

FORCE MAJEURE CLAUSES CHECKLIST AND SAMPLE WORDING

What is force majeure?

Certain events, beyond the control of the parties, may inhibit the parties from fulfilling their duties and obligations under the project agreements.

To avoid the resultant breach of contract, parties may prefer to excuse contractual obligations to the extent that they have been so inhibited.

Different legal systems have developed different theories in response to this need, including the doctrines of impossibility and frustration in England and the United States and *force majeure* in France. Under French law *force majeure* is an event that is unforeseeable, unavoidable and external that makes execution impossible.¹

In order to avoid the uncertainties and delays involved in relying on the applicable law, parties to contracts often prefer to provide for a specific regime for *force majeure*, along with a definition of which events shall qualify for special treatment.

The term *force majeure* used in drafting project documents comes originally from the *Code Napoléon* of France, but should not be confused with the French doctrine. Generally, *force majeure* means what the contract says it means.

Are force majeure clauses standardized?

NO

Force majeure is often treated as a standard clause that cannot be changed. However, as the clause excuses a party from carrying out its obligations, it needs to be carefully thought through and tailored for the project in question.

It may be appropriate for there to be different events that give rise to different contractual consequences. For example, in the UK Project Finance Initiative guidance² there is a distinction between Compensation Events (where authority takes responsibility and contractor is compensated), Relief Events (which relieve the contractor from termination for failure to perform but not of the financial effects of delays) and Force Majeure Events (which relieve the affected party from liability for breach and where the parties share the financial effects of delays)³.

It is important to note that Lenders do not like force majeure as it creates a level of uncertainty for them. Therefore, where external funding is to be called upon, thought should be given when drafting the underlying project agreements as to what Lenders are likely to accept.

¹ "Impossibilité absolue de remplir ses obligations due à un événement imprévisible, irrésistible et extérieur" French Civil Code, arts 1147 and 11248 (30 August 1816, reprinted 1991).

² http://www.hm-treasury.gov.uk/media/DAF/10/pfi_sopc_ver3_chaps1-5_apr04.pdf

³ UK is a sophisticated PFI market where insurance may be available to cover many of the risks that are defined as Relief Events, and what constitutes Force Majeure events there may be too narrowly defined to be appropriate in other markets.

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Checklist of issues to consider re. Force Majeure	
Who should bear risk?	The risk of <i>force majeure</i> is generally allocated to the grantor. The theory goes that the grantor is best able to manage <i>force majeure</i> risk, as such risk relates partially to the activities of the host country government and its relations with other countries and/or its populace, and that the grantor is the only party able to bear such risk, given its size and the difficulty of obtaining adequate insurance. However, in certain markets, such as the UK, the grantor may require the project company to bear a portion, or all, of the <i>force majeure</i> risk or may separate the risks between natural and political force majeure events, with different consequences (see below). ⁴
What are the consequences of <i>force majeure</i> event?	Should the affected party be relieved of its obligations to perform under the contract? In some projects a force majeure event is likely to have an impact on the whole project – such as lightning striking a power plant transmission substation and making it temporarily unusable. However, in other projects, such as a water concession over a whole network, even if force majeure has an impact on a specific treatment plant or pumping station, it may not affect the whole network.
	The affected party should be under an express duty to minimize the disruption caused by <i>force majeure</i> .
	Care should be taken to ensure that <i>force majeure</i> events only relieve obligations to the extent that they prevent the party from performing them.
	Should some events constitute <i>force majeure</i> for one party but not the other?
Liquidated damages	Is the contractor to pay liquidated damages if completion or some other event does not occur by a specified date? If so, the contract should stipulate that the date in question is extended by any period during which the contractor is prevented from carrying out the activity in question.
Continued payment?	To what extent (if any) should the contractor continue to be paid even where it is unable to perform its obligations. This should be expressly stated.
Other project documents	Is there a linked project agreement that may be affected also? Are the provisions in related project agreements “back-to-back”? For example, if a project company is to receive no revenues during a <i>force majeure</i> event under a power purchase agreement, will it still be liable under the take or pay provisions in the fuel supply contract? Lenders will want to ensure that the definition and treatment of <i>force majeure</i> is identical in each of the project contracts. However, it should be remembered that <i>force majeure</i> only excuses a party from performing under a contract to the extent that performance under that contract is hindered or prevented. Therefore, it may be necessary to include a provision specifically referring to circumstances where a party is prevented from performing its obligations under another agreement due to <i>force majeure</i> . ⁵
Termination for extended force majeure	Should there be termination in case of extended <i>force majeure</i> events? Should a maximum period be identified during which the effects of one single event or an aggregate duration of <i>force majeure</i> events over the period of the concession may last before one or both of the parties can act to either remove itself from the project or obtain compensation for damages incurred. NB – watch out for wording which talks about continuation of the force majeure event for a period – what is important is the duration of the inhibiting effects of force majeure. The theory is that parties will have insurance and other resources to tide them over for some period of force majeure, but eventually they should be entitled to terminate. Often if it agrees to continue with the project despite continuing force majeure, the project company’s compensation during force majeure will increase accordingly to create an incentive to remain.

⁴ See

⁵ Vinter – Project Finance (3rd Ed) para 6-004.

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Definition of force majeure	The definition of " <i>force majeure</i> " will vary from project to project and in relation to the country in which the project is to be located. The definition of " <i>force majeure</i> " generally includes "risks beyond the reasonable control of a party, incurred not as a product or result of the negligence of the afflicted party, which have a materially adverse effect on the ability of such party to perform its obligations". Sometimes an even stricter requirement, requiring impossibility of fulfilment, is imposed. This is a very difficult fact to prove and could result in the operator bearing an unacceptable level of risk. Parties should also consider whether it is appropriate to exclude consequences which could reasonably be avoidable by either party
	It is important to ensure that force majeure events are events which are not reasonably foreseeable/ are unlikely to occur. Therefore, where supply of electricity is necessary for the operation of the facilities but is generally intermittent, then the parties should ensure that there is standby generation or some other solution. In other circumstances, however, intermittent supply will be unusual/ not reasonably foreseeable and it will be appropriate to include it as an event of force majeure.
Force majeure events	<p>The parties will usually agree on a list, which may or may not be exhaustive, of examples of <i>force majeure</i> events. <i>Force majeure</i> events generally can be divided into two basic groups: natural events and political events.</p> <p>(a) natural events These may include earthquakes, floods, fire, plague, Acts of God (as defined in the contract or in applicable law) and other natural disasters. These are events which are not within the control of the Host Government. The parties will need to look at the availability and cost of insurance, the likelihood of the occurrence of such events and any mitigation measures which can be undertaken. For example, although the grantor will be best placed to appreciate the ramifications of common natural disasters, the contractor should be able to obtain insurance for the majority of this risk or otherwise mitigate the occurrence of the risk.</p> <p>(b) political and special events These may include terrorism, riots or civil disturbances; war, whether declared or not; strikes (usually excluding strikes which are specific to the site or the project company or any of its subcontractors), change of law or regulation [this is often dealt with separately from Force Majeure], nuclear or chemical contamination, pressure waves from devices travelling at supersonic speeds, failure of public infrastructure.</p>
	The grantor's willingness to protect the contractor from political risk will go a long way to reassure the contractor and the lenders that the project has host government support. In many developing countries, the risk of political upheaval or interference is of great concern. As a general proposition the grantor in a developing country should be willing to bear a certain amount of political <i>force majeure</i> risk. Special risks included in this list generally represent those risks which are uninsurable under normal commercial conditions, such as nuclear contamination. These risks are generally considered to be beyond the control of the contractor.
	Political risk insurances may be available, either through private insurances, multilateral organisations such as the World Bank (www.worldbank.org) and MIGA (www.miga.org) or export credit agencies.

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SAMPLE FORCE MAJEURE CLAUSES

EXAMPLE 1

This is a simple example, with no distinction between political and natural events. It requires that payment obligations continue even in the case of Force Majeure. It relates to a BOT project and so there is a Construction Period as well as an operating phase:

1.1 Definition of Force Majeure

In this Clause [], "**Event of Force Majeure**" means an event beyond the control of the Authority and the Operator, which prevents a Party from complying with any of its obligations under this Contract, including but not limited to:

- 1.1.1 act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods);
- 1.1.2 war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition, or embargo;
- 1.1.3 rebellion, revolution, insurrection, or military or usurped power, or civil war;
- 1.1.4 contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly;
- 1.1.5 riot, commotion, strikes, go slows, lock outs or disorder, unless solely restricted to employees of the Supplier or of his Subcontractors; or
- 1.1.6 acts or threats of terrorism.

1.2 Consequences of Force Majeure Event

- 1.2.1 Neither the Authority nor the Operator shall be considered in breach of this Contract to the extent that performance of their respective obligations (excluding payment obligations) is prevented by an Event of Force Majeure that arises after the Effective Date.
- 1.2.2 The Party (the "Affected Party") prevented from carrying out its obligations hereunder shall give notice to the other Party of an Event of Force Majeure upon it being foreseen by, or becoming known to, the Affected Party.
- 1.2.3 If and to the extent that the Operator is prevented from executing the Services by the Event of Force Majeure, whilst the Operator is so prevented the Operator shall be relieved of its obligations to provide the Services but shall endeavour to continue to perform its obligations under the Contract so far as reasonably practicable [and in accordance with Good Operating Practices], [PROVIDED that if and to the extent that the Operator incurs additional Cost in so doing, the Operator shall be entitled to the

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amount of such Cost [COST BEING DEFINED AS HAVING NO PROFIT COMPONENT] (the Operator having taken reasonable steps to mitigate the Cost)].

1.2.4 If and to the extent that the Operator suffers a delay during the Construction Period as a result of the Event of Force Majeure then it shall be entitled to an extension for the Time for Completion in accordance with Sub-Clause [].

1.2.5 If an Event of Force Majeure results in a loss or damage to the Facility, then Operator shall rectify such loss or damage to the extent required by the Authority, PROVIDED that any Cost of rectification (less any insurance proceeds received by the Operator for the loss or damage) is borne by the Authority (the Operator having taken reasonable steps to mitigate the Cost).

1.2.6 [The Operator shall be entitled to payment of the Base Monthly Charge during the period of interruption caused by the Event of Force Majeure.]

1.2.7 [The Contract Period shall be extended by a period of time equal to the period of interruption caused by an Event of Force Majeure.] [1.2.6 OR 1.2.7]

1.3 Optional Termination, Payment and Release

Irrespective of any extension of time, if an Event of Force Majeure occurs and its effect continues for a period of [180] days, either the Authority or the Operator may give to the other a notice of termination. [If Authority is paying fee during Force Majeure, then Operator should not have a termination right, he is being paid.], which shall take effect [28] days after the giving of the notice. If, at the end of the [28]-day period, the effect of the Force Majeure continues, the Contract shall terminate.

After termination under this Sub-Clause [1.3], the Operator shall comply with Sub-Clause [termination provisions] and the Authority shall pay the Supplier an amount calculated and certified in accordance with [].

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EXAMPLE 2

In this example there is no distinction drawn between political and natural force majeure events: -

"Force Majeure Event" means the occurrence of:

- (a) an act of war (whether declared or not), hostilities, invasion, act of foreign enemies, terrorism or civil disorder;
- (b) ionising radiations, or contamination by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
- (c) pressure waves from devices travelling at supersonic speeds or damage caused by any aircraft or similar device;
- (d) a strike or strikes or other industrial action or blockade or embargo or any other form of civil disturbance (whether lawful or not), in each case affecting on a general basis the industry related to the affected Services and which is not attributable to any unreasonable action or inaction on the part of the Company or any of its Subcontractors or suppliers and the settlement of which is beyond the reasonable control of all such persons;
- (d) specific incidents of exceptional adverse weather conditions in excess of those required to be designed for in this Agreement which are materially worse than those encountered in the relevant places at the relevant time of year during the twenty (20) years prior to the Effective Date;
- (e) tempest, earthquake or any other natural disaster of overwhelming proportions; pollution of water sources resulting from any plane crashing into [];
- (f) discontinuation of electricity supply, not covered by the agreement concluded with the [utility company]; or
- (g) other unforeseeable circumstances beyond the control of the Parties against which it would have been unreasonable for the affected party to take precautions and which the affected party cannot avoid even by using its best efforts,

which in each case directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement;

- (1) Neither Party shall be in breach of its obligations under this Agreement (other than payment obligations) or incur any liability to the other Party for any losses or damages of any nature whatsoever incurred or suffered by that other (otherwise than under any express indemnity in this Agreement) if and to the extent that it is prevented from carrying

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out those obligations by, or such losses or damages are caused by, a Force Majeure Event except to the extent that the relevant breach of its obligations would have occurred, or the relevant losses or damages would have arisen, even if the Force Majeure Event had not occurred (in which case this Clause 20 shall not apply to that extent).

- (2) As soon as reasonably practicable following the date of commencement of a Force Majeure Event, and within a reasonable time following the date of termination of a Force Majeure Event, any Party invoking it shall submit to the other Party reasonable proof of the nature of the Force Majeure Event and of its effect upon the performance of the Party's obligations under this Agreement.
- (3) The Company shall, and shall procure that its Subcontractors shall, at all times take all reasonable steps within their respective powers and consistent with Good Operating Practices (but without incurring unreasonable additional costs) to:
 - (a) prevent Force Majeure Events affecting the performance of the Company's obligations under this Agreement;
 - (b) mitigate the effect of any Force Majeure Event; and
 - (c) comply with its obligations under this Agreement.

The Parties shall consult together in relation to the above matters following the occurrence of a Force Majeure Event.

- (4) Should paragraph (1) apply as a result of a single Force Majeure Event for a continuous period of more than [180] days then the parties shall endeavor to agree any modifications to this Agreement (including without limitation, determination of new tariffs (if appropriate) in accordance with the provisions of Clause 7(4)(e)) which may be equitable having regard to the nature of the Force Majeure Event and which is consistent with the Statutory Requirements.

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EXAMPLE 3

Here is a relatively simple clause, with a distinction between political and other force majeure, and the consequences thereof: -

Force Majeure

Events of Force Majeure

For the purpose of this Agreement, an “Event of Force Majeure” means any circumstance not within the reasonable control of the Party affected, but only if and to the extent that (i) such circumstance, despite the exercise of reasonable diligence and the observance of Good Utility Practice, cannot be, or be caused to be, prevented, avoided or removed by such Party, and (ii) such circumstance materially and adversely affects the ability of the Party to perform its obligations under this Agreement, and such Party has taken all reasonable precautions, due care and reasonable alternative measures in order to avoid the effect of such event on the Party’s ability to perform its obligations under this Agreement and to mitigate the consequences thereof.

Instances of Force Majeure

Subject to the provisions of clause 1.1, Events of Force Majeure shall include, but not be limited to:

(a) the following Natural Force Majeure Events:

- fire, chemical or radioactive contamination or ionising radiation, earthquakes, lightning, cyclones, hurricanes, floods, droughts or such other extreme weather or environmental conditions, unanticipated geological or ground conditions, epidemic, famine, plague or other natural calamities and acts of God;
- explosion, accident, breakage of a plant or equipment, structural collapse, or chemical contamination (other than resulting from an act of war, terrorism or sabotage), caused by a person not being the affected Party or one of its contractors or subcontractors or any of their respective employees or agents;
- to the extent that they do not involve [*country*] or take place outside of [*country*], acts of war (whether declared or undeclared), invasion, acts of terrorists, blockade, embargo, riot, public disorder, violent demonstrations, insurrection, rebellion, civil commotion and sabotage;
- strikes, lockouts, work stoppage, labour disputes, and such other industrial action by workers related to or in response to the terms and conditions of employment of those workers or others with whom they are affiliated save, when such event is directly related to, or in direct response to any employment policy or practice (with respect to wages or otherwise) of the party whose workers resort to such action;
- in relation to the Concessionaire, non-performance by a counter-party to a contract relating to the Concessionaire’s Business by reason of an event or circumstance that would constitute a Natural Force Majeure Event under this Agreement; and

(b) the following Political Force Majeure Events:

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- to the extent they take place in [country], acts of terrorists, blockade, embargo, riot, public disorder, violent demonstrations, insurrection, rebellion, civil commotion and sabotage;
- to the extent that they are politically motivated, strikes, lockouts, work stoppages, labour disputes, or such other industrial action by workers, save in relation to the Concessionaire, when such event is directly related to, or in direct response to any employment policy or practice (with respect to wages or otherwise) of the Concessionaire;
- failure or inability of the Concessionaire to obtain or renew any Consent, on terms and conditions as favourable in all material respects as those contained in the original Consent relating to the Concessionaire's Business (other than due to a breach by the Concessionaire of any of such terms and conditions);
- any action or failure to act without justifiable cause by any Competent Authority, other than a court or tribunal (including any action or failure to act without justifiable cause by any duly authorised agent of any Competent Authority, other than a court or tribunal);
- expropriation or compulsory acquisition of the whole or any material part of the Concessionaire's System or Investor's shares in the Concessionaire, except where such appropriation or compulsory acquisition is on account of contravention of law by the Concessionaire or by the Investor;
- any legal prohibition on the Concessionaire's ability to conduct the Concessionaire's Business, including passing of a statute, decree, regulation or order by a Competent Authority prohibiting the Concessionaire from conducting the Concessionaire's Business, other than as a result of the Concessionaire's failure to comply with the law or any order, Consent, rule, regulation or other legislative or judicial instrument passed by a Competent Authority;
- in relation to the Concessionaire, non-performance by a counter-party under a contract relating to the Concessionaire's Business by reason of an event or circumstance that would constitute a Political Force Majeure Event under this Agreement,

provided that breakdown of plant or equipment (unless itself caused by an Event of Force Majeure), or unavailability of funds, shall not constitute an Event of Force Majeure.

Effects of an Event of Force Majeure

Either Party shall be excused from performance and shall not be in default in respect of any obligation hereunder to the extent that the failure to perform such obligation is due to a Natural Force Majeure Event.

Additionally, the Concessionaire, [but not [] in respect of []], shall be excused from performance and shall not be in default in respect of any obligation under this Agreement to the extent that the failure to perform such obligation is due to a Political Force Majeure Event.

Notice of an Event of Force Majeure

If a Party wishes to claim protection in respect of an Event of Force Majeure, it shall, subject to clause [], as soon as possible following the occurrence or date of commencement of such Event of Force Majeure, notify the other Party of the nature and expected duration of such Event of

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Force Majeure and shall thereafter keep the other Party informed until such time as it is able to perform its obligations. The Parties shall use their reasonable endeavours to:

- (i) overcome the effects of the Event of Force Majeure;
- (ii) mitigate the effect of any delay occasioned by any Event of Force Majeure, including by recourse to alternative mutually acceptable (which acceptance shall not be unreasonably withheld by either Party) sources of services, equipment and materials; and
- (iii) ensure resumption of normal performance of this Agreement as soon as reasonably practicable and shall perform their obligations to the maximum extent practicable,

provided that neither Party shall be obliged to settle any strike, lock out, work stoppage, labour dispute or such other industrial action by its employees.