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DEPARTMENT: CHEMICAL ENGINEERING

MATRIC NO: 19/ENG01/017

2. Describe two scenarios where force majeure clauses can be applicable to contract in your discipline. (Chemical Engineering)

The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled.' From a contractual perspective, a force majeure clause provides temporary reprieve to a party from performing its obligations under a contract upon occurrence of a force majeure event.

A force majeure clause typically spells out specific circumstances or events, which would qualify as force majeure events, conditions which would have to be fulfilled for such force majeure clause to apply to the contract and the consequences of occurrence of such force majeure event. As such, for a force majeure clause to become applicable (should any force majeure event occur), the occurrence of such events should be beyond control of the parties and the parties will be required to demonstrate that they have made attempts to mitigate the impact of such force majeure event. If an event or circumstance comes within the ambit of a force majeure event and fulfils the conditions for applicability of the clause, then the consequence would be that parties would be relieved from performing their respective obligations to be undertaken by them under the contract during the period that such force majeure events continue.

Further consequential liabilities, depending on the language of the clause, the parties may be required to issue a notice formally intimating the other party of the occurrence of such event and invocation of the force majeure clause. Some contracts also contain a provision that if such force majeure event continues for a prolonged time period, the parties may be permitted to terminate the contract.

EXAMPLE A:

In this example there is no distinction drawn between political and natural force majeure events: -

"Force Majeure Event" means the occurrence of:

(a) an act of war (whether declared or not), hostilities, invasion, act of foreign enemies, terrorism or civil disorder;

(b) ionizing radiations, or contamination by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;

(c) pressure waves from devices travelling at supersonic speeds or damage caused by any aircraft or similar device;

(d) a strike or strikes or other industrial action or blockade or embargo or any other form of civil disturbance (whether lawful or not), in each case affecting on a general basis the industry related to the affected Services and which is not attributable to any unreasonable action or inaction on the part of the Company or any of its Subcontractors or suppliers and the settlement of which is beyond the reasonable control of all such persons;

(d) specific incidents of exceptional adverse weather conditions in excess of those required to be designed for in this Agreement which are materially worse than those encountered in the relevant places at the relevant time of year during the twenty (20) years prior to the Effective Date;

(e) tempest, earthquake or any other natural disaster of overwhelming proportions; pollution of water sources resulting from any plane crashing into [];

(f) discontinuation of electricity supply, not covered by the agreement concluded with the [utility company]; or

(g) other unforeseeable circumstances beyond the control of the Parties against which it would have been unreasonable for the affected party to take precautions and which the affected party cannot avoid even by using its best efforts,

which in each case directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement;

(1) Neither Party shall be in breach of its obligations under this Agreement (other than payment obligations) or incur any liability to the other Party for any losses or damages of any nature whatsoever incurred or suffered by that other (otherwise than under any express indemnity in this

Agreement) if and to the extent that it is prevented from carrying out those obligations by, or such losses or damages are caused by, a Force Majeure Event except to the extent that the relevant breach of its obligations would have occurred, or the relevant losses or damages would have arisen, even if the Force Majeure Event had not occurred (in which case this Clause 20 shall not apply to that extent).

(2) As soon as reasonably practicable following the date of commencement of a Force Majeure Event, and within a reasonable time following the date of termination of a Force Majeure Event, any Party invoking it shall submit to the other Party reasonable proof of the nature of the Force Majeure Event and of its effect upon the performance of the Party's obligations under this Agreement.

(3) The Company shall, and shall procure that its Subcontractors shall, at all times take all reasonable steps within their respective powers and consistent with Good Operating Practices (but without incurring unreasonable additional costs) to:

(a) prevent Force Majeure Events affecting the performance of the Company's obligations under this Agreement;

(b) mitigate the effect of any Force Majeure Event; and

(c) comply with its obligations under this Agreement.

The Parties shall consult together in relation to the above matters following the occurrence of a Force Majeure Event.

(4) Should paragraph (1) apply as a result of a single Force Majeure Event for a continuous period of more than [180] days then the parties shall endeavor to agree any modifications to this Agreement (including without limitation, determination of new tariffs (if appropriate) in accordance with the provisions of Clause 7(4)(e)) which may be equitable having regard to the nature of the Force Majeure Event and which is consistent with the Statutory Requirements.

EXAMPLE B:

Here is a relatively simple clause, with a distinction between political and other force majeure, and the consequences thereof: -

Force Majeure

Events of Force Majeure

For the purpose of this Agreement, an “Event of Force Majeure” means any circumstance not within the reasonable control of the Party affected, but only if and to the extent that;

(i) such circumstance, despite the exercise of reasonable diligence and the observance of Good Utility Practice, cannot be, or be caused to be, prevented, avoided or removed by such Party, and
(ii) such circumstance materially and adversely affects the ability of the Party to perform its obligations under this Agreement, and such Party has taken all reasonable precautions, due care and reasonable alternative measures in order to avoid the effect of such event on the Party’s ability to perform its obligations under this Agreement and to mitigate the consequences thereof.

Instances of Force Majeure

Subject to the provisions of clause 1.1, Events of Force Majeure shall include, but not be limited to:

(a) the following Natural Force Majeure Events:

- fire, chemical or radioactive contamination or ionizing radiation, earthquakes, lightning, cyclones, hurricanes, floods, droughts or such other extreme weather or environmental conditions, unanticipated geological or ground conditions, epidemic, famine, plague or other natural calamities and acts of God;
- explosion, accident, breakage of a plant or equipment, structural collapse, or chemical contamination (other than resulting from an act of war, terrorism or sabotage), caused by a person not being the affected Party or one of its contractors or subcontractors or any of their respective employees or agents;
- to the extent that they do not involve [*country*] or take place outside of [*country*], acts of war (whether declared or undeclared), invasion, acts of terrorists, blockade, embargo, riot, public disorder, violent demonstrations, insurrection, rebellion, civil commotion and sabotage;

- strikes, lockouts, work stoppage, labor disputes, and such other industrial action by workers related to or in response to the terms and conditions of employment of those workers or others with whom they are affiliated save, when such event is directly related to, or in direct response to any employment policy or practice (with respect to wages or otherwise) of the party whose workers resort to such action;
- in relation to the Concessionaire, non-performance by a counter-party to a contract relating to the Concessionaire's Business by reason of an event or circumstance that would constitute a Natural Force Majeure Event under this Agreement; and

(b) the following Political Force Majeure Events:

- to the extent they take place in [*country*], acts of terrorists, blockade, embargo, riot, public disorder, violent demonstrations, insurrection, rebellion, civil commotion and sabotage;
- to the extent that they are politically motivated, strikes, lockouts, work stoppages, labor disputes, or such other industrial action by workers, save in relation to the Concessionaire, when such event is directly related to, or in direct response to any employment policy or practice (with respect to wages or otherwise) of the Concessionaire;
- failure or inability of the Concessionaire to obtain or renew any Consent, on terms and conditions as favorable in all material respects as those contained in the original Consent relating to the Concessionaire's Business (other than due to a breach by the Concessionaire of any of such terms and conditions);
- any action or failure to act without justifiable cause by any Competent Authority, other than a court or tribunal (including any action or failure to act without justifiable cause by any duly authorized agent of any Competent Authority, other than a court or tribunal);
- expropriation or compulsory acquisition of the whole or any material part of the Concessionaire's System or Investor's shares in the Concessionaire, except where such appropriation or compulsory acquisition is on account of contravention of law by the Concessionaire or by the Investor;
- any legal prohibition on the Concessionaire's ability to conduct the Concessionaire's Business, including passing of a statute, decree, regulation or order by a Competent

Authority prohibiting the Concessionaire from conducting the Concessionaire's Business, other than as a result of the Concessionaire's failure to comply with the law or any order, Consent, rule, regulation or other legislative or judicial instrument passed by a Competent Authority;

- in relation to the Concessionaire, non-performance by a counter-party under a contract relating to the Concessionaire's Business by reason of an event or circumstance that would constitute a Political Force Majeure Event under this Agreement,

provided that breakdown of plant or equipment (unless itself caused by an Event of Force Majeure), or unavailability of funds, shall not constitute an Event of Force Majeure.

Effects of an Event of Force Majeure

Either Party shall be excused from performance and shall not be in default in respect of any obligation hereunder to the extent that the failure to perform such obligation is due to a Natural Force Majeure Event.

Additionally, the Concessionaire, [but not [] in respect of []], shall be excused from performance and shall not be in default in respect of any obligation under this Agreement to the extent that the failure to perform such obligation is due to a Political Force Majeure Event.

Notice of an Event of Force Majeure

If a Party wishes to claim protection in respect of an Event of Force Majeure, it shall, subject to clause [], as soon as possible following the occurrence or date of commencement of such Event of Force Majeure, notify the other Party of the nature and expected duration of such Event of Force Majeure and shall thereafter keep the other Party informed until such time as it is able to perform its obligations. The Parties shall use their reasonable endeavors to:

(I) overcome the effects of the Event of Force Majeure;

(ii) mitigate the effect of any delay occasioned by any Event of Force Majeure, including by recourse to alternative mutually acceptable (which acceptance shall not be unreasonably withheld by either Party) sources of services, equipment and materials; and

(iii) ensure resumption of normal performance of this Agreement as soon as reasonably practicable and shall perform their obligations to the maximum extent practicable,

provided that neither Party shall be obliged to settle any strike, lock out, work stoppage, labor dispute or such other industrial action by its employees.