the counterparty.

Finally, contracts frequently provide that at the end of a 30-day (in some cases two or three months) period of *force majeure*, the parties may unilaterally terminate the contract, often without compensation. This period is short, too short for an epidemic or pandemic such as COVID-19.

It is highly likely that "post-COVID19" *force majeure* clauses will now include epidemics, pandemics and provide for longer periods before energy contracts can be unilaterally terminated without compensation.

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Malaysia

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Unlike civil law jurisdictions where *force majeure* is governed by the civil code (e.g. French Civil Code, Articles 1218 and 1351; UAE Civil Code, Article 273), the operations of *force majeure* clauses in common law jurisdictions, including Malaysia, is dependent on the exact words of the clause.

Force Majeure under Power Purchase Agreement (PPA)

Malaysian Power Purchase Agreements (PPA), ranging from 1st to 4th generation and the relatively recent solar PPA, spells out events which constitute *force majeure*. Some of the typical circumstances identified in a *force majeure* clause include

- a. "unusually severe weather conditions",
- b. "strikes and/or other work stoppage",
- c. "acts of God or act of public enemies or terrorists or act of war",
- d. "any force majeure event affecting the performance of any Person that is a party to the Fuel Supply Contracts, the EPC Contract or other contract between IPP and such Person relating to the construction, operation or maintenance of the Facility";
- e. "changes-in-law"; and
- f. "any unavailability or interruption in the supply of Fuel".

COVID-19 and Force Majeure

None of the Malaysian PPAs have identified “disease”, “*epidemic*” or “*pandemic*” as an example of a *force majeure* event. Albeit less explicit, identified events such as work stoppage and force majeure event affecting the performance of personnel in relation to the construction, operation or maintenance of the power plant as a result of market conditions or government action, e.g. the Movement Control Order implemented by the Malaysian government, may be relevant.

Operation of Force Majeure under PPA

PPAs, and indeed most standard contracts, often require the affected party to timeously provide a notice of *force majeure*. Dependent on the Contract, such notice may include:

- a. full information about the event;
- b. time estimated to resume performance;
- c. proposed efforts to remedy its inability to perform; and
- d. progress report.

In this regard, an affected party seeking the benefit of a *force majeure* clause would need to establish the causal link between COVID-19 and its inability to perform its obligations under the PPA. The fact that COVID-19 has rendered performance more burdensome, both financially and logistically, may not be sufficient. Such limitations or carved outs are often expressly spelled out under the Malaysian PPAs.

Effect of Force Majeure under Malaysian PPAs

Force Majeure clauses typically provides that parties’ affected obligations will be temporarily suspended until such time the *Force Majeure* event has ceased. Some clauses may give a right to terminate the contract if the impact of the *Force Majeure* event, preventing the party from substantially performing any material obligation, if such *Force Majeure* event subsists for a prolonged period, generally 180 days. Malaysian PPAs makes clear that payment obligations shall remain in force notwithstanding the Force Majeure event. Further, newer generations of PPAs provide a well-delineated payment structure which allocate the risks of *Force Majeure* event according to whether the affected party is the off-taker or the power producer.

Industry players should also review other relevant provisions such as Change in Law clauses and Material Adverse Change clauses.

Extended Malaysian Movement Control Order (MCO)

Under the laws of Malaysia, the power industry is considered an essential service and power producers must continue with safe and reliable operations throughout the MCO. However, if a power producer requires supplies (e.g. coal) which are sourced from areas affected by restrictions, and no alternatives are available, the supply of electricity would be interrupted. This may well constitute a *force majeure* event.

Further, power producers should take appropriate measures to safeguard operations by complying with the Government’s directives on operating conditions/measures to contain COVID-19. Of particular importance is the need to ensure the health & safety of personnel in critical operations and enforcing, where possible, social distancing. This is necessary to avoid the unfortunate situation in Europe where a number of manufacturing facilities which produce equipment essential to power generation were shut down after employees were tested positive for COVID-19.

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