



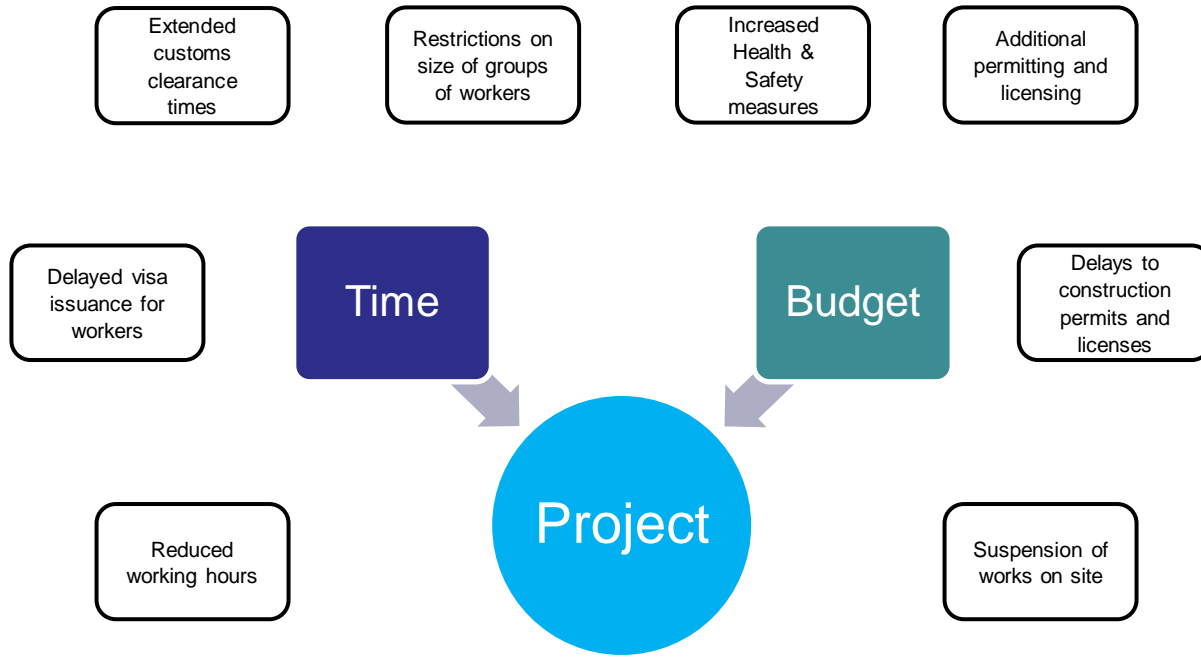
Key Considerations for COVID-19 Force Majeure and Change in Law Claims for Solar Projects

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Overview

- Legal Bases for Claims – Force Majeure and Change in Law
- Types of Relief
- Causation and Mitigation
- Quantification

COVID -19: Impact



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Force Majeure

- **Force Majeure Event** - any circumstance, event or condition (or combination thereof) beyond the reasonable control, directly or indirectly, of the Affected Party but only to the extent that:
 - (a) such circumstance, event or condition, despite the exercise of diligence, cannot be prevented, avoided or overcome by the Affected Party;
 - (b) such circumstance, event or condition prevents the performance by the Affected Party of its obligations under or pursuant to this Agreement (save for payment obligations);
 - (c) the Affected Party has taken all reasonable precautions, due care and measures to prevent, avoid or overcome the effect of such circumstance, event or condition on its ability to perform its obligations under this Agreement and to mitigate its consequences;
 - (d) such circumstance, event or condition is not the direct or indirect result of a breach or failure by the Affected Party to perform any of its obligations under this Agreement or any other Project Agreement;
 - (e) such circumstance, event or condition is without fault or negligence of the Affected Party; and
 - (f) the Affected Party has given the other Party notice in accordance with Clause xx,

Force Majeure Natural Force Majeure Definition of Natural FM

- “Natural Force Majeure Event” is defined as follows - a Force Majeure Event which is not an Offtaker Risk Event, including:
 - (a) lightning, fire, earthquake, unusual flood, cyclone, tornado, tsunami, typhoon or other natural disaster or act of God;
 - (b) epidemic or plague;
 - (c) accident, explosion or chemical contamination;
 - (d) strikes, works to rule or go slows (other than solely by employees of the Affected Party or its Affiliates); and
 - (e) Electricity Transmission Facilities Failure occurring other than as a result of any of the events under Clauses xx [Offtaker Risk Events]



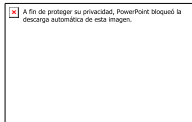
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In this Clause, "**Force Majeure**" means an exceptional event or circumstance:

- a) which is beyond a Party's control,
- b) which such Party could not reasonably have provided against before entering into the Contract,
- c) which, having arisen, such Party could not reasonably have avoided or overcome, and
- d) which is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

- a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
- c) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,
- d) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and
- e) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity



Question

How are parties now protecting themselves in contracts to deal with effects of COVID-19

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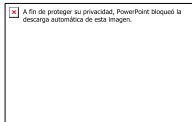
Example Approaches

Contractor bears risk

- All Covid-19 related risk passed to Contractor

Balanced approach and risk is shared.

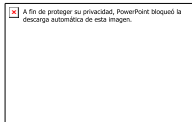
- New definition added for COVID-19 Related Health Event
- Force Majeure clauses amended so that requirement for reasonable foreseeability does not apply to COVID-19 Related Health Event
- Definition of natural FM specifically includes COVID-19 Related Health Event
- Relief is provided for COVID-19 Related Health Event that occurs after Effective Date, ie Contractor takes risk for subsisting events, but protected from wave 2, 3, etc
- Relief follows Natural Force Majeure regime



Offtaker Risk Event & Change in Law

An "Offtaker Risk Event" means:

- acts of war (whether declared or not), invasion, armed conflict, act of foreign enemy or blockade in each case occurring within Saudi Arabia or involving Saudi Arabia
- acts of rebellion, riot, civil commotion, strikes of a political nature, act or campaign of terrorism, or sabotage of a political nature, in each case, occurring within xx
- any boycott, sanction, embargo penalty or other restriction imposed directly on xx by the government of xx during the period up to and including the latest of the Project Commercial Operation Date or the expiration of the relevant warranty period stipulated in the EPC Contract
- any action or failure to act by a **Competent Authority**, including any action or failure that results in any Approval i) ceasing to remain in full force and effect despite the Company having taken all steps to re-apply for the same; or ii) not being issued or renewed in a timely manner upon due application having been made, provided that the proper exercise of any rights of a Competent Authority in response to a Company default under or breach of the terms of any Approval, or any breach of any Law by the Company, shall not constitute an Offtaker Risk Event
- **Change in Law**
- archaeological discoveries or the discovery of oil, gas or other mineral interests (other than Hazardous Substances) on or within the Site; and
- Electricity Transmission Facilities Failure to the extent such failure is caused by any of the events under clauses xx

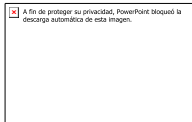


Change in Law

- the introduction, adoption, enactment or promulgation of any new Law by a Competent Authority or any change in the interpretation or application of any Law by any Competent Authority
- the change or repeal by any Competent Authority of any Law
- the introduction, adoption, change or repeal by any Competent Authority of any material condition in connection with the issuance, renewal, or modification of any Approval
- any change to the Saudi Arabian Grid Code (or the same in respect of any replacement thereof) and including the repeal, replacement of or issuing of any revisions of the same

that:

- occurs after the Bid Submission Date; and
- results in any change in Taxes payable or receivable by one or more of the Company, or the EPC Contractor; or
- results in change in or repeal of any of the requirements for the development, financing, design, engineering, procurement, manufacture, factory testing, transportation, construction, erection, installation, completion, testing, commissioning, insurance and ownership of the Project and the ongoing operation and maintenance of the same



Change in Law

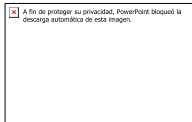
"**Law**" means any decree, **licence**, resolution, statute, act, **order**, **rule**, ordinance, law, **decision**, **code**, regulation (including any implementing regulation), treaty or **directive** (to the extent having the force of law) or any interpretation by a Competent Authority having jurisdiction over the matter in question, as enacted, introduced or promulgated by any Competent Authority having jurisdiction over the matter in question, including any amendments, modifications, replacements or re-enactments thereof

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"**Laws**" means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority

Question:

Which Law is relevant?



Relief

Natural Force Majeure

- Extension of Time
- No Cost

Offtaker Risk Event

- Extension of Time
- Additional Costs

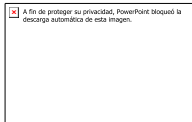
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- Extension of Time
- Additional Costs

Question: What other Relief may be available?

Suspension

- Force Majeure Clause – included Epidemics – Time only
- Employer issued a instruction to Contractor to demobilize
- Contractor demobilized
- Plant and works abandoned
- Attempt to utilize FM mechanism retrospectively
- Instruction deemed as suspending the works under the Contract



Claims at law – hardship provisions?

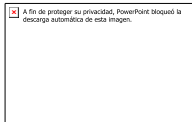
Article 159 Omani Civil Code

“If general exceptional events that were unforeseen at the time of contracting occur and result in the execution of the contractual obligation, even if not impossible, which become burdensome to the debtor and threaten the latter with serious loss, the court may, according to the circumstances and after balancing the interests of both parties, reduce the burdensome obligation to a reasonable limit. Any other agreement to the contrary shall be void”

Variations?

- Owner – imposed restrictions that go beyond restrictions required by law
- Direction to abide by more onerous restrictions may constitute an instruction changing the sequence and/or timing of the work
- Changes to sequence or timing of work or to manner of performance likely to come within definition of variation

Question: What defences are you seeing to COVID claims from Owners?

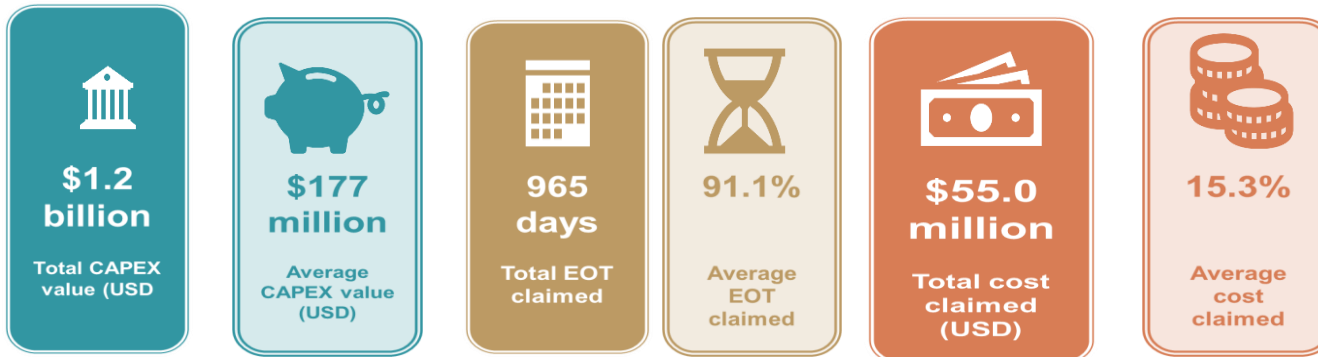


Common defences to COVID claims

Procedural defences:

- Time bar
- Equivalent Project Relief provisions
- Provisions regarding delay analysis

Common Causes



- Materials and/or products were delivered late
- Physical conditions were unforeseen
- Workmanship deficiencies
- Design was incorrect
- Design information was issued late

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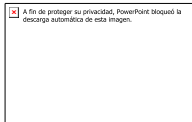


Common defences to COVID claims

Failure to provide 'particulars' as to the 'effect' of COVID-19:

- Cause and effect
- Underlines the need for good records
 - Schedule Data
 - Daily progress report
- Key issue is loss of productivity and capturing impact

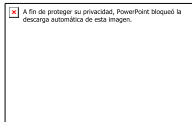
Question: many clauses impose a duty to mitigate, how far does that go?



Duty to mitigate?

- No duty to mitigate under UAE law (cf good faith)
- Contractual duty may be imposed, e.g:
 - “A Party affected by Force Majeure shall take all reasonable measures available at its own expense to mitigate the effect of the Force Majeure Event”
- SCL Delay & Disruption Protocol, Section 15:
 - “The Contractor has a general duty to mitigate the effect on its works of Employer Risk Events. Subject to express contract wording or agreement to the contrary, the duty to mitigate does not extend to requiring the Contractor to add extra resources or to work outside its planned working hours”

Question: Are you seeing acceleration claims as a result of COVID?



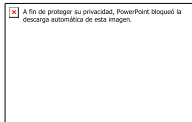
Acceleration

Key points

- Demonstrate an entitlement to an EOT
- Review carried out by both Parties – how Schedule can be accelerated
- Contractor sets out and demonstrates acceleration costs
- Instruction given by Employer/Operator

Avoid

- Implementing recovery measures without following the Contract and above
- Retrospective approach



Costs

Key points

- Follow the provisions in the contract/at Law
 - Definition of cost
 - Cost or rates?
- Records are key
 - Project finances/records must be set up accordingly
 - Recorded during the works
 - JV
 - Level of substantiation

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