MASIN

Force Majeure and Delay: A Causation Problem Disguised as Law

BY PANOS BERTES

Force Majeure and Delay: A Causation Problem Disguised as Law

Force majeure is one of the most frequently invoked concepts in construction disputes, yet one of the most misunderstood. Too often, parties treat it as a legal classification exercise: Was the event unforeseeable? Was it beyond the parties' control? Does it fall within the contractual definition? These questions matter, but they are not the ones that determine whether a project is entitled to additional time.

From a delay expert's perspective, force majeure is not primarily a legal issue.

It is a causation issue.

Tribunals decide whether an event qualifies as force majeure. The delay expert's role is different: to determine whether the event actually delayed completion. That distinction is fundamental, and it is frequently overlooked in both claims and defences.

The Industry's Misplaced Focus on Labels

In many disputes, parties invest significant effort arguing about the classification of an event. They debate foreseeability, contractual wording, and whether the event appears in a list of force majeure triggers.

But even if an event is accepted as force majeure, that does not automatically entitle a contractor to an extension of time. The existence of a force majeure event does not prove delay. It simply opens the contractual door to potential relief.

The real question is straightforward: Did the event delay the project's actual completion date? Without evidence of delay, the label "force majeure" is irrelevant.

Why the Actual Critical Path Is the Real Battleground

Delay analysis ultimately revolves around the critical path — but not the theoretical one shown in a baseline programme or automatically generated by planning software. What matters is the actual critical path at the time the event occurred.

Projects evolve. Sequences change, float is consumed, and activities that were once non-critical can become critical. A force majeure event may disrupt procurement, labour, logistics, or productivity, but unless it affects the actual critical path, it does not delay completion.

A credible delay analysis must therefore answer:

- What was the actual critical path at the time of the event?
- Which activities were impacted?
- Were those activities on the critical path?
- If not, did the critical path shift as a result?

Without this analysis, any assertion of delay is speculative — and speculative claims rarely survive scrutiny.

Recent Regional Disruptions: A Practical Illustration

The ongoing conflict in the Middle East has created significant uncertainty across the region. Supply chains have been disrupted, material lead times have increased, and labour mobility has been restricted. These conditions echo many of the challenges experienced during the COVID-19 pandemic.

These events are clearly external and beyond the parties' control. But their existence does not automatically establish delay.
For example:

- A delayed shipment may not affect the critical path if work can be resequenced.
- Reduced manpower may not delay completion if productivity is maintained elsewhere.
- Supply chain disruptions may be mitigated through alternative sourcing or expedited logistics.

In every case, the key question remains the same: what was the actual impact on the critical path?

This is where many claims fall short. They describe disruption but fail to demonstrate delay.

And crucially, to determine whether the current Middle East conflict has affected a project, this analysis must be carried out contemporaneously, not reconstructed years later during a dispute.

One of the most persistent weaknesses in project management is the absence of real-time delay analysis. Many projects wait until a claim is submitted - sometimes long after the event - to examine the impact of disruptive occurrences.

This approach is fundamentally flawed.

Real-time analysis allows project teams to:

- Identify emerging risks
- Implement mitigation
- Record cause-and-effect relationships accurately
- Preserve evidence before it deteriorates

When analysis is delayed, the quality of evidence declines. Records become incomplete, personnel change, and competing narratives emerge. Distinguishing between concurrent causes becomes significantly harder.

In practice, waiting years to analyse a force majeure event - whether a pandemic, a war, or any other external shock - is often fatal to a credible delay claim. The technical story becomes too difficult to reconstruct.

The COVID-19 Lesson: Disruption Is Not Delay

The current geopolitical tensions in the Middle East share many similarities with the disruptions experienced during COVID-19. Both created widespread uncertainty, supply chain challenges, and labour constraints. But as with COVID-19, the existence of disruption does not automatically translate into delay.

At the start of the pandemic, many contractors assumed that the unprecedented nature of the event would justify extensions of time. In reality, successful claims were those supported by detailed contemporaneous evidence and delay analysis showing how specific restrictions - lockdowns, site closures, labour shortages - translated into critical delay.

Unsuccessful claims tended to rely on broad assertions of disruption without establishing a causal link to completion.

A recent arbitration involving a mega-project in Saudi Arabia illustrates this point clearly. The contractor claimed delays arising from a government-mandated site closure and relied heavily on the official announcement as evidence of a force majeure event.

However, the claim was not supported by contemporaneous delay analysis showing that the closure affected the actual critical path. When the matter proceeded to arbitration, both delay experts agreed that during the relevant period the critical path ran through the design activities, not the construction works affected by the closure.

To make matters worse, the contractor had issued correspondence at the time confirming that design activities were progressing as planned. Construction was disrupted, but construction was not driving the completion date.

The tribunal therefore rejected the extension of time claim. The site closure - although real, documented, and externally imposed — did not impact the critical path.

This case demonstrates a simple truth: an event, even one widely recognised as force majeure, is not self-proving in terms of delay.

The lesson is unmistakable: even globally disruptive events do not remove the need to prove delay. Causation still matters. And as noted above, contemporaneous delay analysis could have prevented the escalation of the dispute entirely - the contractor would have seen that the critical path ran through design, not construction.

The Delay Expert's Role: Technical, Not Legal

A common misconception is that once an event is labelled force majeure, entitlement to relief follows automatically. It does not. Force majeure may open the contractual gateway to relief, but the claiming party must still prove that the event actually caused delay.

As explained above, this requires demonstrating:

1. The occurrence of the event
2. Its impact on specific activities
3. The relationship between those activities and the actual critical path
4. The resulting delay to completion

Without this chain of causation, the claim is incomplete — regardless of how extraordinary the event may be.

This is precisely where the delay expert's role becomes essential. The expert does not decide whether an event is a legally force majeure - that is a matter for the tribunal. The expert's responsibility is to determine whether the event caused the delay, and to what extent. Legal classification without technical causation is incomplete; technical causation without legal classification may be irrelevant. Both are required, and each belongs to a different discipline.

The Saudi Arabia case discussed above illustrates this perfectly. The contractor relied on the government-mandated site closure as a force majeure event, but failed to demonstrate that the closure affected the actual critical path. Contemporaneous records showed that design activities - not construction - were driving completion. Had the contractor carried out real-time delay analysis, it would have recognised this immediately and avoided pursuing an unsustainable claim.

The lesson is clear: force majeure is not self-proving. Causation still matters, and contemporaneous delay analysis is the only reliable way to establish it.

Towards Better Practice in the Industry

To improve how force majeure is handled from a delay perspective, the industry should adopt several practical measures:

- Embed contemporaneous delay analysis

Make delay assessments part of routine project controls, not an after-the-fact exercise.

- Maintain robust records

Clear documentation of progress, disruptions, and mitigation is essential to proving causation.

- Focus on causation, not labels

The term "force majeure" is secondary to demonstrable impact on the critical path.

- Avoid over-reliance on baseline programmes

The baseline is a starting point; the actual critical path at the time of the event is what matters.

- Recognise that disruption and delay are not the same

A project can be heavily disrupted without being delayed - a distinction central to credible delay analysis.

Conclusion

Force majeure will continue to feature prominently in construction contracts, especially in an increasingly uncertain global environment. But from a delay expert's perspective, its treatment must move beyond legal classification.

At its core, the issue is one of causation.

Did the event - whatever its label - delay completion?

And can that delay be demonstrated through credible, contemporaneous evidence?

By focusing on these questions, parties can produce more rigorous, transparent, and persuasive delay assessments. They also improve real-time project management and strengthen the resilience, and reduce the risk of disputes escalating.