

QATAR PROJECTS - WHAT TO DO NOW

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Video

Yesterday, we published a client briefing on the immediate steps which you should take if you are affected by this week's decision by Saudi Arabia, the UAE, Bahrain, Egypt, the Maldives and Yemen to cut diplomatic ties with Qatar, and close all land, sea and air communications to the Emirate (click [here](#)). Today, we look more closely at the construction, energy and projects sectors. With approximately USD261 billion worth of projects planned or underway in the Emirate, this is a sector which will be hard hit if the situation continues for any material time.

Most materials used in Qatar projects are imported from Saudi Arabia and, with the Saudi border closed and access denied to Jebel Ali Port in the UAE, a prolonged closure could have a significant impact on the availability and price of materials.

While those affected will have many immediate priorities which will need to be addressed for business continuity, it is important not to lose sight of the need to assess your position under your contracts.

WHAT IS FORCE MAJEURE?

A force majeure event is something exceptional and beyond the control of the parties which prevents the performance of obligations. Where a party is put in delay or other breach by a force majeure event it can be protected from the consequences of that breach.

HOW IS IT DEFINED?

Many contracts include a force majeure clause with a detailed definition of what is, and what is not, covered. Most Qatar construction contracts are FIDIC based, though of course many have extensive amendments, and the FIDIC contracts generally define Force Majeure as follows:

"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."

FIDIC then gives a non-exclusive list of examples such as war, terrorism and riot. If the effects of this week's events cannot be avoided in your project, they are likely to fall within the definition quoted above.

The most commonly used definition of Force Majeure in power purchase agreements and water purchase agreements is similarly worded. Again, it includes general text requiring, amongst other things, that the event must be beyond the reasonable control of the private sector party, must not have been reasonably foreseeable and could not reasonably have been avoided. The non-exhaustive list of events in this case, however, normally includes "blockade" and, despite the fact that there is no military interdiction of Qatar's sea communication, the word blockade has been almost universally adopted by the media to describe the situation which has developed this week. Once again, current events are likely to fall within the force majeure clause.

DO I NEED TO DO ANYTHING?

The short answer is yes. In almost every case the contract will require you to give notice of a force majeure event. Again taking the FIDIC forms as an example, Clause 19.2 provides that the contractor must notify the employer of the event within 14 days after it became aware, or should have become aware, of the force majeure. While it may seem illogical to notify an employer of events which are making headlines round the world; that is exactly what the contractor must do. And they must comply with the formal notification requirements of the contract when doing so.

DOES FORCE MAJEURE SUSPEND OR TERMINATE ALL OBLIGATIONS?

No. Force majeure provides only a limited relief from your obligations.

In almost every case you will have an obligation to mitigate the impact of the event. In the standard regional power purchase and water purchase agreements, that requirement is expressed as a limitation and so the contract only gives relief against those consequences of the force majeure which "could not have been mitigated" by the private sector party. Separately, standard FIDIC sets out a positive obligation on both parties to "at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure". Either way, you are likely to be protected against only the unavoidable consequences of the force majeure.

WHAT RELIEF DO I GET?

This depends very much on the contract. Most contracts will excuse delays caused by force majeure. Some will allow additional cost to be recovered. For example, standard FIDIC provides that any force majeure event properly notified may entitle a contractor to more time, but only a limited class of events allows the recovery of additional costs.

It also depends on how long the problems last and how severe they are. Again, using FIDIC as an example, if the execution of "substantially all the Works in progress" is prevented for a continuous period of 84 days, or for multiple periods which total more than 140 days, then either party may terminate the contract. Of course where a chain of contracts and sub-contracts has been signed with similar wording it is easy to imagine a situation where substantially all of the work in a sub-contract is prevented, and a termination right might arise, while substantial other work is ongoing under the main contract and it survives. Thus there is a risk that different contracts will be treated in different ways.

OTHER REMEDIES

Force majeure remedies are not the only remedies which may apply. Most power or water purchase agreements in the region, for example, include some protection against a Material Adverse Change, which will apply if there has been an increase in the private sector party's costs or a decrease in its revenue which exceeds a specified threshold value; so long as the change is caused by one of a specified list of events. Those clauses may be triggered.

Further, many contracts include protection where work simply cannot continue. The FIDIC forms provide that if an event outside the control of the parties makes it impossible or unlawful for a party to fulfil its obligations, the parties can be discharged from further performance of the contract - and this right is not limited to events which qualify as force majeure.

WHAT IF MY CONTRACT IS SILENT?

Even if there is no remedy set out in the agreement, that is not necessarily the end of the matter. You should look to your governing law. Qatar is a civil law country, and it has a number of provisions in its Civil Code addressing force majeure.

The concept of force majeure is contained in Article 204 of the Qatar Civil Code. If a person establishes that a loss has arisen due to an external cause not of their making, such as a force majeure or an unforeseen event, that party will avoid paying damages unless there is agreement to the contrary. Article 256 then provides that "If the debtor fails or delays in performing the obligation specifically, he shall be bound to compensate the creditor for the damage he suffers unless he proves that the failure or delay is due to an extraneous cause beyond his control." Article 258 of the Civil Code allows the parties to effectively contract out of Article 256 and agree that the party owing the obligation will be liable for the consequences of force majeure or an unforeseen event.

So, the law may provide a defence. However, many project documents are governed by other laws, such as English law, and there is no generally recognised common law doctrine of force majeure. Other common law concepts, such as frustration, may come into play, but they go beyond the scope of this briefing.

INSURANCE

Everyone involved in an affected project should review the insurance policies which they hold. Most obviously, if you have delay-in-start-up, or business interruption, cover, claims may need immediate notification and you should liaise closely with insurers on the steps which you are taking to manage the situation.

RECORD KEEPING

The rights and remedies discussed in this note are not automatic. Most contracts provide that claims for time or money under force majeure clauses, material adverse change clause, or similar provisions must be notified and evidenced in the normal way. This is likely to mean that you need full details of the precise implications of the events. As the position is rapidly changing it may be impossible to comprehensively and compellingly tell the story of the problems which a project has faced unless detailed records are kept at the time of exactly what has happened. While everyone involved in a project is inevitably going to be focused on solving problems, it is important to insist that diaries are maintained, that attendance notes are made and that emails, SMS messages and WhatsApp conversations are retained and filed.

CONCLUSION

- **Read The Contract** - Check your contract for the protections which it offers, whether in the force majeure clause, the material adverse change clause or elsewhere. Closely review any special conditions, as standard form force majeure wording is often amended. If there is a possibility that any of the clauses apply, notify this to the counterparty. It is important to submit the notice quickly and to comply with all contractual formalities; and it is always best to make sure notices are served even if it then turns out that the problems which you envisaged do not actually impact the project.
- **Write It Down** - Make sure the whole project team keeps detailed records of the impact of the events. Without those records it may be hard to make any recovery.
- **Tell Your Counterparty** - You will be in a much stronger position to recover time and cost if you update your counterparty on an ongoing basis after you have given formal notice, telling them what the problems are and what you are doing to address them.
- **Mitigate** - If you can find solutions, you should do so.
- **Record Where You Are Today** - While the events of this week may impact many projects, they will offer no excuse for past issues. Make sure you have records of the

status of the project now so there is a starting point to work from in assessing the impact of the events.

- **Follow The News** - The position is highly dynamic and there may be many developments over the coming weeks. Whether or not events today amount to a force majeure does not mean that they will count the same way tomorrow. We will be keeping a close watch on developments and will provide further briefings as the situation changes.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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