Impact of coronavirus on solar projects

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As the number of confirmed coronavirus cases continues to climb both globally and in Japan, it appears inevitable that the pandemic will affect the country's solar energy industry.

Disrupted supply chains

China's public health measures may have an adverse effect on the shipment of photovoltaic modules and other equipment manufactured there, on which many Japanese developers rely. As China is home to eight of the world's 10 largest panel manufacturers, the nationwide shutdown of its factories has led to global delays in panel deliveries. This has put Japanese solar projects at significant risk of failing to meet the various deadlines imposed by the Ministry of Economy, Trade and Industry (METI), local government authorities, utilities, investors and lenders.

Japan's response

Japan has started to adopt numerous public health measures to cope with the coronavirus. Prime Minister Shinzo Abe is considering expanding these public health measures having enacted a law on 13 March 2020 that would allow the government to declare a state of emergency, directly affecting the rights of individuals. If the government declares a national emergency, this – together with any subsequent public health measures taken – may inhibit engineering, procurement and construction (EPC) contractors' ability to perform their obligations to develop and construct solar projects.

Force majeure

Ultimately, EPC contractors, developers and other parties to the development of Japanese solar projects may decide (or be forced) to rely on *force majeure* clauses in the relevant project agreements as a means to suspend, exit or avoid liability for the non-performance of their contractual obligations. *Force majeure* clauses define the exceptional circumstances in which parties' obligations may, due to events or circumstances that are outside their control, be suspended, delayed or relieved. The World Health Organisation's declaration that the coronavirus outbreak is "an extraordinary event which is determined to constitute a public health risk to other states through the international spread of disease and to potentially require a coordinated response" may support a declaration of *force majeure*.

However, whether a *force majeure* clause applies to the current coronavirus outbreak would need to be determined on a case-by-case basis based on a close reading of the specific contractual terms. First, a party seeking relief under a *force majeure* clause would need to demonstrate that the circumstances surrounding the coronavirus fall within the definition of a '*force majeure* event' under the contract. For example, a *force majeure* clause may:

- enumerate examples of the circumstances that will constitute a *force majeure* event;
- provide a general catch-all description of such circumstances; or
- use both examples and general descriptions.

Second, should the claiming party be able to prove that the coronavirus outbreak can be classified as a *force majeure* event, it would usually also need to prove that there is a sufficient causal link between the delay or non-performance of its contractual obligations and the *force majeure* event.

Should a party successfully claim *force majeure*, the disruptive effect of such declaration may have a cascading effect through other ancillary agreements. For example, manufacturers that cannot receive a delivery of the raw materials necessary to produce solar equipment and parts as a result of the coronavirus may look to claim that a *force majeure* event has occurred. On such declaration

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being made, the delay or non-performance of manufacturing obligations will have a knock-on effect on other parties' ability to satisfy their particular contractual obligations, including equipment and parts suppliers, shipment and logistics services providers, EPC contractors and developers. Over the next few months, this risk may make it harder to engage EPC contractors for projects that are under development.

FIT period and *force majeure*

Under the current legal feed-in tariff (FIT) framework, solar developers and solar facility operators have no grace period from applicable regulatory deadlines due to *force majeure* events. The 2017 and 2019 amendments to the Renewable Energy Act impose strict deadlines on solar projects to reach commercial operation. Should developers fail to complete the construction of solar projects and commence commercial operation by the respective deadline, the guaranteed FIT period (during which the project is able to sell electricity to applicable utilities at a subsidised rate) will be reduced.

Without any exemption or special treatment contemplated under the standard power purchase agreement or the current Renewable Energy Act and related regulations and ordinances, solar developers cannot claim an extension of the FIT period even if they fail to reach commercial operation within the deadline due to the coronavirus pandemic. Such solar developers would also be unable to invoke the typical risk allocation mechanisms contemplated under construction or module supply contracts with the contractors claiming *force majeure*, frustration or impossibility.

Developers will be able to obtain relief for the unexceptional losses suffered due to the coronavirus only if METI relaxes the commercial operation deadlines for solar projects.

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