

Seller's Invocation of Force Majeure Under NAESB Contract Rejected by NJ Appellate Division

In a case of first impression that interpreted the *force majeure* provisions of an industry contract form promulgated by the North American Energy Standards Board (NAESB), Cozen O'Connor prevailed on behalf of plaintiff when, on January 9, 2014, the New Jersey Appellate Division affirmed the trial court's ruling in *Hess Corporation v. Eni Petroleum U.S. LLC, et al.*, No. A-3464-12T4 (A.D., January 9, 2014).

In September 2007, Hess Corporation (Hess), as purchaser, and Eni Petroleum U.S. LLC (Eni), as seller, entered into a NAESB form Base Contract for the Sale and Purchase of Natural Gas (Base Contract), which contained the terms and conditions that governed the respective rights and obligations of the parties. Each month thereafter, the parties executed Transaction Confirmations that identified the details of each monthly purchase, i.e., price, delivery dates, daily volume and place of delivery. Neither the Base Contract nor the Transaction Confirmations referred to the Independence Hub (I-Hub), a floating platform that aggregated and processed gas from Eni's wells in the Gulf of Mexico. The contract documents also did not mention the Independence Trail, a 185-mile pipeline used to transport gas from the I-Hub to the mainland United States. The only pipeline identified in the contract documents was the Tennessee 500 L, a pipeline located in the southeastern United States that was the agreed delivery point in the Transaction Confirmation.

After performing for the first eight days of the agreed delivery period, Eni claimed that further performance was excused under the *force majeure* provision of the Base Contract because a crack in the Independence Trail prevented Eni from transporting natural gas from the I-Hub to the on-shore delivery point, i.e., the Tennessee 500 L. Hess rejected the defendant's *force majeure* declaration because neither the Base Contract nor the relevant Transaction Confirmation identified the source of Eni's gas or the pipeline that Eni was using to transport it. Hess argued that Eni should have covered its contractual obligation by obtaining gas from alternative sources available at the Tennessee 500 L where the gas supply remained liquid.

Before the Appellate Division's ruling in this case, it was unsettled as to whether disruption of a producer's gas supply was an adequate basis for declaring *force majeure*. The only authoritative case that touched upon the issue, but did not resolve it, was *Virginia Power Energy Marketing, Inc. v. Apache Corp.*, 297 S.W. 3d 397 (Tex. App. 2009). In *Virginia Power*, the Texas Court of Appeals reversed and remanded the issue back to the trial court; however, the case apparently settled at that point, so the question sent back was never ruled upon by the trial court.

This same issue, whether disruption of a producer's gas supply was sufficient to sustain a *force majeure* defense, was the focal point of the trial in *Hess v. Eni*. Following entry of a judgment in favor of Hess, the NJ Appellate Division affirmed the trial court's ruling and held that a seller of natural gas could not rely upon *force majeure* to excuse non-delivery resulting from a damaged pipeline when neither the source of the gas nor the "transporter" are identified, and alternative supplies of gas remained available at the delivery point. Noting that *force majeure* clauses are narrowly construed, the court emphasized that the language of the Base Contract defined *force majeure* to entail interruption or curtailment of transportation by "Transporters" rather than a single transporter. Building upon this distinction, the court rejected Eni's position because gas was available from other sources at the delivery point, the Tennessee 500 L, having been transported there by other transporters.

In light of the court's holding, and in order to avoid the uncertainty that gave rise to the dispute in this case, parties to a NAESB contract should consider describing the source of the gas in the Special Provisions section of the Base Contract, and identifying the transporter in the Transaction Confirmation.



Christopher Raleigh

Member

craleigh@cozen.com
Phone: (212) 908-1245
Fax: (212) 509-9492

Related Practice Areas

- Business/Corporate
- Environmental Regulatory & Due Diligence
- Transportation & Logistics Litigation
- Transportation & Trade

If you have any questions about the issues discussed in this Alert, or how the holdings in this case may apply to your particular circumstances, please contact Ira Megdal in Cherry Hill at (856) 910-5007 or imegdal@cozen.com; Geoffrey Ferrer in New York at (212) 908-1201 or gferrer@cozen.com; or Christopher Raleigh in New York at (212) 908-1245 or craleigh@cozen.com.