

Energy Projects and the Impact of COVID-19: Contract Issues, Force Majeure Claims, Restructuring Considerations

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Energy Projects and the Impact of COVID-19: *Contract Issues, Force Majeure Claims, Restructuring Considerations*

Mona E. Dajani & Shellka Arora-Cox
Pillsbury Winthrop Shaw Pittman LLP

May 21, 2020

The Pillsbury logo, featuring the word "pillsbury" in a lowercase, sans-serif font. The letters are a reddish-brown color. The logo is positioned in the bottom right corner of the slide, set against a white rectangular background.

Impact of COVID-19 on the energy sector

Project development and operations:

- Interruptions in the supply chain and impact on the suppliers
 - Solar
 - Asia is a hub for solar panel material production
 - Malaysia, Vietnam and the Philippines have imposed visa restrictions on visitors from China, including Chinese workers and management staff at solar manufacturing facilities
 - SunPower expects net losses of US\$145-195 million for 2020
 - SunRun has pulled its 2020 guidance and has not offered any new expectations for the year
 - Tesla's solar installations dropped 26 percent from Q1 2019 to Q1 2020 and fell from 54 megawatts in Q4 2019 to 35 megawatts in Q1 2020
 - U.S. installations that use tier 1 Chinese panels will be interrupted

Impact of COVID-19 on the energy sector

Project development and operations:

- Interruptions in the supply chain and impact on the suppliers
 - Wind
 - Vestas posted a net loss of €80 million for Q1 2020 compared to €25 million profit in Q1 2019
 - Siemens Gamesa posted a net loss of €165 million for Q1 2020 compared to €49 million profit in Q1 2019
 - Energy Storage and Electric Vehicles
 - China's battery production capacity is expected to decrease by 10% in 2020
 - Half of the energy storage companies are anticipating a loss in revenues
 - China and South Korea both have major vehicle battery manufacturing
 - Lithium and cobalt are feeling the pain

Impact of COVID-19 on the energy sector

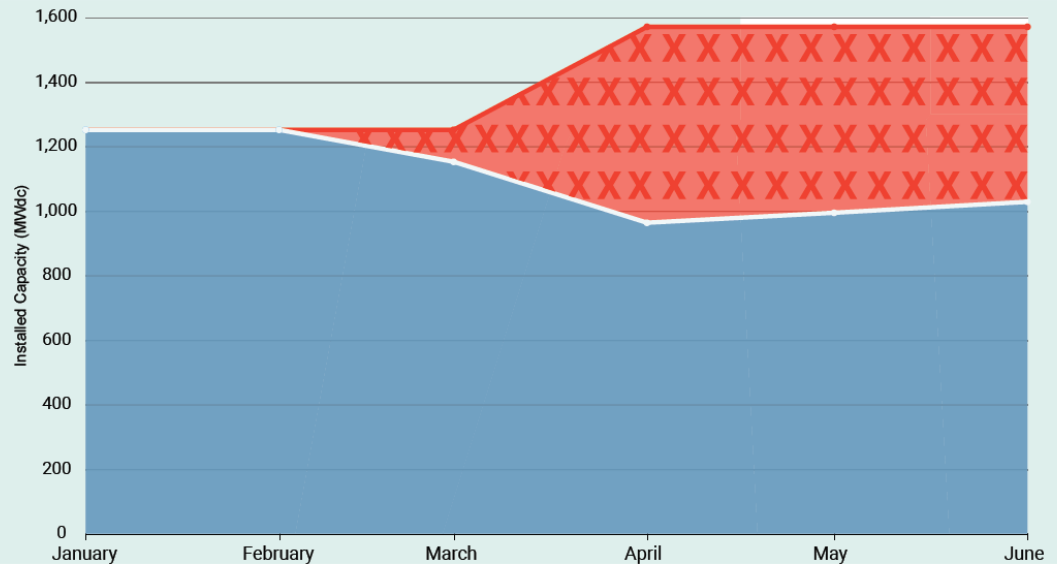
Project development and operations:

- Demand and Generation
 - Global energy demand fell 3.8% in the first quarter of 2020
 - Global electric vehicles sales could see a drop of 43% from 2.2 million in 2019 to 1.3 million in 2020
 - BNEF has reduced global solar demand forecast for 2020 from between 121 GW and 152 GW to a range of 108 GW to 143 GW
 - United States
 - Retail sales of electricity in the commercial and industrial sector are expected to fall by 6.5% in 2020
 - Total electric power generation is expected to decline by 5% in 2020
 - Electricity demand in New York City has fallen by 18% compared to normal times
 - California has reported weather-adjusted load reductions of 5-8% on weekdays
 - Solar installations in Q2 2020 are expected to be just 3 GW – a 37% decline from pre-COVID forecasts

Impact of COVID-19 on the energy sector

Impact of COVID-19 on 2020 U.S. Solar Deployment

- Baseline Forecast
- COVID-19 Impact

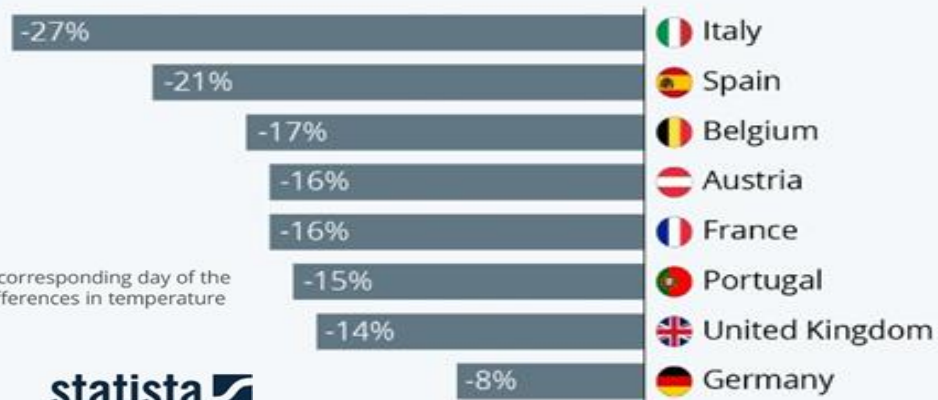


Source: SEIA COVID-19 Impact Analysis

Impact of COVID-19 on the energy sector

How Covid-19 is affecting electricity consumption

Change in electricity consumption in selected countries on 8 April 2020 compared to 2019*



* Average peak hours consumption. Comparison with corresponding day of the week (10 April 2019). Percentages are adjusted for differences in temperature from 2019 to 2020.

Sources: Bruegel, ENTSO-E



statista

Impact of COVID-19 on the energy sector

Project development and operations:

- Labor shortages and Unemployment
 - Work that often requires face-to-face interactions are the hardest hit – installing solar panels on rooftops and adding energy-efficiency measures inside homes
 - About 106,000 clean-energy workers filed for unemployment in March alone, according to Bureau of Labor Statistics data by Environmental Entrepreneurs
 - Sungevity, once one of the nation’s leading solar-installation companies, laid off 377 workers, most of its workforce, in late March
 - The Solar Energy Industries Association had anticipated growth in solar jobs, from 250,000 to 300,000 over the course of 2020; now, half the workforce is at risk
 - AWEA estimates that COVID-19 could put over 35,000 jobs at risk and jeopardize \$43 billion in investments and payments to rural communities

Impact of COVID-19 on the energy sector

Project development and operations:

- Delays in construction
 - Examples include:
 - Five of Ørsted's U.S. offshore wind projects totaling nearly 3 gigawatts may face delays due to COVID-19 and slowed permitting
 - New York has delayed second offshore wind solicitation due to COVID-19
- Maintenance issues
 - Health and safety regulations make social distancing impossible
 - Shortage of technicians
 - Impact on warranties

Impact of COVID-19 on the energy sector

Tax Credits:

- Deadlines for completion to receive full tax credits
 - Wind – the projects that started construction before the end of 2016 must complete construction by December 31, 2020 to receive the full 30% PTC
 - Solar – the projects had to be under construction by the end of 2019 to qualify for the 30% ITC
 - Extension of the continuity safe harbor – letter dated May 7, 2020 from the Treasury
 - Lack of certainty

Impact of COVID-19 on the energy sector

Recent Developments:

- Executive Order issued on May 1, 2020 on Securing the United States Bulk-Power System
 - Authority to Secretary of Energy to prohibit certain interests from supplying the U.S. bulk-power system
 - Prohibited transactions will include those where there is any foreign interest by an adversary that the Secretary has determined poses an unacceptable risk to the U.S. bulk-power system, critical infrastructure, or national security
 - The Executive Order has also established a Task Force on Federal Energy Infrastructure Procurement that will develop recommendations to “identify, isolate, monitor, and replace” existing equipment which has been potentially compromised

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Recent Developments:

- New Section 232 Investigation announced on May 4, 2020
 - Products covered – electrical transformers and certain internal components of electrical transformers, including laminations and cores
 - Investigation is supported by steel producers in Ohio and Pennsylvania who claim that imports of downstream products of grain-oriented electrical steel have increased significantly since the Section 232 duties on steel entered into effect in order to circumvent the tariffs
 - The Department of Commerce has 270 days to provide the President with a report
 - Investigation was initiated on May 11, 2010 and a notice for public comments was issued on May 19, 2020
 - Potential tariffs and increased costs for projects

Impact of COVID-19 on the energy sector

Impact on financing:

- Project financing and tax equity
 - Availability
 - Existing deals in the pipeline are closing
 - Likely repricing of early stage deals
 - Greater scrutiny
 - Risk appetite
 - Uncertainty
- Development capital

Impact of COVID-19 on the energy sector

Impact on financing:

- Implications on existing financings
 - Notices to lenders
 - Funding shortfalls
 - Delays in construction
 - Draw-stops
 - Revisions to budgets
 - Events of default
 - Representations and warranties
 - Material adverse effect
 - Financial covenants
 - Distribution lock-up

Impact of COVID-19 on the energy sector

PPAs:

- Projects under construction
 - Completion deadlines
 - Delay damages
- Operational projects
 - Additional collateral
 - Force majeure
 - Curtailments
 - Ability to make payments
 - Renegotiation

Key Issues for Contract Drafting and Enforcement

Reexamining contract provisions:

- Representations and warranties
- Material adverse effect
- Excusable events
- Force majeure
- Change in law
- Insurance and indemnities
- Events of default
- Governing law
- Dispute resolution

Key Issues for Contract Drafting and Enforcement

Force Majeure Clauses: scope

- Core function is a *shield*: “not breach if performance is prevented or delayed”
- Often, duty to pay money is ***not*** excused
- But some clauses are much broader—e.g., if performance is “inadvisable” or “materially adversely impacted”—and can be a *sword*
- Enumerated series of unfortunate events
- Then a catch-all, “or any other cause beyond party’s reasonable control”
- Unforeseeability requirement?
- Notice—By when? Starting when? Content?
- Duties, duties, duties—to mitigate, resume, make up, allocate

Key Issues for Contract Drafting and Enforcement

Force majeure clauses: remedies

- Usually, extension of time
- What about cost impacts?
- Direct costs of contingency
- Costs resulting from the delay—of extended overhead, consequential costs of contingency
- Mitigation of costs

Key Issues for Contract Drafting and Enforcement

Litigating Claims:

- Proving force majeure – causation
- Considering various remedies
- Relationships and reputational issues
- Cross-defaults

Best Practices for attorneys, investors and developers

Best Practices:

- Review of financing, tax equity, offtake and material project documents
- Manage risks and relationships
- Dual sourcing supplies
- Amount at risk
- Mitigation plan
- Reputational considerations

Thank you



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