quinn emanuel
quinn emanuel urquhart & sullivan, llp

Force Majeure and the AI Data Center Buildout: Allocating Risk in AI Data Center Contracts

I. Introduction

Physical war risk is not the only disruption vector. The AI buildout is also colliding with a global memory-and-storage shortage affecting HBM (high-bandwidth memory), DRAM (dynamic random-access memory), NAND flash memory, and enterprise SSDs.[1] Recent reporting and market data indicate that AI-driven data center demand is outpacing available supply.[2] For AI data centers, that matters because memory and storage are not peripheral inputs. HBM is integral to AI accelerators; high-capacity DRAM supports AI and general-purpose servers; and enterprise SSDs are critical for data-intensive workloads. A project may have land, permits, power, and financing—yet still miss customer or financing milestones if critical compute, memory, or storage components are unavailable. This and other types of shortages raise often raise other contractual considerations outside the scope of force majeure clauses, with any application of force majeure dependent upon the clause and the considerations set out.

These developments matter because the AI data center buildout—projected to require $5.2 trillion in investment to meet worldwide demand for AI alone by decade's end—depends on myriad variables, including construction schedules, complex global supply chains, reliable access to power, and enormous capital commitments.[3] Numerous variables can thus affect a buildout: physical war, tariffs, sanctions, export control, memory-and-storage shortages, equipment shortages, labor shortages, and power constraints. When delays occur, the consequences cascade through the contractual chain: developers face liquidated damages, tenants face liability to their customers, GPUs depreciate while idle, and credit enhancements keyed to milestone

[1] Hyunjoo Jin et al., *The AI frenzy is driving a memory chip supply crisis*, REUTERS (Dec. 2, 2025), https://www.reuters.com/world/china/ai-frenzy-is-driving-new-global-supply-chain-crisis-2025-12-03/.
[2] *Id.*
[3] McKinsey & Company, *The Cost of Compute: A $7 Trillion Race to Scale Data Centers* (Apr. 28, 2025), https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/the-cost-of-compute-a-7-trillion-dollar-race-to-scale-data-centers.

dates may never trigger, any or all of which may lead to invocation of force majeure.[4]

The core question is therefore not just: "Was there a force majeure event?" The more important questions are: Which obligation was actually prevented or delayed? What proof of causation and mitigation exists? What notice was required and when? Does the clause provide only an extension of time, or does it also excuse liquidated damages, customer credits, rent, payment obligations, milestone failures, or financing defaults? And does relief under one agreement pass through the rest of the construction, supply, power, customer, lease, insurance, and financing documents?

This note provides practical guidance under New York and Delaware law.[5] Before a dispute, parties should map high-risk contracts; draft risk-allocation clauses—including force majeure clauses—with specificity; align pass-through rights across the project stack; preserve insurance and financing rights; and decide expressly who bears the risk of tariffs, sanctions, export controls, power constraints, equipment scarcity, and war-related disruption. When invoking force majeure, parties should provide timely and carefully drafted notices, build a contemporaneous causation record, document mitigation, and avoid overclaiming relief. When defending against force majeure, parties should challenge the triggering event, causation, foreseeability, notice, mitigation, and—often most importantly—the scope of relief.

In AI data center projects, force majeure is no longer a back-end boilerplate provision. It is a core litigation and risk-allocation tool that can determine whether a delay remains isolated—or cascades through the project's construction, customer, power, insurance, and financing documents.

II. Force Majeure Clauses for AI Data Center Projects—When They Might Be Invoked, and Might Apply

Force majeure clauses are a creature of contract. Force majeure clauses can excuse one or both parties of their obligations due to certain extraordinary events enumerated in the parties contracts. In a common-law regime like the United States, force majeure only provides a defense for breach of contract where specifically addressed by the applicable contract. Without a force majeure clause, parties will be limited to excusing performance under alternative legal doctrines like impracticability, impossibility, or frustration of purpose. Because a force majeure clause is created by contract, its scope, meaning, and applicability turn on the specific language of the contract, the unique set of facts affecting performance, and the governing law.

Choice of law matters. Different jurisdictions apply more or less rigorous

[4] For an overview of the financing structures and litigation risks to AI data centers, see Quinn Emanuel, *Financing the AI Infrastructure Boom: Emerging Litigation Risks in AI Data Centers*, (Mar. 13, 2026), https://www.quinnemanuel.com/the-firm/publications/client-alert-emerging-litigation-risks-in-financing-ai-data-centers-boom.

[5] The case law on force majeure in energy, supply, and construction disputes frequently arises in other jurisdictions. We cite those decisions where they illuminate principles likely to apply in data center disputes governed by New York or Delaware law.

standards when interpreting and applying force majeure provisions. Contractarian jurisdictions like Delaware have demonstrated a willingness to enforce broad catch-all force majeure language in contracts between sophisticated parties.[6] New York law, by contrast, requires courts to construe force majeure clauses narrowly, so that a party may be excused "only if the *force majeure* clause specifically includes the event that actually prevents [that] party's performance."[7] New York further "cabin[s] the meaning" of catch-all language to "things of the same kind or nature as the particular matters mentioned."[8]

This distinction matters in AI data center projects because the relevant documents may not all be governed by the same law. A construction agreement equipment supply contract, lease, power arrangement, customer capacity agreement, and financing document may each contain different governing-law provisions, different force majeure language, and different remedial consequences. Parties should not assume that relief under one agreement will be recognized, available, or sufficient under another.

Enumerate specific risks. Regardless of jurisdiction, provisions specifically listing the categories of events most likely to affect data center projects—supply chain disruptions, equipment lead-time delays, utility interconnection delays, government moratoriums, permitting delays, labor shortages, tariffs, sanctions, and armed conflict—are more likely to be enforceable.[9, 10] Judicial scrutiny is especially demanding when a party seeks to declare force majeure based on economic hardship.[11] Such searching scrutiny is deployed in other jurisdictions as well.[12]

For this reason, parties may seek to characterize tariffs and other trade barriers

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[6] In a COVID-related corporate lease dispute, the Delaware Superior court enforced a broad force majeure clause against a tenant, finding that the obligation to pay rent was not excused by the government shutdown of the mall in which tenant was based. *Simon Property Group, L.P. v. Regal Entertainment Group*, 2022 WL 2304048 (Del. Super. June 27, 2022) (holding force majeure provisions "broadly allocat[ing] the risk of unforeseeable events" to a mall's corporate tenants to be neither ambiguous nor subject to narrow construction); *see also Dover Mall, LLC v. Tang*, 2023 WL 6536975 (Del. Super. Oct. 5, 2023) (similar).

[7] *JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 29 F.4th 118, 124 (2d Cir. 2022).

[8] *Id.*; *see also Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 2021 WL 4344172 (Del. Super. Ct. Sept. 23, 2021) (affirming difference between NY and DE standards).

[9] *Kel Kim Corp. v. Central Markets*, 70 N.Y.2d 900, 902–03 (1987) (holding that non-performance based on a force majeure clause is excusable "only if the force majeure clause specifically includes the event that actually prevents a party's performance").

[10] *Compare Goldberg v. Pace University*, 88 F.4th 204, 211–12 (2d Cir. 2023) (enforcing Pace University's "Emergency Closings" provision because it allocated the risk of loss to students only in the event of "unforeseen" circumstances that were "beyond the University's control," and was limited by illustrative examples such as "faculty illness," "unavailability of particular University facilities," and "school closings because of inclement weather."), *with Rynasko v. New York University*, 63 F.4th 186 (2d Cir. 2023) (vacating dismissal of pandemic-related breach claims because NYU's disclaimer gave it "unfettered" power to change course offerings "without notice at any time").

[11] *See, e.g.*, *J.P. Morgan Ventures Energy Corp. v. Miami Wind I, LLC*, 77 Misc.3d 1218(A), 2022 WL 17957452 (holding increase in the price of energy occasioned by Winter Storm Uri was not a basis for force majeure); *Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227, 227 (N.Y. App. Div. 1st Dept. 2001) (no force majeure where plaintiff "shut down its plant voluntarily" due to costly "environmental regulations"); *Urb. Archaeology Ltd. v. 207 E. 57th St. LLC*, 891 N.Y.S.2d 63, 64 (N.Y. App. Div. 1st Dep't 2009) ("downturn in the economy" did not excuse performance); *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 287-88 (3d Cir. 2014) (mere economic hardship does not constitute force majeure).

[12] *See, e.g.*, *Kyocera Corp. v. Hemlock Semiconductor*, 886 N.W.2d 445, 453 (Mich. Ct. App. 2015) (rejecting solar panel manufacturer's invocation of force majeure based on "trade war" between the U.S. and China the relevant event was not an act of government, but rather "a depression of prices" that had made the manufacture of solar panels "unprofitable"); *but see LNG Americas, Inc. v. Chevron Nat. Gas*, 2023 WL 2920940, (S.D. Tex. Apr. 12, 2023) (finding that a winter storm constituted force majeure and prevented performance of a natural gas supply contract where "the cost of supplying gas from the spot market [became] totally disproportionate to the contract price").

as geopolitical events or acts of government, rather than as purely financial considerations. But parties should not assume that post-dispute characterization will overcome the text of the contract. If the commercial concern is tariffs, sanctions, export controls, change in law, or a dramatic change in input costs, the agreement should say so expressly. The focus of this article is force majeure clauses, but in many contracts, the better drafting solution is not only a force majeure clause, but also a tailored change-in-law, tariff-adjustment, sanctions/export-control, hardship, price-adjustment, or equitable-adjustment provision—all of which warrant further consideration and advice on their own terms.

Furthermore, unless specifically allocated to one party, courts may not consider changes in financing terms, or liquidity problems occasioned by global events sufficient to trigger force majeure.[13] Parties negotiating take-or-pay computing capacity contracts, equipment supply agreements, or energy procurement contracts for data centers should carefully review whether the force majeure clause carves out supply-side failures, price increases, or market disruptions.[14] Supplier or third-party insolvency raises a related but distinct problem. Whether a counterparty's bankruptcy qualifies as force majeure depends on whether the clause covers "bankruptcy," "insolvency," or "inability to perform"—and the answer may differ under the supplier's governing law. Parties should not assume that a general "circumstances beyond reasonable control" formulation will capture a supplier's Chapter 11 filing or a foreign-law equivalent, particularly where courts treat insolvency as a foreseeable commercial risk rather than an extraordinary event. Parties should also consider whether the clause distinguishes between true impossibility of performance and materially increased cost—a distinction that will often matter where the alleged disruption is a tariff, energy-price spike, shipping-cost increase, component-price increase, or financing-market disruption.

Parties should also decide expressly who bears the risk of critical semiconductor, memory, storage, and other construction component shortages—and whether force majeure will or will not apply. Generic references to "supply-chain disruption" may not be enough to invoke it, particularly for contracts signed after certain shortages have become widely known. Agreements should address whether shortages of critical construction components (e.g., compute, memory, storage)might qualify as force majeure; whether increased prices are excluded; whether supplier allocation decisions excuse performance; whether long-term supply agreement failures or priority-allocation disputes are covered; whether substitutions are permitted; and whether relief under an equipment supply agreement passes through to customer, lease, construction, power, and financing obligations. A full analysis of these issues is outside the scope of this article, but many of these issues have been addressed in construction-related litigation and all warrant further study.

Clearly allocate assumption of risk. The presence of a force majeure clause in a contract may prevent parties from resorting to common law defenses such as

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[13] *See, e.g.*, *USA Staffing Services, LLC v. YDC, Inc.*, 2025 WL 327376, at *5 (S.D.N.Y. Jan. 29, 2025) (holding defendant's dispute with its lenders causing cash flow interruptions not excused by force majeure clause listing "labor disputes, strikes, fire, riot, war, terrorism, acts of God, or any other causes beyond the control of the nonperforming party.")

[14] *See Kyocera*, 886 N.W.2d at 453 (noting that the solar panel manufacturer "did not (although, again, it could have) negotiate a contractual force-majeure clause that by its terms would have excused contractual performance resulting from unprofitability due to governmental market manipulation").

impracticability, impossibility, or frustration of purpose. Given that many current disruptions (tariffs, geopolitical conflict) may be characterized as foreseeable, contracts should specify whether unforeseeability is a prerequisite to force majeure relief—and if so, the relevant baseline date. When the parties have defined the contours of force majeure in their agreement themselves, those contours dictate the application, effect, and scope of force majeure. Furthermore, parties may elect to carve out certain responsibilities from the scope of a force majeure defense.

Just as importantly, parties should specify what happens if force majeure is triggered. Does the clause merely extend time for performance? Does it suspend liquidated damages? Does it excuse minimum capacity commitments or take-or-pay obligations? Does it preserve rent, debt service, reporting covenants, confidentiality obligations, payment obligations, lender remedies, and termination rights? In AI data center projects, the answer to those questions may matter more than whether a qualifying event occurred.

Coordinate pass-through rights across the project stack. AI data center projects often depend on a chain of interlocking obligations: equipment suppliers must deliver critical components; contractors must achieve milestone dates; utilities must provide power and interconnection; tenants or operators must meet customer service obligations; and borrowers must satisfy financing milestones. Force majeure drafting should address whether relief passes through that chain. If a utility delay pushes the ready-for-service date, are liquidated damages tolled? If a financing condition is missed because a force majeure event delayed completion, do lenders retain acceleration or default remedies?

Parties should also confirm that builder's risk, delay-in-startup, and political-risk insurance programs are coordinated with the force majeure provisions in the underlying contracts, so that an event triggering force majeure relief also triggers—rather than voids—available insurance recovery.

The objective should be ex ante alignment. Parties should compare the force majeure provisions in construction agreements, supply contracts, customer contracts, power arrangements, leases, insurance policies, parent guarantees, letters of credit, and credit agreements before signing. Parties should also look to prior litigation of similar types of contracts in relevant jurisdictions. Otherwise, a party may successfully invoke force majeure in one part of the project structure while remaining fully exposed elsewhere.

III. Invoking Force Majeure — What Must the Invoking Party Do?

The party asserting force majeure bears the burden of demonstrating that each

element of the clause is satisfied.[15] This is a heavy burden because courts construe force majeure clauses strictly. In an AI data center dispute, that burden will typically require more than pointing to a generalized disruption in the market. The invoking party should be prepared to show the specific contractual obligation affected, the specific qualifying event, the causal connection between that event and non-performance, and the steps taken to mitigate or avoid the disruption.

Follow contractual notice requirements. Parties should pay careful attention to the particular requirements of the relevant contract. Contracts may require the party asserting force majeure to demonstrate due diligence, to provide notice, or to satisfy other requirements before force majeure can be raised as an excuse. Courts generally will not overlook these requirements, and neither should parties.[16] Providing notice to the counterparty can have other benefits, such as obtaining assurances from them that the asserting party could use in the future for a promissory estoppel claim.[17]

Force majeure notices should be drafted as litigation documents. A well-drafted notice should identify the contractual provision invoked, the qualifying event, the obligations affected, the date the event began, the expected duration if known, the relief sought, and the mitigation steps being taken. It should also reserve rights and avoid unnecessary admissions. In multi-contract projects, parties should coordinate notices across related agreements so that a position taken in one notice does not undermine the party's rights under another.

Assess anticipatory-breach risk before sending notice. A force majeure notice is, in substance, a declaration that the party cannot or will not comply with its contractual obligations— coupled with a claim that the non-compliance is legally excused. If the underlying force majeure claim is not sustained, the notice may be recharacterized as an anticipatory repudiation. But the risk is not limited to post-adjudication outcomes. Upon receiving a force majeure notice, the counterparty may have the immediate right to demand adequate assurance of future performance, or—where the notice signals a material or indefinite delay—to terminate the contract outright.[18] For that reason, parties

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[15] *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985); *J.P. Morgan Ventures Energy Corp. v. Miami Wind I*, 2022 WL 17957452, at *7 (N.Y. Sup. Ct. 2022); *Stroud v. Forest Gate Development Corp.*, 2004 WL 1087373, at *5 n.23 (Del. Ch. 2004).

[16] For example, in *Nextera Energy Mktg., LLC v. Macquarie Energy LLC*, the clause required affected party to "provide written notice as soon as reasonably possible" and, upon doing so, party would "be relieved of its obligation, from the onset of the Force Majeure event, to make or accept delivery of Gas … to the extent and for the duration of the Force Majeure." 2025 WL 2613756, at *3 (S.D.N.Y. Sept. 10, 2025); *see also Kaiser Aluminum Warrick, LLC v. US Magnesium LLC*, 2023 WL 3847367 (S.D.N.Y. June 6, 2023) (contract required invoking party to "give written notice to the other party within 10 days of the occurrence of the Force Majeure Event"); *In re Magna Entertainment Corp.*, 475 B.R. 411, 416 (Bankr. D. Del. 2012) (holding that although a force majeure event had occurred, party waived right to obtain contract extension due to failure to follow contractual notice procedure).

[17] In *Murphy Marine Services, Inc. v. Dole Fresh Fruit Co.*, 2022 WL 610755 (D. Del. 2022), a contractor plausibly alleged a promissory-estoppel claim against its customer when unforeseeable tariffs were imposed on the contractor, the customer assured the contractor it would bear the costs of those tariffs (inducing continued performance), and then reneged. *See id.* at *1-2.

[18] The risk runs in both directions. A force majeure notice that proves unfounded may be treated as an anticipatory repudiation by the sender; conversely, the counterparty that receives a valid notice may itself acquire termination or assurance rights. On the sender's side, New York common law permits a party to a long-term commercial contract to demand adequate assurance of future performance when reasonable grounds arise to believe the other party will not perform—and to treat failure to provide such assurance as a repudiation. *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 468 (1998) (extending UCC 2-609's adequate-assurance doctrine to non-UCC long-term commercial contracts between corporate entities that are "complex and not reasonably susceptible of all

invoking force majeure should avoid overstatement. The notice should not claim more relief than the clause provides. It should distinguish between obligations actually prevented, obligations merely delayed, and obligations that remain unaffected. And where the event is still developing, the notice should preserve flexibility by explaining that the party is continuing to investigate, mitigate, and assess the event's impact.

Document evidence of qualifying events. Parties should take care to act fairly and in good faith and keep detailed contemporaneous documentation of the events, which may make the difference in close cases.[19] Force majeure clauses often specify various events (*e.g.*, "acts of God, government restrictions, wars, insurrections, labor disturbances, earthquakes, fires, floods, epidemics") together with more general language (*e.g.*, "or any other cause beyond the reasonable control of the party"). In addition, certain events may be carved out or excluded from the force majeure clause.[20]

Document mitigation steps. If the impediment arises from unavailability of a particular source or route, courts may require the party to explore alternative procurement. In *J.P. Morgan Ventures*, the court noted that the sellers were obligated to purchase and schedule energy through ERCOT, not solely from their own windfarms, and their windfarms' inability to generate electricity did not excuse their failure to procure energy from other sources.[21] Contracts may additionally specify the extent to which a party is required to go to mitigate the effect of the purported force majeure event.[22] The invoking party should document whether it investigated substitute equipment, alternative suppliers, expedited shipping, temporary power, phased energization, design substitutions, revised construction sequencing, or other workarounds. If those alternatives were unavailable, technically infeasible, commercially unreasonable, or contractually prohibited, the invoking party should document why.

IV. Defending Against A Force Majeure Invocation

When a counterparty invokes force majeure, contracting parties have several legal avenues to challenge the invocation. The strongest response will usually combine contractual, factual, and project-schedule analysis: what does the clause cover, what

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security features being anticipated, bargained for and incorporated in the original contract"). On the counterparty's side, under the UCC, a buyer may terminate upon "notification of a material or indefinite delay." N.Y. UCC § 2-616(1)(a); *see Blue Bus Tours, LLC v. Gore*, 2025 WL 2816891, at *10–11 (E.D.N.Y. Oct. 3, 2025) (buyer that terminated contract after receiving a force-majeure delay notification was within its rights; termination discharged seller's executory obligations before any breach occurred). The practical consequence is that an overbroad force majeure notice may give the counterparty the very exit it was looking for.

[19] *See Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991) (finding defendant used "reasonable diligence" by allocating port capacity on a first-come, first-serve basis after hurricane).

[20] For example, energy contracts frequently exclude supply issues from the ambit of force majeure. *See, e.g.*, *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 558 (N.Y. App. Div. 1st Dep't 2017) ("Force majeure shall not include loss or failure of either Party's markets or supplies.").

[21] 2022 WL 17957452, at *5.

[22] *See, e.g.*, *Kaiser Aluminum Warrick, LLC v. US Magnesium LLC*, 2023 WL 3847367 (S.D.N.Y. June 6, 2023) (contract required invoking party to "exercise due diligence to eliminate or remedy the Force Majeure Event," and to "notify the other party when the Force Majeure Event is remedied or removed.").

relief does it provide, did the event actually cause the claimed non-performance, did the invoking party comply with notice and mitigation requirements, and does the claimed relief align with the broader project structure?

Whether the event prevented performance, merely hindered performance or only increased cost? The precise degree of interference required for force majeure to apply varies according to the wording of the clause. For instance, many contracts stipulate that the force majeure event must "prevent" performance, whereas others require no more than "hindrance" or "delay."[23] Such distinctions matter in practice. An embargo of ports in a country affected by a military conflict or global pandemic could, by way of example, affect a contractor's obligation to deliver materials very differently depending on which standard applies.[24] If the relevant obligation is simply the delivery of materials and the applicable contractual regime requires prevention as a condition to relief, the contractor would be unlikely, on the face of the contract, to be able to claim force majeure as other methods of delivering the materials would be likely to be available. Instead, the contractor would generally be required to restructure its supply chain to source the materials from elsewhere (potentially at great costs).[25] By contrast, a force majeure clause subject only to a "hindrance" condition might more readily enable a supplier to suspend its obligations entirely, avoiding major financial damage, in the same circumstances.

This distinction will be important in AI data center disputes. A delayed shipment, increased tariff burden, higher power cost, or supplier price increase may make performance more expensive or less profitable without making performance contractually impossible. The defending party should therefore ask: What precise obligation was allegedly prevented? Was performance impossible, or merely more expensive? Were alternative sources, routes, suppliers, designs, or sequencing options available? And does the clause excuse increased cost at all?

Assess causation. The occurrence of an unexpected event is not sufficient—the force majeure event might also be required to *cause* the impediment to performance. Surprisingly, this is often overlooked in the drafting of force majeure notices and reliance upon force majeure clauses. The necessary causal proximity between the force majeure event and the impeded performance will vary according to the terms of the force majeure clause. An affected party may have to prove that the event of force majeure is the operative cause of the impediment.[26] Alternatively, it may be enough for the event merely to have contributed substantially to the occurrence of the event, such that while it is among the *concurrent* causes, the non-performance might have occurred without it.

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[23] *Compare Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) ("Mere impracticality or unanticipated difficulty is not enough to excuse performance."), *with Mieco, L.L.C. v. Pioneer Natural Resources USA, Inc.*, 109 F.4th 710 (5th Cir. 2024) (a force majeure event need not render a party's performance "literally impossible" but need only render it impracticable).

[24] *See, e.g.*, *Blue Bus Tours, LLC v. Gore*, 2025 WL 2816891 (E.D.N.Y. Oct. 3, 2025), (enforced a clause excusing "failure or delay in performing" where delay was "occasioned by … supplier delays.").

[25] Williams et al., *When War Is No Excuse*, GLOB. CONSTR. REV. (Apr. 17, 2026), https://www.globalconstructionreview.com/when-war-is-no-excuse/ (noting that sea mines in the Black Sea during the Russia-Ukraine conflict did not prevent a contractor from receiving supplies when its subcontractor could have used alternate routes).

[26] *See, e.g., Nextera Energy Mktg., LLC v. Macquarie Energy LLC*, 2025 WL 2613756, at *6 (S.D.N.Y. Sept. 10, 2025) (holding governmental orders issued during Winter Storm Uri not cause of seller's non-performance where seller had already downranked the buyer's deliveries hours before governmental orders issued).

In defending against a force majeure invocation, parties should test the causal chain closely. Was the project already behind schedule before the alleged event? Was the missed ready-for-service or substantial-completion date caused by the cited event, or by design changes, procurement decisions, labor management, financing delays, permitting strategy, or other non-excused issues? Would the same milestone have been missed even without the asserted force majeure event? A contractor that was already 60 days behind on electrical fit-out before a tariff took effect will have difficulty attributing the full delay to the tariff. Are the claimed delay days supported by a critical-path analysis, or merely by generalized references to market disruption?

Foreseeability and assumption of risk. If the parties have agreed in the contract that the risk of a foreseeable event (like a natural resource shortage, or spike in the cost of energy) is to be borne by one party, then the occurrence of that event does not trigger force majeure. Even where foreseeability is not addressed in the text of the contract, some courts will infer a foreseeability requirement into a force majeure provision.[27] That said, in the present day, many categories of risks (political turmoil, extreme weather, and regulatory delays) are considered foreseeable, if not routine.[28] Contracts entered into after a risk became known will face a stronger foreseeability challenge.

This argument may be particularly important for AI infrastructure contracts signed in the current market. By now, parties may have difficulty claiming surprise from well-known risks such as long equipment lead times, interconnection queues, power constraints, transformer shortages, memory and storage-component shortages, supplier allocation decisions, export controls, tariffs, community opposition, permitting delays, and regulatory scrutiny of large data center projects. The defending party should therefore examine the contract date, the parties' diligence materials, board materials, financing materials, public disclosures, and negotiation history to determine whether the alleged force majeure risk was known, priced, or expressly allocated.

Compliance with contractual prerequisites. Where the clause requires notice "as soon as reasonably possible" (as in *NextEra*), the defending party should argue that any delay in notice was unreasonable under the circumstances. Where the clause imposes a specific deadline (as in *Kaiser Aluminum* (10 days)), the defending party should argue strict compliance. In either case, the defending party should also challenge whether the invoking party satisfied ongoing obligations to exercise due diligence to eliminate or remedy the Force Majeure Event and/or to notify when the event is resolved.

Understand the scope of relief. Even where a triggering event exists, the invoking party still must show what contractual relief follows. Some clauses provide only an extension of time; others suspend performance obligations but preserve payment obligations, reporting obligations, confidentiality obligations, termination rights, customer credits, liquidated damages, lender remedies, or debt-service obligations. In AI data center projects, this is the pass-through problem discussed above: relief under one

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[27] *See, e.g., VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 288 (3d Cir. 2014) (recognizing this practice, but rejecting it as waived in the instant case).

[28] *See, e.g., Zero Carbon Holdings, LLC v. Aspiration Partners, Inc.*, 732 F. Supp. 3d 326 (S.D.N.Y. 2024) (rejecting impossibility and frustration of purpose defenses where carbon credit developer faced political turmoil in Brazil, weather challenges, and regulatory delays).

agreement does not automatically excuse obligations under another.

A defending party should therefore separate the trigger from the remedy. The fact that a force majeure event occurred does not necessarily mean that all obligations are suspended, all damages are excused, all milestones are extended, or all defaults are avoided. The specific clause may excuse only the obligation actually prevented and only for the duration of the actual delay. It may also preserve payment obligations, require continued mitigation, impose ongoing notice duties, or permit termination if the delay exceeds a specified period.

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The AI data center buildout is entering a period of heightened construction, supply chain, and regulatory risk. Force majeure clauses will be central to the disputes that follow. But the most important disputes may not be about force majeure in isolation. They may be about whether force majeure relief in one part of the project structure protects—or fails to protect—the party from liability elsewhere.

Parties should act now to: (1) review and, where possible, renegotiate force majeure provisions to specifically address the risks of the current environment; (2) prepare compliance infrastructure (notice templates, documentation protocols, mitigation records) for potential invocations; and (3) develop litigation strategies for both invoking and defending against force majeure claims. The checklist below provides a triage framework. The time to run it is before the next disruption, not after.

Force Majeure Triage Checklist for AI Data Center Contracts		
1	**Map Exposure**	• Identify high-risk contracts: supply chain agreements, customer covenants, financing obligations, construction contracts, power-purchase agreements, GPU procurement contracts, and take or pay compute agreements • Identify specific risks: environmental regulation, supplier or 3rd party insolvency, natural disasters, geopolitical conflicts (wars/blockades), sanctions, export controls, tariffs, memory-chip shortages, utility interconnection delays, and supply allocation decisions • Rank contracts by: (a) financial value, (b) strategic importance, (c) risk of non-performance, and (d) whether non-performance under one contract may trigger cross-defaults, liquidated damages, termination rights, or missed financing milestones under another • Evaluate whether insurance policies cover losses from force majeure events, including flow-on breaches to downstream contracts, business interruption, contingent business interruption, delay-in-startup, and political risk coverage
2	**Flag Key Clauses**	• Identify governing choice of law provisions: this may determine how broadly or narrowly a force majeure clause is to be read, and to what extent the court will consider how equitable the provision is. • Consider what specific events are included: review for "governmental acts," "trade restrictions," or "emergencies" • Identify specific carve outs: check for language excluding "general economic conditions," cost of energy or raw material exceptions, and mandatory rent payments • Notice requirements: catalog deadlines (often 10-30 days) and required documentation formats • Scope of relief: determine whether the clause only provides an extension of time, suspends performance, excuses liquidated damages, preserves termination rights, or affects payment and financing obligations

3	**Preserve Leverage**	• Draft and issue reservation-of-rights letters before contractual notice periods expire • Document all mitigation efforts: alternate sourcing bids, logistics workarounds, substitutions, power alternatives, utility correspondence, permitting communications, revised critical-path schedules, and efforts to re-sequence construction activities • Prepare contemporaneous evidence of impacts of geopolitical interruptions: importer statements, customs records, supplier notices, export-control determinations, grid-operator notices. • Coordinate notices across related contracts so that a force majeure position taken in one agreement does not create admissions, defaults, or waiver issues in another.

Figure 1: AI data center development agreements and financing documents.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

Rajat Rana
Partner
New York
rajatrana@quinnemanuel.com , Tel: 212-849-7000

Laya Maheshwari
Associate
Boston
layamaheshwari@quinnemanuel.com, Tel: 617-712-7111

Daniel Albert-Rozenberg
Associate
Boston
danielar@quinnemanuel.com, Tel: 617-712-7149

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