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IS COVID-19 A FORCE MAJEURE EVENT IN MYANMAR CONSTRUCTION CONTRACTS AND POWER PURCHASE AGREEMENTS?

As with all sectors of the economy, the infrastructure sector in Myanmar will likely be significantly impacted by the current COVID-19 outbreak. Although there is no nationwide mandated shutdown, delays in construction projects are expected nonetheless. This article will focus on the provisions that sponsors and contractors should pay attention to in power purchase agreements (“PPAs”) and construction contracts.

1. Force majeure provisions in Myanmar PPAs

Extent of force majeure

While project-specific, Myanmar PPAs all contain force majeure (“FM”) provisions, i.e., provisions that protect a party that is prevented from performing its obligations due to acts that are beyond its control. However, there are two conditions with regard to claiming FM:

- The event preventing performance should not be in the control of the claiming party, which would usually be the case for a pandemic; and
- The party needs to mitigate the effect (delays or additional costs) due to such FM, which means that companies that have not been impacted yet should take proactive steps to mitigate any future negative impact now to ensure

that they can claim FM in the future.

Note that case law usually requires a genuine link between the FM event and the delay/prevention in performing the contract. As such, sponsors are strongly advised to set up a monitoring system to show how and to which extent the non-performance of obligation is caused by the current events.

Myanmar PPAs usually list examples of FM events that are particularly relevant to the current events, including an epidemic, restrictions on importation and closing of borders, or failure to obtain or renew a governmental approval (such as a construction permit). Sponsors should be aware that those events will constitute FM only if they fulfill the general conditions set out above.

Highlights of this note

- ▶ Force majeure provisions in Myanmar PPAs
- ▶ Entitlements for contractors under construction contracts
- ▶ When to claim FM?

Governmental Force Majeure

Myanmar PPAs usually include a specific type of force majeure, 'governmental force majeure' ("GFM"), which covers "any act or omission by any Governmental Authority (excepting lawful actions taken by any Governmental Authorities in response to acts or omissions of the Company (...)) which directly and adversely affects the performance by the Company of any of its obligations."

Interestingly enough, the lawfulness exception in Myanmar GFMs only excludes those taken in response to acts by the company; this leaves the door open for sponsors to claim GFM in case of nationwide lawful measures, such as a general or targeted lockdown decided by the authorities under the Prevention and Control of Communicable Diseases Law.

FM under subcontracts

In a power project, however, the project company would not typically undertake the construction and the operation of the power plant itself and would typically have subcontractors doing this. PPAs in Myanmar typically cover FM events affecting subcontractors. However, it is important to review

whether the FM event preventing the contractor under the subcontract also constitutes an FM event under the PPA itself, as certain PPAs explicitly exclude relief from performance if the FM affecting contractors does not also constitute FM under the PPA.

Finally, in our experience, only a handful of Myanmar PPAs signed so far contain the obligation for the Electric Power Generation Enterprise ("EPGE") (the offtaker) to compensate the project company for any additional demobilization and remobilization costs incurred by the contractors in relation to an FM event.

Consequences of FM

The project company will usually be entitled to additional time to reach commercial operation and/or to some sort of payment during an FM event. Generally speaking, payments for GFM are higher than for FM; sponsors should review the possibility of declaring GFM rather than FM when possible.

Either party can terminate the PPA if an FM or GFM event continues for more than 12 or 24 months (depending on who terminates and why the PPA is terminated) and EPGE would – in most cases – be liable to purchase the power

plant at a purchase price at least equal to the amount of commercial debt.

2. Entitlements for contractors under construction contracts

Sponsors will also need to be wary of claims that contractors may file in relation to the COVID-19 pandemic, which usually revolve around two main aspects: (i) compensation for additional costs and (ii) an extension of time ("EOT") for completion. For the purpose of this article, we will focus on provisions from the FIDIC Silver conditions of contract.

FM under FIDIC Silver

The definition of FM (rebranded as Exceptional Events in the 2017 Edition) covers events that (i) are beyond a party's control, (ii) the party could not have reasonably have known before entering into the contract, (iii) the party cannot reasonably overcome, and (iv) are not substantially attributable to the other party.

FIDIC Silver lists various examples of events that could constitute FM; however, FIDIC does not expressly list epidemics and pandemics as an FM event. This should not, however, prevent contractors from claiming FM.



Consequences of FM

Contractors will be entitled to an EOT in case of an FM event. However, interestingly, contractors are only entitled to additional costs in some of the events listed in the definition of FM; given that epidemics or pandemics are not expressly listed, sponsors should not be liable for any additional demobilization and remobilization costs.

Other applicable FIDIC Silver provisions

It should be noted that even though the pandemic does not qualify as an FM event under the contract (e.g., the contract was signed recently, after the beginning of the epidemic), contractors will still be entitled to additional time in certain cases if: (i) the pandemic impacts the availability of goods and materials (narrowed to employer-supplied material in the 2017 Edition) as well as if (ii) authorities cause a delay (such as failure to issue an import license) duly applied for by the contractor.

FIDIC Silver also mandates contractors to put all measures in place to prevent the spread of epidemics, meaning contractors may have a limited right to claim an EOT for certain measures that would however already have had to be undertaken on the site due to obligations predating the pandemic.

3. When to claim FM?

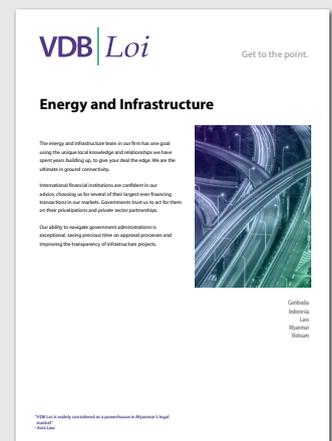
Sponsors and contractors usually have a fairly short window to claim FM. In most Myanmar PPAs, this must be done “as soon as reasonably practicable” after the occurrence of the FM event, while in FIDIC, contractors have a limited period of 14 days to claim FM. If timely notice is not given, the remedies granted under FM provisions will no longer be available to contractors.



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