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**Force Majeure Under the NAESB**

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## I. Introduction<sup>1</sup>

The North American Energy Standards Board (“NAESB”) Base Contract for Sale and Purchase of Natural Gas (“Base Contract”) has always been intended as a commercially-friendly document, with terms based on industry practices and a feel that is less legalistic than other industry-standard master agreements. However, that lack of legal specificity can give rise to disputes, and this is true more so with regard to force majeure than any other issue. As of the time of this writing NAESB is weighing arguments from both sides of the industry that it should modify the Base Contract force majeure provisions or leave them as presently drafted. This paper will first provide a general background of the Base Contract force majeure provisions and will then examine some of the case law interpreting these provisions.

## II. Executive Summary

In general, force majeure provisions offer an affirmative defense for claiming parties unable to perform their contractual obligations due to an extraordinary event outside of the claiming party’s control and not due to that party’s negligence. Force majeure provisions in energy transactions under New York law are narrowly interpreted according to the terms of the governing contract. The NAESB is the most commonly used master agreement for the purchase and sale of natural gas, and its provisions have generally been interpreted to favor the excuse of sellers’ performance in force majeure disputes.

## III. Overview of Force Majeure

The concept of force majeure in United States law was introduced in the 1863 English contract law case of *Taylor v. Caldwell*.<sup>2</sup> This dispute involved an agreement between Caldwell, who owned a music hall, and Taylor, who planned to rent out the music hall for four days. A week before the agreement took effect, the music hall burned down. The court held that Caldwell was excused from renting out the music hall due to forces beyond his control. The holding followed from an impossibility or frustration of purpose analysis, which is similar but not identical to a force majeure analysis. Prior to *Taylor*, even impossibility was not a defense to performance.

Modern law, specifically New York law, views force majeure as an extraordinary event that prevents performance.<sup>3</sup> The event must be out of the claiming party’s control and not due to that party’s negligence. Further, impracticability or economic hardship are not sufficient to prove force majeure.

Force majeure clauses are interpreted narrowly and are confined to things of the same kind or nature as those specifically set forth in the agreement. As the *Kel Kim v. Central Markets* court wrote, “[t]he general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned.”<sup>4</sup>

## IV. Analysis

Section 11 of the Base Contract contains its force majeure provisions. Force majeure is defined in Section 11.1 as “any cause not reasonably within the control of the party claiming suspension [...]”,<sup>5</sup> but it will not excuse the performance of payment obligations including the payment of invoiced amounts,

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<sup>1</sup> Thank you to David Portz for his assistance with this presentation.

<sup>2</sup> *Taylor v. Caldwell* [1863] 3 B&S 826.

<sup>3</sup> See *Kel Kim Corp. v. Central Markets, Inc.*, 519 N.E.2d 295 (N.Y. 1987).

<sup>4</sup> *Id.* at 297 (quoting Williston, *Contracts* § 1968, at 209 [3d. 1978]).

<sup>5</sup> North American Energy Standards Board, *Base Contract for Sale and Purchase of Natural Gas*, NAESB Standard 6.3.1 (September 5, 2006) [hereinafter *Base Contract*].

liquidated damages, imbalance charges, and early termination payments.<sup>6</sup> Section 11.2 lists specific events of force majeure:

- i. physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes, which result in evacuation of the affected area, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery or equipment or lines of pipe;
- ii. weather related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines of pipe;
- iii. interruption and/or curtailment of firm transportation and/or storage by transporters;
- iv. acts of others such as strikes, lockouts or other industrial disturbances, riots, sabotage, insurrections or wars, or acts of terror; and
- v. governmental actions such as necessity for compliance with any court order, law, statute, ordinance, regulation, or policy having the effect of law promulgated by a governmental authority having jurisdiction.<sup>7</sup>

The above examples are not exhaustive and are often updated by parties to the Base Contract to reflect changes in the industry since the Base Contract was published in 2006.<sup>8</sup>

Exclusions from force majeure are listed in Section 11.3 of the Base Contract. A claim of force majeure may not be based upon:

- i. the curtailment of interruptible or secondary firm transportation unless primary, in-path, firm transportation is also curtailed;
- ii. the failure of the party claiming excuse to remedy the condition and to resume the performance of such covenants or obligations with reasonable dispatch;
- iii. economic hardship, to include, without limitation, seller's ability to sell gas at a higher or more advantageous price than the contract price, buyer's ability to purchase gas at a lower or more advantageous price than the contract price, or a regulatory agency disallowing, in whole or in part, the pass through of costs resulting from the Base Contract;
- iv. the loss of buyer's market(s) or buyer's inability to use or resell gas purchased under the Base Contract except, in either case, as provided in Section 11.2 of the Base Contract; or
- v. the loss or failure of seller's gas supply or depletion of reserves, except, in either case, as provided in Section 11.2 of the Base Contract.<sup>9</sup>

Notice of force majeure is addressed in Section 11.5 of the Base Contract. Notice must be given by the claiming party if it believes a force majeure event has occurred. The initial notice of force majeure may be oral, but "written Notice with reasonably full particulars of the event or occurrence is required as soon as reasonably possible".<sup>10</sup> Upon notice, performance is excused back to the onset of the force majeure event, not from the date of the notice.<sup>11</sup>

Cases interpreting the Base Contract force majeure provisions may generally be divided into pre- and post-Winter Storm Uri.

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<sup>6</sup> *Base Contract* § 11.1.

<sup>7</sup> *Base Contract* § 11.2.

<sup>8</sup> For example, many parties have begun listing pandemics and, sometimes, COVID specifically in light of the COVID pandemic.

<sup>9</sup> *Base Contract* § 11.3.

<sup>10</sup> *Base Contract* § 11.5.

<sup>11</sup> *Base Contract* § 11.5.

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