FORCE MAJEURE!

Bracewell discusses the regional conflict and the contractual terms that will determine relief. Developers must test force majeure, political risk and notice provisions before deadlines foreclose protection.

The escalation of hostilities between the United States, Israel and Iran, drawing in the wider Gulf region and placing the Strait of Hormuz under threat of closure, has prompted every developer with exposure to Gulf Cooperation Council infrastructure to do precisely what their predecessors did during the COVID-19 pandemic – reach for the force majeure clause in their concession agreements. The reflex is entirely understandable. The difficulty, as the pandemic made painfully clear, is that the devil is very much in the detail, the relief available being peculiarly specific to the contractual terms each project negotiated, differing materially from one jurisdiction to the next and from one procurer to another.

THE ARCHITECTURE OF THE REVENUE DOCUMENT

Every PPP concession in the GCC region is anchored by a primary revenue agreement (in the utilities sector, typically a Power Purchase Agreement, a Water Purchase Agreement, a Power and Water Purchase Agreement, or an Energy Conversion and Water Purchase Agreement) which functions as the economic heart of the project. It is in this document that the right to relief for a force majeure event is both granted and circumscribed. The force majeure clause in a GCC concession agreement is never a simple gateway to excuse non-performance. It is instead an intricate, multi-stage mechanism, each stage carrying its own conditions and its own capacity to bar the developer from relief if those conditions are not precisely met.

The clause typically opens with a general definition that the event must be beyond the reasonable control of the affected party and must prevent, hinder or delay performance. What follows includes carve-outs, specific notice requirements and corresponding time bars and post-cessation obligations, all of which need to be considered, met and duly discharged.

THE CRUCIAL DISTINCTION: PURE FORCE MAJEURE AND POLITICAL RISK

The most commercially significant structural feature of the GCC PPP concession model is the bifurcation of force majeure into two distinct categories: events of a natural or exogenous character (pure force majeure) and events attributable to the host state or political action (variously termed Government Risk Events, Offtaker Risk Events, or simply Political Force Majeure/Risk Event, all dependent on jurisdiction for terminology). This is not a semantic distinction — it carries profound financial consequences.

For operational assets, under a pure force majeure event, the buyer's payment obligation is typically limited to what the plant actually produces: capacity charges accrue only on demonstrably available capacity, and output charges follow actual delivery. The developer's revenue stream is therefore directly exposed to the extent the event impairs the asset's ability to operate (the idea being that insurances pick up the difference). Under a government or political risk event, however, the buyer is usually required to make payments on the basis of deemed available capacity (or in the context of renewables, deemed energy delivered) — that is, the capacity the asset would have provided had the event not occurred — regardless of whether it can actually operate. This deemed payment mechanism is the economic safety net, recognising that the relevant government or political risk event is usually uninsurable (or not on commercial reasonable basis).

THE GEOGRAPHIC LIMITATION PROBLEM

This is the analysis that developers confronting the current regional conflict cannot afford to skip. Many regional models (but not all) include, within the meaning of political risk event, acts of war, armed conflict, invasion or blockade occurring "within or involving" the host state. Notably, the inclusion or absence of the word “involving” may determine whether the devastating consequences of a regional conflict are shared between the developer and the procurer or fall primarily on the developer.

In Oman, the buyer risk event only applies to war and hostilities "occurring in Oman."

In Kuwait, the government risk category captures acts of war occurring "within or involving the State of Kuwait", but carries a further and critical proviso: the action or inaction of a Governmental Instrumentality of Kuwait must be the "controlling or contributing force" causing the event. Similarly structured provisions appear in Abu Dhabi.

The implication for the current conflict is stark. If the United States and Israel are striking Iran, and Iran responds by closing the Strait of Hormuz (as it had done several times), the question for a developer in any of these jurisdictions is whether their host state is "involved" in that conflict in a legally meaningful sense under their specific concession. Worst still, for regional models that only refer to the conflict occurring “within” the country, closing of the Strait of Hormuz may not be recognised.

In Qatar, the analysis carries an additional structural complexity. Political risk events under that jurisdiction's standard concession form are captured not as force majeure events at all, but as a separate category of procurer risk, governed by different definition and claims process. The developer who conflates the two categories in their initial notice may find themselves pursuing the wrong remedy and, critically, missing the applicable procedural deadlines for the right one.

THE NOTICE TRAP

If definitional architecture is the strategic question, the notice provisions are the procedural minefield. Across most regional models, the initial notice of a force majeure event is a condition precedent to relief — but the strictness of its application varies materially.

In Kuwait, Abu Dhabi and Saudi Arabia, the initial written notice must be delivered within ten days of the party first having knowledge of the event. The consequence of missing this window is absolute: the party "shall not be entitled to invoke the benefits" of the force majeure clause. This is not a soft principle subject to waiver arguments. It is, on the express terms of these concessions, a complete bar. In Oman, the equivalent window is fourteen days — marginally more generous — although this is coupled with an express obligation to prove both the existence and the effect of the force majeure event, arguably heightening the evidentiary burden on the developer.

In Qatar, the initial notice must be served within seven business days of the affected

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party becoming aware of the occurrence. Critically, timely provision of this notice is itself a condition precedent to relief running from the time the event occurred. A party that delivers the notice late does not lose the right to relief entirely — but it loses it from the date of occurrence, receiving only relief from the date of the notice actually given.

Thereafter, continuing obligations apply. Under the Qatar concession form, the affected party must furnish written updates every fourteen days throughout the continuation of the event. Failure to do so is itself a condition precedent to continued relief. Under Kuwait, Abu Dhabi and Saudi Arabia concessions, the equivalent reporting burden is similarly ongoing. And across all jurisdictions, within three days of the cessation of the force majeure event, the affected party must submit reasonable proof of the nature of the delay and its effects. This three-day post-cessation window may easily be missed by project companies focused on restarting operations rather than completing the contractual paperwork.

WHAT DEVELOPERS MUST DO NOW

First, read the specific concession. The structural differences between jurisdictions — and between procurers within jurisdictions — are material. The regime governing a power purchase agreement with one GCC authority is not the same as that governing a water purchase agreement with another, even where both are denominated as force majeure clauses. The starting point is always the specific contractual language.

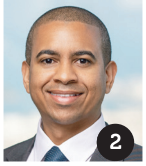
Second, map the current factual situation against the definitional threshold. Is the host state "involved" in the conflict within the meaning of the political risk category? Which category — pure force majeure or government risk — most accurately describes the event being experienced? This categorisation drives not just the financial consequences but the entire notice and claims procedure.

Third, act within the notice windows. The initial notice deadlines across the GCC jurisdictions are short. Where there is any doubt about whether an event qualifies, a protective notice should be served. The cost of serving a notice that turns out to be unnecessary is negligible. The cost of missing a deadline that turns out to have been mandatory is potentially catastrophic.

Fourth, maintain the reporting cadence throughout. The continuing reporting obligations are not administrative formalities. They are contractual conditions precedent to relief. A project company that serves its initial notice correctly but then fails to keep the procurer updated may find, when it comes to assert its claim, that its entitlement to relief for the intervening period has quietly evaporated.

Finally, diarise the post-cessation obligations immediately. The proof of impact requirement after the event ends should be tracked from the outset. They will not be visible in the heat of recovery. A calendar entry today is worth more than a lawyer's apology in month four.

The Iranian conflict has reminded the GCC development community of a truth that COVID taught and which the intervening years of relative stability had allowed to recede: force majeure provisions are not insurance policies. They are contractual mechanisms of precise and demanding construction. The relief they offer is real — but it is intrinsically linked, as it was then and as it is now, to the specific circumstance of each project, the specific text of each concession, and the specific steps taken in the specific time allowed.



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