

It's just a clause, isn't it?

clauses, contracts and their generational impacts No. 5

Force Majeure - Preparing for the future today

Force majeure (FM) clauses are contractual provisions that excuse a party from fulfilling contractual obligations due to unforeseen circumstances beyond the party's control that hinder or prevent the party from performing those obligations.

In civil law jurisdictions (for example, those patterned after the French legal system), these protections may be included in the law. However, if parties have included a specific clause in the contract (which occurs frequently in investment contracts), the contractual language will likely prevail. In common law jurisdictions (for example, those patterned after the English legal system) the scope of protections is based on the contract's language.

These "boilerplate" FM clauses receive comparatively less attention than more widely discussed provisions such as stabilization and arbitration, both of which have been the subject of many publications on balancing investor and state interests.

However, the pandemic's onset and the ensuing global disruptions have put the spotlight on these often-overlooked clauses. Parties were (perhaps for the first time) scrutinizing what kinds of protections and requirements were included in their force majeure provisions.

With the pandemic's major disruptions receding, governments should not become complacent when negotiating force majeure clauses. Indeed, they should look at the recent past and the potentially very uncertain future to guide them.

Climate change and the growing frequency of extreme weather events present increasing

risks to mining projects and their operations. Responsibility for managing these risks must be properly allocated under the contract. Governments should require companies to build climate resilience into their project design, construction and operations. Force majeure clauses are one way to allocate risk and assign climate resilience responsibilities, but many standard clauses do not yet adequately address climate impact preparedness.

Force majeure clauses should include the following elements:

- Definition of a force majeure event;
- Mitigation, notice and evidence requirements;
- Consequences of force majeure -- e.g., specifying whether obligations are merely suspended and the time frame for performance is extended, whether a party may be excused from performance altogether or whether the party may terminate the contract;
- Ongoing obligations-- e.g., specifying that the party must fulfill obligations that the FM event did not directly affect, specifying that payment obligations remain in effect or noting any ongoing obligations post-termination of the contract if the clause allows for termination under specified circumstances.

At a minimum, governments should ensure their force majeure clauses provide clarity on all the above issues. This particular analysis will focus on the implications of definitions and mitigation requirements for climate impact risk allocation.

Definition

FM clauses will often list events that qualify as force majeure and often include a



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“catch-all” provision for other events beyond a party’s reasonable control. For example, the below FM clause from a mining contract includes the following (rather expansive) definition:

“For the purposes of this Agreement, Force Majeure shall include war, insurrection, civil disturbances, blockades, riot, embargoes, strikes, lock-outs and other labour conflicts, land disputes, epidemics, volcanic eruptions, earthquakes, cyclones, floods, explosions, fires, lightning, governmental restrictions, change in applicable law, unavailability of materials or equipment, failure by [government] or any of its applicable ministries, departments or agencies to grant or issue to the Company (as consultant/operator) or contractors or subcontractors appointed by the Company (as consultant/operator) the necessary consents and permissions to enable them to operate in [country] or to import equipment into [country] or to grant or issue the necessary permits for non-[country] employees of the Company to enter into [country] and take up employment in a timely fashion and any other event which the Party claiming Force Majeure could not reasonably be expected to prevent or control and which prevents a Party from complying with any of the terms, conditions or provisions of this Agreement (provided that [government] shall not be entitled to give notice of the occurrence of Force Majeure nor be excused from performance hereunder as a result of any of its actions or inaction or any of the actions or inactions of its applicable ministries, departments or agencies).”

Unlike the above contract example, some contract clauses may also require that the event be unforeseeable. For example, one extractive sector contract specifies that an event will only be considered force majeure if: “it is unforeseeable, unavoidable and beyond the control of the Party that declares Force Majeure.”

Reference to extreme weather events is very common in FM clauses in extractive sector contracts. I recently reviewed 34 petroleum contracts and model contracts signed or issued since adoption of the Paris Agreement. All but one of the 34 contracts included extreme weather events such as storms, lightning or floods as a basis for force majeure claims, with only 12 of them explicitly requiring that the event be unforeseeable.

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Notably, none of the contracts specifically required companies to prepare for climate change events.

However, changing weather patterns now call into question when extreme weather events should be deemed “unforeseeable.” Indeed, some experts have explicitly advised that climate change events are no longer unforeseeable due to their increasing frequency and the growing sophistication of climate data and models.

Instead, governments should require companies to embed climate resilience in project design, construction, upgrades and operations based on climate risk assessments. They should also require companies to obtain insurance to cover climate events. Others advise that contracts should define “unforeseeable” or what can be considered “extreme” or “unusual” weather based on agreed data sources. Given this increasing frequency of extreme weather events, governments must include climate change considerations in contracts, particularly given the decades-long duration of many extractive contracts.

The above FM definition also includes “change in applicable law” and “government restrictions.” However, governments should be mindful that change in law inclusions, especially when combined with stabilization clauses, could impede their ability to strengthen environmental, climate, health and safety, labour, and other regulations over time.

One extractive contract I recently reviewed included government regulation as a force majeure event where it leads “to the inability

of the company to meet its obligations in a timely manner". It equally placed responsibility for any resulting cost on the government by providing that "[g]overnment shall incur no responsibility...for any damages, restrictions, or loss" as a consequence of the force majeure event "except a force majeure caused by any order, regulation or direction of the government whether published in the form of a law or otherwise."

Governments must think very carefully about including these kinds of protections in contracts, as they could increase the costs of improving regulations over time.

Mitigation

FM clauses generally require the company to take some kind of action to mitigate the event's effects, and under English common law a party will be required to do so. For example:

"The Party affected by the Force Majeure will exert all reasonable efforts to remove the cause, keep the other Parties fully informed of the situation and the current evolution of the Force Majeure event, and will promptly notify the other Parties as soon as the Force Majeure event is over and no longer prevents it from complying with its obligations or conditions under this Contract."

However, it is equally important for governments to specify that the company must take prior precautionary action to avoid or to mitigate the event's impact, rather than solely mitigating after the fact.

One extractive contract I recently reviewed required that "if reasonably foreseeable [the company] shall have prior thereto taken all reasonably appropriate precautions...". Another extractive contract defined a force majeure event as any event that "materially and adversely affects the performance by such affected Party of its obligations under or pursuant to this Agreement; provided, however, that such material and adverse effect could not have been prevented [emphasis added], overcome or remedied by the affected Party through the exercise of diligence and reasonable care."

Such a precautionary action requirement should be seen as complementary to new definitions of foreseeability with respect to extreme weather events, as well as clearly articulated climate resilience requirements. In short, the important risk allocation function of force majeure clauses must not be ignored or underestimated, especially in light of changing global risks and challenges. Governments that strategically negotiate these clauses will be better prepared and more resilient over a contract's duration. ✂



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