

Force Majeure Under the NAESB

Craig R. Enochs

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

UT Law 2023 Gas and Power Institute

1

Topics for Discussion

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

2

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

3

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 19th 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).

4

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

5

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

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Force Majeure and NAESB

Also available as part of the eCourse

[2023 Gas and Power eConference](#)

First appeared as part of the conference materials for the
2023 Gas and Power Institute session

"Force Majeure and NAESB"