



**Coronavirus**  
*Force majeure notices  
in the energy sector*



**APRIL 2020**

# CLIENTS ALERT

***Force majeure notices  
and their current repercussions  
in the energy sector***



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**Factors in  
determining  
*force majeure*  
applicability**

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**Force Majeure  
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**Electricity  
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regarding force  
majeure**

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**Challenges for the  
Greek market**

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In general, a force majeure clause specifies unforeseen and uncontrollable events that would make it impossible for a party to meet its contractual obligations. If a covered event occurs, the force majeure clause may excuse a party from performing under the contract.

Force majeure clauses commonly include specific examples of covered events, such as natural disasters, weather-related events, terrorist attacks, diseases or acts of war. These clauses can be drafted broadly or narrowly, depending on the intent of the parties to the contract. They can specifically enumerate covered events, or alternatively, they can speak in more general terms about the types of events that would be covered.

### **Factors in determining force majeure applicability**

Courts or arbitrators will generally examine and assess the following factors to determine whether performance may be excused pursuant to a force majeure triggering event: 1) whether the language of the force majeure clause covers the triggering event, 2) whether the party seeking to be excused from having to perform, can demonstrate that the triggering event materially inhibited its ability to perform under the contract, and 3) whether the triggering event is beyond the parties' control.

In analysing whether COVID-19 can be used as the basis to excuse a contracting party from performing its contractual obligations, the party should first look to the language of the force majeure clause.

Courts often read force majeure clauses strictly, so if the clause indicates explicitly that a pandemic would be a triggering event that could excuse a contracting performance, a party would have a strong argument that COVID-19 is covered.

However, force majeure clauses often do not specifically identify pandemics as covered events. If that is the case, a contracting party should review the language of the clause to determine whether COVID-19 may fall under the definition of another specific triggering event. For example, some clauses include language defining the enactment of laws, regulations, or governmental orders as force majeure events.

In particular, in the oil and gas context, governmental actions, including orders to halt production, have been deemed to be force majeure events. Thus, if oil and gas production is halted due to a government order, or if a company is prevented from otherwise performing due to COVID-19 travel restrictions or shelter-in-place orders, it may be able to rely on that language to excuse performance.

### **Impossible Performance**

A contracting party seeking to have its performance excused, should be mindful of the fact that it may need to demonstrate that COVID-19 made its performance under the contract impossible, as opposed to simply more burdensome or expensive.

Frequently, it is complicated to define whether a performance is impossible or not.

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For example, in the context of a gas purchase agreement that increased costs or changes to the market, the performance is not excused unless it was caused by an unforeseen circumstance that **alters the essential nature of performance under the contract**.

Based on this holding, it may be difficult for an oil and gas producer to argue that declines in oil prices make performance under the contract impossible. However, there may be other relevant considerations, such as supply chain or workforce availability issues brought on by COVID-19 that would be relevant to the "impossibility" analysis. Essentially, this will be a fact-dependent analysis, and it would be beneficial to have strong and sound legal assistance.

### **Force Majeure Notices**

When a contracting party believes events constitute a force majeure, it should send a force majeure notice to its counterparty. The party invoking force majeure should be sure the notice describes all grounds on which the party seeks to invoke the force majeure clause. The invoking party should also not hesitate to update or supplement its notice as facts and circumstances continue to change.

Finally, the invoking party should carefully review the applicable contract to confirm all timing and notice requirements will be satisfied by the force majeure notice. Further, upon transmission or receipt of a force majeure notice, the sending or receiving party should consider whether dispute resolution is probable. If so, preservation notices should be distributed.

### **Other Considerations**

#### **Allocation of Resources**

As a result of COVID-19, parties may be limited in their ability to perform if not entirely prevented from performing. These parties may be inclined to allocate performance to higher priority counterparties or contracts. Before allocating resources, however, parties should know performance under some contracts (but not all) could detrimentally affect any force majeure claims asserted under contracts where performance is suspended. After all, force majeure is predicated on the idea that an event prevented the performance of the party's obligations under its contract(s).

Nonetheless, an allocation of resources may be proper in certain circumstances. Natural gas supply contracts, for example, frequently include provisions requiring pro-rata allocation of supply when capacity at certain delivery points is reduced. In addition, many jurisdictions provide a "fair and reasonable" standard for allocation of products by a seller whose full performance is impracticable due to a "failure of presupposed conditions."

In Greece, as the situation currently stands, the current volatility of many factors determining earnings for the RES special account, the coffer used to remunerate producers supplying green energy to the grid, threatens to once again cause payment delays after a period of hard-earned order. While DAPEEP, the RES market operator, managed to bring order to the account, however, a new round of pressure on the RES special account, primarily induced by the coronavirus crisis and drastic reduction of energy commodity prices, has led to payment delays.

The Legislative Context Act issued by the government (GG A 84/13.04.2020), in the context of taking emergency measures for the Covid-19, provides the possibility of facilitating electricity and gas suppliers in the payment of 30%

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of the regulated charges in four interest-free monthly instalments to the Network and Transport Managers.

In addition, another provision of the Ministry of Environment and Energy obliges the DAPEEP to conclude a one-time, short-term loan with a bank to cover revenues from the ETMEAR, the special fee for reducing gas emissions and then get back the remittances provided by the commodities' providers.

### **Common Law Rights**

Even when a force majeure clause is included in a contract, a contracting party may invoke force majeure under common law. For instance, depending on the jurisdiction, doctrines of commercial impracticability, frustration of purpose, or impossibility may afford opportunities for relief from contractual obligations.

In Greek Civil Law there are two clauses of the Greek Civil Code that are suitable for any party wishing to terminate a contract under these circumstances. Force Majeure Hardship (art. 388 of the Greek Civil Code) and the application of Good Faith and Business Usages (art. 288 GCC).

### **Electricity Contracts at Issue**

As the current crisis continues to evolve, specific force majeure issues have also arisen in the energy sector:

**Power Purchase Agreements (PPAs):** For projects under construction, COVID-19 may present workforce shortages and supply chain disruptions, as well as construction delays from regulatory/permitting agency shutdowns. Operational projects under existing PPAs are susceptible to an impaired ability to make payments or renegotiation for lower rates if an off-taker's customer load changes (e.g., office shutdowns, industrial and manufacturer shutdowns, or commercial business closures).

**Construction and Operations and Maintenance (O&M) Agreements:** Similar to PPAs, a project's construction and O&M agreements may fluctuate if supply and worker shortages occur.

**Utility Interconnection and Distribution Agreements:** Although utility operations are "essential services" that will likely continue, workforce and equipment shortages may delay electric interconnection and distribution processes as new projects are seeking to come online.

**Project Finance:** Project delays and shutdowns could disrupt payments from project debtors and obligors to lending institutions that finance energy project developments.

**Solar and Wind Land Leases:** Project delays and shutdowns could cause financial drains on developer-lessees' obligations to pay rent to landowners.

**Permitting Delays:** As state agencies temporarily close down or move to a remote-work framework, project proponents may experience permitting delays that could push out a project's completion date.

### **Applicable Precedent Governing each Contract**

Given that pandemics in the European Union are rare, case law is scant on the extent to which pandemics and government-mandated quarantines constitute valid grounds to suspend performance under energy contracts.

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However, some jurisdictions have offered helpful insight as for example that a nonperforming party needs to demonstrate not only that the force majeure event was unforeseeable ***but also that the availability and delivery of the gas were affected by the occurrence of a force majeure event.***

Case law and Commission's precedent may vary depending on the jurisdiction, so when interpreting a force majeure clause, courts look to the intentions of the parties in all the circumstances.

In particular, they focus on what (objectively) appears to have been intended on the basis of the express words of the contract.

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