

# COVID-19 and force majeure under LNG sale and purchase agreements

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The coronavirus outbreak has to date had far reaching effects on the global economy, and the LNG industry is no exception. One question at the forefront of the minds of both sellers and buyers of LNG has been the availability of force majeure relief.

The availability of force majeure relief depends upon the specific wording of the agreement and the governing law of that agreement.<sup>1</sup> However, some general observations can be made about issues arising from the application of force majeure concepts commonly found in LNG sale and purchase agreements.

## General rule

- Force majeure provisions in many LNG sale and purchase agreements (whether in the form of a master spot arrangement, a long-term sale and purchase agreement, or something in between) will contain a general rule which excuses a party from liability for non-performance or a delay in performing its contractual obligations, provided that certain requirements are satisfied. Examples of common requirements found in such force majeure provisions include varying combinations of the following:<sup>2</sup>
  - the event or circumstance must have affected performance to the degree specified in the contract (which, in addition to the common requirements of preventing or delaying performance, may often also include other concepts such as interfering with or impeding performance);
  - the event or circumstance must be beyond the reasonable control of the affected party (some agreements also require that the affected party acted as a reasonable and prudent operator);
  - the event or circumstance must not have been reasonably foreseeable; and
  - the affected party must not have been reasonably able to overcome or avoid the event or circumstance.
- The party asserting force majeure relief will first need to specify the event or circumstance of force majeure. This may not be the coronavirus outbreak itself, but may include consequences of the outbreak (such as governmental restrictions imposed to contain the outbreak). Such party will also have the burden of proof to demonstrate that all of the requirements of its force majeure claim are satisfied.

<sup>1</sup> This article focuses on LNG sale and purchase arrangements that are governed by English law or New York law.

<sup>2</sup> See, e.g., Clause 12 of the 2011 GIIGNL Master Ex-Ship LNG Sales Agreement, Article 13 of the 2012 AIPN Model Contract Master LNG Sale and Purchase Agreement and Clause 15 of the BP Standard Form MSA (DES) 2019 Edition.

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## Specific references to “epidemic” or “pandemic”

- Some force majeure provisions list events that may constitute force majeure.<sup>3</sup> Those lists may refer specifically to an “epidemic” or “pandemic.” However, the existence of such a reference will not be determinative. Rather, the requirements related to the effect the coronavirus has on performance must also be addressed. The less direct the causal link between the event of force majeure and the effect on performance, the more challenging it may be to demonstrate an entitlement to force majeure relief. That can be either because evidence across a more complex chain of cause and effect is needed or because there may be more opportunities along such chain for a party arguably to have overcome the effects.
- On the other hand, a given force majeure clause might not specifically refer to “epidemics” or “pandemics”. Such an omission does not necessarily exclude the availability of force majeure relief if performance is affected by the coronavirus. Force majeure provisions are typically worded so that the list of events that could entitle a party to force majeure relief are not exclusive, so long as general requirements are satisfied.

## Exclusions and limitations

- Parties analyzing the availability of force majeure relief should also be mindful of specific exclusions and limitations that may be included in the agreement. For example:
  - A force majeure provision may include a statement of one or more circumstances that are specifically excluded from the scope of force majeure (for example, the ability to obtain better economic terms<sup>4</sup> or a change in the market or demand for LNG).<sup>5</sup>
  - Some provisions explicitly limit the application of the force majeure to specific facilities (for example, in the case of portfolio LNG sale and purchase agreements, there may be rules limiting the scope of force majeure to facilities or vessels that were already scheduled for delivery or receipt of the relevant LNG cargoes when the circumstance arose).

It will be important to review any such exclusions or limitations in view of the specific reasons that the coronavirus is asserted to affect performance.

## Obligations following force majeure

LNG sale and purchase agreements will typically also include obligations following the force majeure event, which the parties will want to keep in mind. These may include:<sup>6</sup>

- obligations requiring the affected party to notify the other party of events or circumstances that may constitute force majeure, and the degree to which performance is affected (and to provide periodic updates);
- some level of obligation (often reasonable endeavors) on the affected party to resume normal performance under the agreement as soon as possible;
- in some term agreements, obligations in respect of fair apportionment of the affected party’s remaining capacity to perform; and
- in some term agreements, obligations with respect to efforts to deliver or take “force majeure restoration” cargoes in future years.

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<sup>3</sup> See, e.g., Clause 12(2)(b) of the 2011 GIIGNL Master Ex-Ship LNG Sales Agreement, Article 13.1.2.1(a) of the 2012 AIPN Model Contract Master LNG Sale and Purchase Agreement and Clause 15.1(a) of the BP Standard Form MSA (DES) 2019 Edition.

<sup>4</sup> See, e.g., Clause 13.1.2.2(a) of the 2012 AIPN Model Contract Master LNG Sale and Purchase Agreement.

<sup>5</sup> See, e.g., Clause 13.1.2.2(b) of the 2012 AIPN Model Contract Master LNG Sale and Purchase Agreement.

<sup>6</sup> See, e.g., Clauses 12(3) and 12(4) of the 2011 GIIGNL Master Ex-Ship LNG Sales Agreement, Clause 13.2 of the 2012 AIPN Model Contract Master LNG Sale and Purchase Agreement, and Clauses 15.6 and 15.7 of the BP Standard Form MSA (DES) 2019 Edition.

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## Complexity and high stakes

As the coronavirus outbreak shifts from an unexpected occurrence to a known risk, analysis of the availability of force majeure relief becomes potentially more complex. In addition, where multiple cargoes are involved, the stakes can quickly rise. Considering the potential consequences, parties should carefully assess their positions when evaluating whether to assert force majeure or how to respond to such an assertion.

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