

# Force Majeure Under the NAESB

Craig R. Enochs

Craig R. Enochs  
cenochs@reedsmith.com  
(713) 469-3884 phone

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## Topics for Discussion

- Overview of the concept of force majeure
- Analysis of the NAESB Force Majeure provision
- Relevant case law

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## Overview of Force Majeure

- Origin in US law - *Taylor v. Caldwell*
  - English law, contract to rent a music hall for 4 days in 1861
  - Hall burned down before the event
  - Court held that the lessor was excused
  - Holding was closer to an impossibility or frustration of purpose analysis, which are similar to FM but different

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## Overview of Force Majeure

- General NY law\*
  - An extraordinary event prevents performance
  - Event must be out of the claiming party's control and not due to that party's negligence
  - Impracticality or economic difficulty is not sufficient
    - Until the late 19<sup>th</sup> century even impossibility was not a defense
  - FM clauses are interpreted narrowly and are confined to things of the same kind or nature as those specifically set forth in the clause
    - “[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.” (at p. 903)
  - \*\*\*See *Kel Kim Corp. v. Central Markets, Inc.* (70 N.Y.2d 900, N.Y. 1987).

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## Analysis of FM Under the NAESB

- Section XI
  - FM is “[a]ny cause not reasonably within the control of the party claiming suspension”.
  - FM does not excuse obligations to make payments for invoiced amounts, liquidated damages, imbalance charges, and early termination payments
  - FM includes Acts of God (primarily weather); weather-related events affecting an entire region; interruption or curtailment of Firm transportation; acts of others including strikes, sabotage, wars and terrorism; and governmental actions

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## Analysis of FM Under the NAESB

- Section XI (contd.)
  - FM does **not** include:
    - the curtailment of interruptible or secondary Firm transport unless primary Firm is interrupted or curtailed;
    - if the claiming party failed to cure or remedy the FM with reasonable dispatch;
    - economic hardship, including seller being able to sell at a higher price or buyer buying for a lower price;
    - the loss of buyer’s markets; and
    - seller’s loss of supply unless due to a permitted FM condition

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