

Fingering the Force Majeure trigger

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A lot of people write off Coronavirus – Covid-19 if you really must – as a storm in a teacup, a ramped-up flu virus that’s no more worrisome than a passing bout of the sniffles... however, the infra/energy community begs to differ.

Speaking to folk around the industry this week, concerns over the virus go far beyond hapless tourists stuck on cruise ships in Japan, holidaymakers confined to quarters in Tenerife hotels, Chevron staff sent home from Canary Wharf... or masked commuters daily taking their lives in their hands as they trudge to work each morning.

In the last week, we hear that sponsors have been phoning lawyers seeking opinions over calling Force Majeure on projects that are being impacted by supply chain issues as the World Health Organization warns that the virus could reach most – if not all – countries.

At this early stage of the virus’ progress, the pinch is starting to be felt on projects that rely on Chinese components with supply chains feeling the squeeze. For our community, this is particularly impacting solar and wind projects.

Meanwhile, LNG take-or-pay contracts have many in the industry worried and – at a more mundane level, and further down the road – demand-risk transport projects are sure to follow... if the killer virus sweeps the planet.

Calling all lawyers...

David Metzger, head of Clifford Chance’s international construction group, has been tasked with leading the magic circle law firm’s advisory group tackling the impact of Coronavirus.

“It started with colleagues saying they were receiving Force Majeure claims on existing contracts –not just renewable energy – every single construction, infrastructure, and energy project you can think of,” he says.

“And that’s not just the ones with Chinese main contractors – it’s there throughout the supply chain. Even operational projects are looking nervously at parts production.

“This really is quite serious... if it goes on for a long time. And it will only get worse with disruption spreading.”

However, it’s not just construction companies getting worried, lenders are picking up the phone too.

“Lenders are saying that they do not want to see Coronavirus – or an epidemic – to fall within the Force Majeure event,” says Metzger. “They want to carve out the current spread of the epidemic because they don’t want to lend to a project that’s immediately going to be affected.

“It’s not just the claims that will arise under construction and supply contracts, but ultimately it all leads to delays in revenue when projects get taken over – and that means no debt service at that point.

“Lenders are saying – either you put up some contingency finance to cover this risk or we’re not going to lend.”

Similar discussions are being raised in capital markets, making this not only the hottest topic on claims, but also the hottest topic on negotiations for projects that are trying to close right now.

And to make matters a little more interesting, it's not just Force Majeure that's being raised, but also Change In Law.

"If you have a public authority saying that no shipments are allowed or that factories have to close, that might – depending on the contract wording – come through as Change In Law, rather than a Force Majeure situation," says Metzger.

The one good thing...

It's difficult to identify a positive from the Coronavirus when more than 50 countries now have confirmed cases.

Today the first cases were identified in Mexico and Nigeria (the first sub-Saharan Africa country), the Japanese prefecture of Hokkaido has declared a state of emergency, and stock markets around the world have plummeted.

Furthermore, it's revealing a technological weakness that needs to be resolved so that the industry has the resilience to cope with an international epidemic... and that is a rank inability to coordinate video conferencing.

As a side point, this will also help you all to reduce carbon footprints and increase ESG standing which, if it's not already at the front of your mind, really should be.

We are hearing that travel bans to parts of Asia have led lenders – most of whom are complete dinosaurs – to broach that most feared of individual with an organisation... The IT Guy.

"This problem is highlighting the lack of standardisation of different systems," says one senior infra lending source. "When you try to set up a video conference with a client, it's almost impossible.

"Oil companies often have their own system that doesn't talk to our system and nobody really knows how to make our system work in the first place."

So, if you're reaching for a positive from Coronavirus, it could be that you will have to invest in a secure, standardised system for video conferencing... which means you may never have to leave the country again.

Having said that, next week you'll probably be working from home...

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