

Leslie Thorne, Avery Burrell in New York Law Journal: Gas and Electric Power Lending, Swaps and Hedges: How to Handle the Force Majeure Fallout from the ERCOT Market Disaster

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Every impacted market participant is examining its force majeure rights under a plethora of contractual arrangements to determine whether performance may be excused. Banks need to be ready to take advantage of or defend against the invocation of these provisions, depending on the circumstances.

A contract's force majeure clause allows a party to suspend performance if it cannot perform due to enumerated circumstances beyond the parties' control. Every contract is different and, further complicating matters, financial institutions may have multiple interests in a deal, some of which might benefit from a force majeure assertion (say, a generation project lender) and others that would stand to lose from one (say, a bank hedge offtaker). It's therefore critical to understand which contracts are at issue and what exactly the relevant force majeure provisions contemplate.

Regardless of the arrangement, if the relevant contracts include a force majeure clause, the bank needs to (1) evaluate whether a weather or grid failure-related event qualifies such that performance is excused, and (2) understand what it needs to do to protect its rights. With the sheer volume of force majeure notices expected following the events in the ERCOT market, observers expect significant litigation concerning the legitimacy of such notices. Banks must be ready for it.

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