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## NAESB Force Majeure Provisions After Winter Storm Uri: Key Considerations for Legal Departments

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Last year saw a flurry of litigation in Texas state and federal courts arising from the February 2021 extreme cold weather event known as Winter Storm Uri.

From price gouging claims to the applicability of force majeure provisions in the widely used North American Energy Standards Board form “Base Contract for the Sale and Purchase of Natural Gas,” natural gas industry players had reason to scrutinize the language of their contracts. In Houston alone, close to a dozen cases centered on whether Winter Storm Uri constituted a force majeure event under the terms of natural gas contracts.

With the one-year anniversary of Winter Storm Uri upon us, and with many of these cases still winding their way through the courts, prudent players within the natural gas supply chain should conduct a review of their natural gas contracts to prepare for future adverse weather events.

The following are key considerations legal departments in the natural gas sector must consider when reviewing their company’s NAESB contracts:

What law governs? Parties are free to choose the law that governs the interpretation and performance of their contracts. The choice of law matters because not every state applies the same legal standards. For instance, Texas courts will apply force majeure provisions narrowly and are not in the business of rewriting contracts. Texas courts have also had more occasions than other states to interpret the force majeure provisions of the NAESB contract. Knowing what the courts would say can lead to greater predictability when disputes arise. What law the parties choose also affects the interpretation of other provisions like dispute resolution clauses.

What constitutes a force majeure event? Determining what specific circumstances constitute force majeure is essential. The purpose of a force majeure clause is to excuse nonperformance under a contract where events such as hurricanes, freezing weather and other “acts of God” prevent or hinder parties from performing. The standard NAESB contract covers typical force majeure events such as “acts of Gods”

and other extreme weather events. It also includes industry-specific events such as weather related events that cause freezing or failure of wells or lines of pipe and interruption and/or curtailment of “firm” transportation. Most standard form natural gas contracts, including the NAESB, do not include economic hardship and unfavorable market conditions as force majeure events. It is essential to understand the scope of applicable force majeure provisions before providing the required notice to counterparties.



**Key Issues.** It is important to review the NAESB contract’s force majeure provisions with an eye toward litigation. One issue playing out in Texas courts is whether a natural gas seller is under an obligation to procure gas from another source during a force majeure event when its own “gas supply” fails. Texas courts have indicated in prior cases that this may be required where the contract does not tie the seller’s “gas supply” to a specific pipeline or transporter.

The NAESB contract also requires parties to resume the performance of its obligations with “reasonable dispatch.” Companies should consider formulating in advance an action plan in order to avoid any challenges to a force majeure declaration.

Are special provisions necessary? In light of the slew of force majeure lawsuits arising from Winter Storm Uri, parties should consider whether to insist on special conditions. Upstream producers stand in different positions along the supply chain from natural gas marketers who have little control over the gas supply. Carefully negotiated force majeure provisions that accommodate the parties’ unique positions can lead to greater clarity and decrease the likelihood of expensive, protracted litigation.

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