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**IT'S A CATASTROPHE, BUT WE HAVE A FORCE MAJEURE CLAUSE,  
SO NO WORRIES, RIGHT?**

**LITIGATION CONSIDERATIONS**

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## FORCE MAJEURE - LITIGATION CONSIDERATIONS

As the world evolves, so too do the types of force majeure events that parties should contemplate when drafting construction contracts. The following analysis will begin with an introduction to the concept of force majeure. Next, it will proceed with a discussion of terrorism as a contractual force majeure event, and will describe the considerations parties should take into account when drafting a force majeure clause that contemplates terrorism. Next, the analysis will discuss the impact of climate change on construction contracts, and will describe the lessons that can be learned from case law interpretations of “unusually severe or abnormal weather” force majeure clauses in various standard contracts. Finally, the analysis will conclude with a brief discussion of force majeure, and the closely related common law doctrines of impossibility and impracticability, in the context of embargoes and material shortages.

### I. “Force Majeure” Concepts in General and Their Typical Appearance in Construction Contracts

#### *a. Definition and development*

“Contract liability is strict liability.”<sup>1</sup> Except when it isn’t. If a party to a contract wants to be subject to anything less than strict liability for its failure to perform as promised, all that party needs to do is “contract for a lesser [obligation] by using one of a variety of common clauses,” including force majeure clauses.<sup>2</sup> No force majeure clause? No problem. Since at least the 19<sup>th</sup> century, the common law has added some additional wiggle room for nonperforming parties who could be excused if timely performance was rendered impossible *due to an act of God, the law, or the other party*.<sup>3</sup>

Force majeure is a French term that means “superior force,” and is defined in the law as “[a]n event or effect that can be neither anticipated nor controlled,” especially an unexpected event that prevents a party from doing something that it had agreed to do.<sup>4</sup> Some force majeure

events can be considered “acts of God” (such as floods, tornados and volcanic eruptions), while others are acts of people (such as terrorist attacks, labor strikes and new governmental regulations).<sup>5</sup> Force majeure encompasses both a judicial doctrine excusing nonperformance and the contractual allocation of the risk of nonperformance. The end result is the same: force majeure excuses a party from performing a contract in the face of an unusual event beyond its control. The doctrine has been adopted in many different legal systems,<sup>6</sup> and its international variations have been consolidated by the International Institute for Unification of Private Law (“UNIDROIT”).<sup>7</sup>

By the 20<sup>th</sup> Century, other doctrines besides force majeure had continued to soften the strict liability imposed by contracts<sup>8</sup>: the judicial insertion of “a host of implied conditions”,<sup>9</sup> the shift from the doctrine of strict and absolute impossibility to the modern principle of impracticability,<sup>10</sup> and the courts’ moderating focus on fairness when deciding matters of contract enforcement.<sup>11</sup> Thus, while it originated as a judicial doctrine, the most common current expression of force majeure is as a contractual agreement whereby parties allocate the risk of nonperformance differently than the common law would.

The doctrine of strict contractual liability was not only harsh, it was also economically inefficient. By default, the risk of untimely completion in a construction contract was allocated to the contractor as a “risk of the undertaking.”<sup>12</sup> If contractors could not allocate the risk of untimely completion away from themselves, they would have to “include contingencies in their contract pricing to cover supervening risks.”<sup>13</sup> This would result in unnecessarily expensive construction contracts – the prices driven up by the fear of liability caused by some catastrophic event that was very unlikely to actually happen. To avoid this, standard construction contracts began to provide that “delay caused by fortuitous supervening events above and beyond the

control of both the owner and the contractor would result in a pro tanto extension of the contract completion date, with each party bearing its own extra costs and losses attributable to the delay.”<sup>14</sup>

Any contractual clause that achieves the goal of reallocating the risk of nonperformance caused by fortuitous supervening events is a “force majeure clause,” even if it is not called that. For example, the American Institute of Architects (AIA) and ConsensusDocs standard construction contracts include their force majeure clause under the heading “Delays and Extensions of Time” while the Engineers Joint Contract Documents Committee (EJCDC) standard contract simply identifies its force majeure concept under “Delays.” The Federal Acquisition Regulations (FARs), incorporated into Federal contracts, still include a reference to “acts of God.” In each of these cases, force majeure clauses are contractual provisions, and they are “construed in each circumstance *with exacting attention to the specific wording of the provisions* as the scope and effect of the clause may vary with each contract.”<sup>15</sup> Knowing this, careful drafting is essential for force majeure clauses to fulfill their purpose.<sup>16</sup>

*b. Two approaches to drafting force majeure provisions*

Force majeure provisions are generally drafted in one of two ways: (1) a clause with general language, or (2) a clause that provides a specific list of force majeure events.<sup>17</sup> Standard form construction contracts employ a “belt and suspenders” approach by including both.<sup>18</sup>

Generally, force majeure clauses often include language relating to unforeseeability, external causation and unavailability.<sup>19</sup> Alternatively, general force majeure clauses may focus on an undesirable effect (e.g., a delay), and provide relief for any event that causes this effect.<sup>20</sup> In theory, a general force majeure clause provides great flexibility. However, it is “difficult to predict how a court will interpret and apply a general force majeure clause, which makes it little

better than relying on the common law doctrines of impossibility, impracticability and frustration.”<sup>21</sup>

The second approach in drafting a force majeure clause is to provide a list of specific events, often preceded or followed by a catch-all phrase. While this approach allows for greater clarity at the contracting stage, it can be difficult to specifically anticipate and enumerate the whole universe of events that could disrupt the contract, and the clause may prove to be too narrow. The “catch-all phrase” is intended to avoid the narrowness problem, but some courts may refuse to apply a force majeure clause to a situation different from the listed events even though the clause itself provides that the list is not exclusive.<sup>22</sup> A comprehensive list may unduly limit parties if a later-occurring event is not listed in the “parade of horrors”<sup>23</sup> in the force majeure clause as drafted.

*c. Three defining characteristics*

Regardless of what they are called, how they are drafted, or what legal system they are found in, three common characteristics define force majeure provisions: unforeseeability, external causation, and unavailability.<sup>24</sup>

*i. Unforeseeability*

Even if an event fits the contractual definition of force majeure, this will not necessarily excuse a party from performance.<sup>25</sup> “Foreseeability often plays a crucial role in determining whether a party may obtain force majeure relief.”<sup>26</sup> The underlying rationale is that when an event was foreseeable at the time of contracting, the party who bears that risk is presumed to have assumed the risk of that event occurring, or is presumed to have priced the foreseeable risks into the contract price.<sup>27</sup>

Courts are split on the question of whether a specific event must be unforeseeable in order to qualify as a force majeure event. Some courts have held that the foreseeability test should not be applied to enumerated events if it is not specified within the force majeure provision that an event must be unforeseeable.<sup>28</sup> The rationale is that where the parties specifically list a particular event in a force majeure clause, courts should not change the allocation of risk that was agreed upon in the contract.<sup>29</sup> Other courts disagree, however, and have required that a listed event must be unforeseeable to excuse performance, even if the contract does not contain an unforeseeability requirement.<sup>30</sup>

Somewhere between these two extremes, courts have applied a foreseeability analysis to “belt and suspenders” clauses, where a listed event occurs but the clause also contains general unforeseeability language. *United States v. Brooks-Calloway Co.*<sup>31</sup> is the landmark case for this approach. The contract in *Brooks-Calloway* provided that the contractor would not be assessed liquidated damages for delays due to “unforeseeable causes beyond the control and without the fault or negligence of the contractor,” and cited “floods” as an example of such causes.<sup>32</sup> The Supreme Court rejected an interpretation that the contract made *all floods* unforeseeable per se, reasoning that “not every fire, quarantine, strike, freight embargo or flood should be an excuse for delay” where the risk of any such event was foreseeable at the time of contracting.<sup>33</sup> Courts deciding whether an unenumerated event triggers a “catch-all” phrase in a force majeure clause have reached a similar result by applying the doctrine of *ejusdem generis*.<sup>34</sup>

#### Unforeseeable or Highly Unlikely?

Of course, virtually all events are foreseeable to some degree. If force majeure provisions are to have any effect, “unforeseeable” has to mean something different from “inconceivable.” When courts distinguish between foreseeable and unforeseeable events, they are really

distinguishing the likelihood and type of the event. Force majeure events are “nothing more and nothing less than extremely low-probability, high-liability events.”<sup>35</sup> In a legal sense, courts are deciding that “unforeseeable” means that reasonable parties believed that the likelihood of the event occurring in the context of the contract was very low.<sup>36</sup> A party should be able to consider (and price into the contract) only the *likely* risks associated with performance. Otherwise, the unforeseeability requirement would bring back the same inefficiencies that afflicted contracts in the strict contractual liability era.

*ii. External Causation*

The force majeure provisions in the four standard form construction contracts discussed here all contain a requirement that the force majeure event must be “beyond the control” of the party invoking force majeure.<sup>37</sup> This requirement clearly applies to “acts of God,” but it also means that a party may not affirmatively cause a force majeure event.<sup>38</sup>

*iii. Unavoidability*

Contracts can also focus on whether the effects of the force majeure event could have been avoided by the exercise of due diligence of the party claiming force majeure. For example, ConsensusDocs 200 Section 6.3.1 contains both a general force majeure clause and a non-exclusive list of examples of qualifying events. Section 6.3.3 then provides that “[t]he Owner and Contractor agree to undertake reasonable steps to mitigate the effect of . . . delays” caused by force majeure events. Other contracts simply include a list of mitigation measures, separate from the force majeure clause.<sup>39</sup> Either way, if a party can take reasonable steps to avoid the occurrence or effects of a force majeure event, then the party will not be excused from the contract.

Unavoidability may also fall under the analysis of ultimate causation.<sup>40</sup> “Courts . . . require the party claiming force majeure to bear the burden of proving the force majeure event caused its damages. It is not enough to prove a hurricane occurred, the contractor also must show that the hurricane actually impeded its contractual performance.”<sup>41</sup> For example, a contractor who fails to secure building materials that are swept away by a hurricane may be unable to claim force majeure because, although the hurricane itself was unavoidable, the damage to the materials (and the delay caused by this damage) might have been prevented if the contractor had taken reasonable protective steps.<sup>42</sup>

*d. Remedies available to a party who successfully raises a “force majeure” argument*

In construction contracts, a contractor who gives proper notice of a force majeure event is usually entitled to a reasonable extension (AIA A201-2007), “equitable adjustment” (EJCDC C-700), or “equitable extension” (ConsensusDocs 200) of the contractually agreed completion time without penalty, for as long as the force majeure event prevents performance.<sup>43</sup> Neither party incurs liability for the delay. The owner will not be liable for the additional overhead costs of the contractor, and the contractor will not be liable for liquidated damages.<sup>44</sup> In some contracts, such as the EJCDC C-700, the adjustment in contract time is the contractor’s “sole and exclusive remedy” for delays.<sup>45</sup> In more rare situations, successfully invoking a force majeure clause may even lead to termination of the contract.<sup>46</sup>

**II. Is a Terrorist Attack a Force Majeure Event? Acts of the Public Enemy in the 21<sup>st</sup> Century.**

If the United States Government cannot foresee and avoid a specific terrorist attack, how could a contractor be expected to?<sup>47</sup> Common sense would seem to dictate that all terrorist attacks should be force majeure events: A specific terrorist attack is unforeseeable and unavoidable, and absent some bizarre factual scenario, a contractor is unlikely to affirmatively

cause a terrorist attack and then claim it as a force majeure event. As discussed in the introduction, however, force majeure clauses are contractual provisions and are interpreted based on contractual principles. Courts, maybe still weighted by the old strict contract liability doctrine, can have a tendency to narrowly interpret force majeure provisions and limit their application to events specifically listed. So even when it comes to something as seemingly clear-cut as terrorism, parties may have a drafting problem.

*a. What's in a Name?*

Old force majeure clauses included events such as “riots” and “acts of war,” but courts found that acts of terrorism did not fit in these categories.<sup>48</sup> In the aftermath of the September 11<sup>th</sup> attacks, commentators advocated including the phrase “acts of terrorism” as a designated force majeure event, hoping to capture a unique type of event that did not fit traditional categories.<sup>49</sup> Still, while the term “terrorism” has now become commonplace in our society, there was concern that “the term ha[d] not been directly interpreted and scrutinized judicially.”<sup>50</sup> One commentator noted that the broader phrase “acts of a public enemy” was becoming common in force majeure provisions.<sup>51</sup>

There is at least one case where even broader language excused a party's performance in the aftermath of the September 11<sup>th</sup> attacks. The plaintiff in *World Trade Center LLC v. Fitzgerald* was a tenant at one of the destroyed twin towers who sued to recoup a portion of its rent payments allegedly paid in contemplation of future benefits under the lease.<sup>52</sup> The court held that the claim was barred by the contract's force majeure provision, which expressly excused performance of the lessor resulting from “the acts of third parties.”<sup>53</sup> The court found that this language applied “under circumstances such as those presented by the events of September 11, 2001.”<sup>54</sup>

Other than *World Trade Center LLC*, there is no case law where a force majeure clause was invoked after a terrorist attack because the direct damages of the attack (e.g., the destruction of the twin towers) had rendered performance impossible. This dearth of case law may be attributed to the fact that clear-cut cases rarely work their way up to becoming written opinions.<sup>55</sup> Or perhaps because the risk of a terrorist attack is very real but very unlikely, it is precisely the type of risk that neither party would want to assume contractually, choosing instead to mandate acquisition of terrorism insurance.<sup>56</sup> Still, it may be risky to assume that the very general language that excused performance in *World Trade Center LLC* could be successfully invoked again. Because enforcing general force majeure clauses can be a roll of the dice, drafters may do well to look for alternative language that properly protects them from the risk of terrorist attacks.

*b. Learning from the Terrorism Risk Insurance Act of 2002.*<sup>57</sup>

While there is limited case law interpreting the term “terrorism,” the United States Congress has tried over the past 13 years to find a functional definition for it in the Terrorism Risk Insurance Act (TRIA). The September 11<sup>th</sup> attacks caused the fifth-costliest insurance loss in history, and are the only man-made disaster in the all-time Top 10.<sup>58</sup> As the insurance claims from the September 11<sup>th</sup> attacks accumulated, most insurers and reinsurers began to exclude liability for losses caused by terrorist attacks, or radically escalated the premiums for terrorism risk insurance. Congress found that this reaction by insurers “could seriously hamper ongoing and planned construction, property acquisition, and other business projects,”<sup>59</sup> and reacted by passing the Terrorism Risk Insurance Act of 2002. Under the Act, insurers are required to offer coverage for acts of terrorism on similar terms as for other risks. But if an act of terrorism causes losses exceeding certain thresholds, the federal government shares the cost of funding those losses. The drafters of the Terrorism Risk Insurance Act share many of the same goals as the

drafters of a force majeure clause in a construction contract: 1) ensuring that providing for the hard-to-quantify risk of terrorism does not result in astronomic contract prices or halt construction; 2) limiting the government's exposure so that not *every* "act of third parties" would excuse insurers from paying their full claims; 3) at the same time, reassure insurers that when the hard-to-quantify risk does materialize, their performance will be at least partially excused; and 4) plan ahead as much as possible, while maintaining a system that is flexible enough to respond to an amorphous risk. Below are some examples of how the TRIA drafters have tried to meet these shared objectives.

*i. All (Public) Enemies, Foreign and Domestic*

The original Terrorism Risk Insurance Act, passed in 2002, defined an "act of terrorism" as a violent or dangerous act "committed by an individual or individuals *acting on behalf of any foreign person or foreign interest*, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion."<sup>60</sup> An act of terrorism had to be certified as such by the Secretary of the Treasury, "in consultation with the *Secretary of State* and the Attorney General of the United States."<sup>61</sup>

In 2007, the Terrorism Risk Insurance Act was amended by the Terrorism Risk Insurance Program Reauthorization Act of 2007.<sup>62</sup> The amendment struck the "acting on behalf of any foreign person or foreign interest" language,<sup>63</sup> belatedly recognizing the reality of domestic terrorism that seeks to promote domestic interests. Congress could have used the broader term "act of the public enemy," as it has in the FARs force majeure clause, but it chose not to – probably because the purpose of the TRIA is narrower than the purpose of the FARs.

*ii. Streamlining the Process to Certify an Event as a Terrorist Act*

When “acts of terror” could only be carried out on behalf of foreign persons or interests, the decision to certify an “act of terror” was made in concurrence with the Secretary of State. In another belated recognition of the reality of domestic terrorism, Congress amended this part of the original TRIA in 2015 (via the Terrorism Risk Insurance Program Reauthorization Act of 2015) by striking “concurrence with the Secretary of State” and inserting “consultation with the Secretary of Homeland Security.”<sup>64</sup> The new language shows a push to streamline the certification process: instead of two Secretaries having to “concur,” the new Act leaves only one decision maker: the Secretary of the Treasury.

Additionally, the 2015 Amendment mandates a “complete study of the certification process” examining what the ideal timeline for certification should be, who should be involved in the process, and what information is needed to reach a decision.<sup>65</sup> The same issues are important when drafting a force majeure provision. The drafting parties should consider how, when, and by whom force majeure is declared, documentation requirements of the occurrence and its effects as they happen, and other next steps for both parties to deal with the effects of the event. The more this process can be dictated by the terms of the contract, the better off both parties will be.

**III. New Events, or the (Foreseeable) New Normal? Climate Change, its Effects, and “Unusually Severe or Abnormal Weather”**

Extreme, catastrophic weather events like Hurricane Katrina and Superstorm Sandy fit the three characteristics of traditional force majeure doctrine: They are beyond the parties’ control, they are external forces, and usually there is very little that can be done to prevent them or their effects. Few courts would disagree that extreme weather events are unforeseeable in the legal sense. Of course it is conceivable, and even likely, that a Category 5 hurricane will strike

Miami, Florida within a 100-year span. But the likelihood of a Category 5 hurricane hitting Miami *this year* is 3%.<sup>66</sup> This event is so abnormal, that it is unforeseeable, but what about weather *variations*?

“Weather can be ‘abnormal’ in four distinct respects—temperature, humidity, precipitation and wind velocity.”<sup>67</sup> Climate change can generate two of these four “abnormal” weather events that usually affect construction. It is indisputable that average temperatures have risen worldwide, and average temperatures in the United States have risen at approximately twice the global rate.<sup>68</sup> Increased temperatures have correlated strongly with changing precipitation patterns. More specifically, “an increasing percentage of precipitation has come from intense, single-day events (whether as rain or snow).”<sup>69</sup>

Standard contracts addressing non-catastrophic weather delays refer to “abnormal” (AIA A201 § 15.1.5.2, EJCDC C-700 Art. 4.05.C.2.) or “unusually severe” (FARs (b)(1)(x)) weather, or to “adverse weather conditions not reasonably anticipated” (ConsensusDocs 200). These concepts are too vague to be useful. To decide whether an event qualifies, courts often examine past weather data – although the timeframe the courts analyze can range “from as little as five years to as much as 86 years.”<sup>70</sup> The most common timeframe seems to be ten years, probably based on a widely recognized procedure developed by the United States Army Corps of Engineers.<sup>71</sup> Even without considering the potential effects of climate change, and even when the parties have agreed to a source of data and a time frame for data, contracts can be confusing.<sup>72</sup> Once the reality of climate change is acknowledged, the obvious problem with the current approach is that “[a] focus on historical weather data is fundamentally problematic because *it assumes that historical patterns will continue in the future.*”<sup>73</sup> This should benefit contractors – the “new normal” may look pretty abnormal when compared to the last 100 years – unless the

judge analyzing the contract has been listening to the news a lot and overestimates how “foreseeable” record-breaking temperatures and downpours should be.<sup>74</sup>

The pitfalls of “unusually severe or abnormal weather” clauses are illustrated by four cases decided over the past 10 years. Although all cases involve rain delays, each involves a clause from a different standard form contract and different lessons can be learned from each.

**a. Hartec Corp. v. GSE Associates, Inc.<sup>75</sup> (EJCDC)**

Hartec Corporation (“Hartec”) entered a contract with Consolidated Waterworks District No. 1 (“Waterworks”) to construct a water plant in Terrebonne Parish, Louisiana. The contract provided for completion in 540 calendar days. If Hartec needed more time, Article 12.1 of the contract required Hartec to make a written request to GSE (the engineering firm Waterworks had hired to manage the project) for an extension of time, no later than 30 days after the occurrence of the event causing the delay. Article 12.2 provided:

12.2 The Contract Time will be extended in an amount equal to time lost due to delays beyond the control of CONTRACTOR if a claim is made therefor as provided in Paragraph 12.1. Such delays shall include, but not be limited to, acts or neglect by OWNER or others performing additional Work as contemplated by Article 7, or to fires, floods, labor disputes, epidemics, *abnormal weather conditions*, or acts of God.<sup>76</sup>

Hartec worked on the project from September, 1999 to June, 2002, when it notified Waterworks that it was terminating the contract because work had been suspended for more than 90 days in critical areas of the project. Hartec filed suit against Waterworks and GSE in September, 2002 alleging among other things that it had suffered substantial additional expenses as a result of GSE's refusal to grant Hartec extensions of time to complete the project. The trial judge issued a judgment in favor of Waterworks and against Hartec in the amount of over \$1.5 million, consisting of excess completion costs and \$479,500.00 in liquidated damages at the rate of \$500 per day for 959 days. On appeal, Hartec claimed that the lower court erred in assessing

liquidated damages because GSE should have granted Hartec time extensions due to weather delays.

Hartec had submitted numerous requests for extensions due to rain.<sup>77</sup> First, the court of appeals concluded that GSE had valid grounds to reject Hartec's requests for extensions of time because many of the requests were well beyond the time limit in Article 12.1, and because Hartec had been the cause of some of the delays. This would have been enough to uphold the liquidated damages awarded by the trial court. However, the appeals court went further. While "abnormal" was not defined, the court of appeals upheld the trial court's finding that "the amounts of rain did not amount to an abnormal weather condition."<sup>78</sup>

Hartec had sought two contract time extensions due to two separate flood events at the work area. The first happened on November 15, 2000, but the court found that GSE had reasonably denied the request as untimely. The second event, in June 2001, was the result of Tropical Storm Allison, and caused delay because it damaged certain valve motors that were not properly secured. The trial court found that Hartec could have avoided the damage to the valve motors by taking reasonable precautions.<sup>79</sup> The trial court also noted that the threat of Allison "had been widely publicized,"<sup>80</sup> and that the second flood had occurred less than seven months after the first – in other words, the second flood was foreseeable. Because the second event was foreseeable, and the damage was avoidable, the trial court held that Hartec was not entitled to an extension of time.<sup>81</sup>

- Main Lesson Learned: You can still lose on foreseeability and unavoidability.
- Refresher Lesson Learned: "Adverse weather conditions" is not the same as "abnormal weather conditions." Rain, by itself, is not an abnormal weather condition.

**b. Ryll International, LLC v. Department of Transportation<sup>82</sup> (FARs)**

Ryll International, LLC (“Ryll”) entered into a fixed price contract with the Federal Highway Administration (FHWA) to crush and stockpile select borrow (soil used to fill land) and surface course aggregate (stone or gravel mixed with concrete to be used in pavement structure) in Katmai National Park, Alaska. The performance period for the project was from July 16, 2007 to October 31, 2007. The contract incorporated the Federal Acquisition Regulation (FAR) clause for commercial services. The contract provided that if Ryll failed to comply with the contract or give adequate assurances of future performance, the government could terminate for cause, except in the case of excusable delays:

*Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, *unusually severe weather*, and delays of common carriers.<sup>83</sup>

Ryll was delayed almost immediately – it did not secure a rental contract for the necessary equipment until August 16, and the equipment did not arrive on site until September 22, after Ryll had difficulty negotiating a transportation contract. Crushing did not begin until October 1, 2007, but stopped the next day when a backhoe broke down. The crushing subcontractor eventually walked off the job on October 6, and Ryll terminated its subcontracting agreement on October 7. When Ryll was not able to find another subcontractor, and failed to complete the work within the period specified, the FHWA terminated the contract for cause.

Ryll argued that it was entitled to have its termination for default set aside, among other reasons, because of the provision for “unusually severe weather” contained in the excusable delay clause of the contract. Ryll insisted that despite the challenges it faced during mobilization, it was positioned to complete the work within the contract period, but was thwarted by bad

weather and the subsequent saturated condition of the materials to be crushed. On October 9, 2007, Ryll had requested a 20-day extension due to unusually severe weather, but the request was denied nine days later. Ryll stated that it was “undisputed” that it encountered significant adverse weather conditions between September 18, and October 7, 2007, during mobilization and performance of the contract work. The judge ruled that even if Ryll had been delayed by adverse weather, the proximate cause of the contract breach was the subcontractor’s abandonment of the jobsite.<sup>84</sup> Here, again, the judge could have upheld the denial by finding that the bad weather had not been the ultimate cause of the delay. Instead, it decided that the weather Ryll had encountered was not “unusually severe.”

The Contracting Officer who denied the extension reviewed weather records from the National Oceanographic and Atmospheric Administration (NOAA) and found the following:

- The amount of precipitation for the period of September 18 through October 7, 2007, was 147% of the ten year average.
- The number of days with measurable precipitation was 116% of average.
- The number of days with rain over ½ inch was 100% of average (one day).
- There were nine days where the rain amount was higher than the ten year average for that date (September 18, 20, 24, 26 through 28, 30, October 4 and 5).
- There were eleven days when the rain amount was lower than the ten year average for that date (September 19, 21, 22 through 25, 29, October 1 through 3).<sup>85</sup>

The judge summarized the law, which states that “[u]nusually severe weather is construed to mean adverse weather which at the time of year in which it occurred is unusual for the place in which it occurred.”<sup>86</sup> “Unusually severe weather is determined based on a comparison of the conditions experienced by the contractor and the weather conditions of prior years.”<sup>87</sup> The judge ultimately concluded that a review of the 10 year average of weather conditions “demonstrated that while precipitation for September 2007 in Katmai was above normal, in October 2007 it was slightly below.”<sup>88</sup> The adverse weather earlier in the time period afforded contractor for performance was not severe enough to warrant a finding of excusable delay.

- Main Lesson Learned: Averages can be deceiving. During the 20-day period for which contractor claimed delay, the amount of precipitation was 47% higher than the ten year average for that same time period. That seems pretty bad, but then the judge looked at each day: Only nine individual days had a rain amount higher than the ten-year average, while 11 days had a rain amount lower than the ten-year average. Result: "The weather was not more severe than the range of weather reasonably anticipated." The opinion does not relay the daily amounts of rain, but here are some numbers that would fit the description: Historic average for 20-day period = 10 inches. Assuming daily rainfall is constant, that's 0.5 inches per day. Sep-Oct 2007 for 20-day period: 14.7 inches. Per the court's description, that could have been 11 days of 0.4 inches (4.4), 8 days of 0.6 inches (4.8 inches), and one day of 5.5 inches - 5 times the expected rainfall on that day, but still on "average" not more severe than reasonably anticipated.
- Refresher Lesson Learned: You Can Still Lose on Ultimate Causation - The judge found that the proximate cause of the delay was the subcontractor's abandonment of the job - had the sub not walked off the job, the contract could have been completed on time.<sup>89</sup>

c. **Daewoo Engineering & Construction Co., Ltd. v. U.S.<sup>90</sup> (Army Corps of Engineers)**

The United States Army Corps of Engineers (the "Corps") solicited bids for the building of a fifty-three-mile road in the Republic of Palau. The Corps estimated that the price of constructing the road would be between \$100 million and \$250 million, in great part due to the humid and rainy weather and moist soils in Palau, which made it difficult to achieve the soil compaction density required by the contract. Daewoo initially proposed to build the road for \$73 million. When the Corps pointed out that Daewoo was unlikely to be able to do the job at that

price, Daewoo revised its proposal and submitted a final bid of \$88.6 million. Daewoo was awarded the contract, which required completion of the road within 1080 days. The contract included the Corps' standard Adverse Weather Clause, which provided as follows:

Special Contracts Requirements Clause 1, Time Extensions for Unusually Severe Weather

(a) In order for the Contracting Officer to award a time extension under this clause, the following conditions must be satisfied:

(1) The weather experienced at the project site during the contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the project location during any given month.

(2) The unusually severe weather must actually cause a delay to the completion of the project. The delay must be beyond the control and without the fault or negligence of the Contractor.

(b) The following schedule of monthly anticipated adverse weather delays is based on National Oceanic and Atmospheric Administration (NOAA) or similar data for the project location and will constitute the base line for monthly weather time evaluations. The Contractor's progress schedule must reflect those anticipated adverse weather delays in all weather dependent activities.

Monthly Anticipated Adverse Weather Delay Work Days Based on 6 Day Work Week

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
6	5	3	5	8	10	10	10	12	7	8	6

(c) Actual adverse weather day delays must prevent work on critical path activities for 50 percent or more of the Contractor's scheduled work day.<sup>91</sup>

The original contract provided for sixty-one anticipated adverse weather delay days, but was amended post-closing to a total of ninety days per year.

Construction was delayed, even after the Corps agreed to lower the soil compaction density requirement. Daewoo sought adjustment of the contract price and the time to perform the contract. The Corps offered a 125-day no-cost time extension because of unusually severe weather during the 2001 calendar year, *in addition to the ninety days in the original contract*, but refused to increase the price. Daewoo rejected the time adjustment offer, filed a complaint

seeking a total of \$64 million in equitable adjustments. Daewoo claimed that the weather-delay clause in the contract was misleading, and resulted in an “unreasonable and artificially shortened contract performance period.”<sup>92</sup>

Unlike other bidders, Daewoo had not inquired about the weather delay provision in the contract during the bidding process. It was not until it ran into difficulties during performance that Daewoo asked about the criteria for calculating adverse weather for purposes of the Adverse Weather Clause. In its lawsuit, Daewoo contended that the choice of 0.5 inches of rain to denote an adverse weather day was arbitrary, and that the calculation should have included additional time for “dry-out days” (days where it did not rain, but work was still not possible because the soil had not yet dried after previous days’ rain).

The court was “puzzled” by Daewoo’s misunderstanding of the purpose of the Adverse Weather Clause. “The purpose of the Weather Clause was to disclose in advance the parties’ exposure for excess adverse weather days during contract performance. *The Clause did not and could not predict future weather patterns.*”<sup>93</sup> The Clause “does not create an implied warranty of future weather. Its purpose is to provide a contractual baseline against which to measure the contractor’s entitlement to no-cost time extensions.”<sup>94</sup> Further, the court held that even if the clause had been misleading, Daewoo had conducted its own investigation of weather data and had arrived at roughly the same number of adverse days as the government.<sup>95</sup>

- Main Lesson Learned: Even when two parties agree in advance to an estimated number of expected weather delay days, they are just giving themselves a “no-questions-asked” buffer based on an agreed-upon definition of abnormal weather. Once that buffer is exhausted, the same problems with the other kinds of clauses return.

- Refresher Lesson Learned: Each party is expected to do its own due diligence. If the contractor estimates that weather will be worse, it can negotiate more days or increase the price (which Daewoo could have done when the Corps suggested that they reconsider their original bid).

*d. Handex of the Carolinas, Inc. v. County of Haywood*<sup>96</sup> (EJCDC)

Haywood County (the “County”) contracted with Municipal Engineering Services (“MES”) to provide design services, review and obtain bids, draft contract documents and administer contract performance for the extension of an existing landfill. Upon submitting the lowest bid, Handex of the Carolinas, Inc. (“Handex”) was awarded the contract to construct the landfill extension. Pursuant to its contract with the County, Handex had 180 days from the Notice to Proceed to achieve Substantial Completion on the landfill, and 45 days from Substantial Completion to accomplish Final Completion.<sup>97</sup> The contract’s liquidated damages provision provided that the County was entitled to retain \$1,000.00 for each day Handex was late in reaching Substantial Completion, and \$500.00 for each day until Final Completion.<sup>98</sup> The County retained liquidated damages after Handex completed construction 93 days beyond the Substantial Completion deadline and 10 days beyond the Final Completion deadline.<sup>99</sup> This prompted Handex to file suit against MES and the County for breach of contract, among other causes of action.<sup>100</sup>

During the course of construction, Handex made eight separate requests in the form of change orders for additional time and money, of which MES and the County approved only one.<sup>101</sup> Handex alleged that MES and the County’s denial of these change orders constituted a breach of contract. At the close of all evidence, MES and the County moved for directed verdict.<sup>102</sup> The trial granted MES’s motion for directed verdict (primarily due to lack of privity),

but denied the County's motion. The jury rendered a verdict against the County and awarded damages to Handex.<sup>103</sup> Both parties appealed.

On appeal, the court analyzed the County's denial of Change Orders #3 and #8.<sup>104</sup> In Change Order #3, Handex had sought an additional 30 days to complete the contract due to "poor weather conditions;"<sup>105</sup> specifically, snow and rain.<sup>106</sup> In Change Order #8, Handex had sought an additional 21 days to complete the contract plus an \$80,000.00 price adjustment due to "substantial rainfall . . . causing significant damage."<sup>107</sup> The County appealed the trial court's denial of its motion for directed verdict concerning Change Order #3, and Handex appealed the trial court's granting of the County's motion for directed verdict concerning Change Order #8.<sup>108</sup> The court of appeals affirmed.

In its analysis, the court of appeals looked to the contract's provisions governing "abnormal weather conditions," which provided that "'abnormal weather conditions' were to be determined based upon the National Weather Service's thirty-year average."<sup>109</sup> Although the parties were in agreement concerning the appropriate source of data for determining if weather conditions were "abnormal," they disputed how this data should be interpreted.<sup>110</sup> The court of appeals described that "[t]he evidence before the jury provided two different interpretations of what constituted the time frame for measuring [abnormal weather conditions], thus affecting calculations of whether it was above or below the National Weather Service's thirty-year average. . . ." and "[i]t was also unclear . . . whether the 'average' was to consider days of rain, or inches of rain, and where the statistical data for the weather conditions was to be collected."<sup>111</sup> As a result, the court of appeals deemed the contractual means of determining "abnormal weather conditions" ambiguous, and ruled that Handex's weather logs and data provided sufficient evidence of an "abnormal weather condition" to give the issue of the County's denial

of Change Order #3 to the jury.<sup>112</sup> As for the County's denial of Change Order #8, the court of appeals held that there was no issue of fact to be decided by a jury because a price adjustment was not an offered remedy under the contract's force majeure clause, and Handex had failed to submit Change Order #8 within the contractual timeframe for requesting additional time due to abnormal weather conditions.<sup>113</sup>

- Main Lesson Learned: Although it's a good idea for parties to contractually agree upon the source of data for determining if weather conditions are "abnormal" in a given time period, the parties open the door for disputes if they fail to stipulate how this data should be interpreted.

Refresher Lesson Learned: Unless the contract says otherwise, you are not entitled to monetary relief for a force majeure event.<sup>114</sup>

*e.* **General Lessons Learned**

The four cases discussed above illustrate the problems that can arise from "unusually severe or abnormal weather" force majeure clauses. Several drafting lessons can be gleaned from these cases. First, parties should specifically define "unusually severe" or "abnormal" weather. It's never a good idea to leave it to the court to make this determination. Second, in addition to defining the specific source of data for determining if weather was "abnormal" or "unusually severe," parties should delineate precisely how this data is to be interpreted, since statistical data can be subject to innumerable interpretations. Third, parties should consider limiting historical weather data to the past ten years, as this will narrow the scope of weather events that may be deemed foreseeable, and will better reflect the "new normals" resulting from climate change. Finally, parties to construction contracts in areas with unpredictable weather should consider adopting the Corps' approach, which examines historical weather data at the outset of contract

formation and predicts the number of weather-delay days that may be anticipated during the contractual period. Although this approach is more time-consuming on the front end, it allows parties to waste less time and resources during the construction phase dicker about whether a particular weather event qualifies as “abnormal” or “unusual” (at least until the expected number of weather-delay days is exceeded).

#### **IV. Force Majeure Distinguished from Impossibility and Impracticability**

If events such as material shortages and embargoes are specifically enumerated as force majeure occurrences in a construction contract, a party may potentially be protected from performance if faced with such events. Whether such occurrences will qualify as force majeure events may ultimately depend upon whether the particular court requires force majeure events to be unforeseeable.<sup>115</sup> If a court requires contractual force majeure events to be unforeseeable, a party could encounter difficulties arguing that a particular material shortage meets this standard. Material shortages are a common problem in the construction industry, especially those that merely result in price increases. Material shortages caused by market fluctuations are arguably foreseeable. As for material shortages caused by embargoes, these are probably more likely to be deemed unforeseeable than general market fluctuations. However, it is not hard to imagine circumstances where the political climate at the time of contracting could render a future embargo foreseeable.

Although the focus of this paper is the doctrine of force majeure, it is worth briefly discussing two closely related common law doctrines: impossibility and impracticability in the context of material shortages and embargoes. In the event a party is unable to assert a force majeure clause when faced with such events, impossibility and impracticability may be a party’s next best bets. The common law doctrine of impossibility “allows a party to suspend or avoid

performance when a supervening event beyond its control makes performance of the contract no longer capable of being performed.”<sup>116</sup> Where unforeseeable severe material shortages or an embargo render the materials necessary to complete a construction contract completely unavailable, impossibility is probably a viable defense. However, the more likely effect of an embargo or a material shortage is that it will significantly increase the cost of completing a contract, but not render it impossible. In such a scenario, a party’s best defense may be the doctrine of commercial impracticability.

Many courts have “moved beyond the requirement of absolute impossibility” and recognize the doctrine of commercial impracticability, which allows a party to be excused from performance where, although performance of the party’s contractual obligations is technically possible, changed circumstances have rendered performance commercially unreasonable.<sup>117</sup> The doctrine of commercial impracticability is codified in the Uniform Commercial Code § 2-615 “Excuse by Failure of Presupposed Conditions.”<sup>118</sup> When deciding U.C.C. cases involving commercial impracticability, in addition to U.C.C. § 2-615, courts often also expressly discuss the Restatement of Contracts (Second) § 261, which sets forth the common law application of the doctrine of commercial impracticability.<sup>119</sup> Thus, the holdings of these U.C.C. cases should be generally applicable to non-U.C.C. construction contracts involving the provision of services.<sup>120</sup>

In order to prevail on a defense of commercial impracticability, a party must show the following: “(i) a supervening event, either an ‘act of God’ or an act of a third party, made performance impracticable, (ii) the non-occurrence of the event was a basic assumption upon which the contract was based; (iii) the occurrence of the event was not the party's fault; and (iv) the party did not assume the risk of the event's occurrence.”<sup>121</sup> Whether non-occurrence of a particular event “was a basic assumption” generally depends upon the foreseeability of the

event.<sup>122</sup> “If a disruptive event was foreseeable and the promisor failed to protect himself by means of an express provision in the contract (a force majeure clause), then the promisor will be deemed to have assumed the risk of the disruptive event.”<sup>123</sup>

Under the U.C.C., performance will ordinarily not be excused based on “[i]ncreased cost alone” or “a rise or a collapse in the market itself.”<sup>124</sup> Such events are arguably foreseeable. However, “a severe shortage of raw materials or of supplies due to a contingency such as a war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost” or prevents performance altogether is likely sufficient for an impracticability defense under the U.C.C.<sup>125</sup> The Restatement’s comments echo those of the U.C.C. and provide that such circumstances would also probably be sufficient for an impracticability defense in a contract for services.<sup>126</sup> Even if such circumstances are present, a party cannot successfully assert the impracticability defense unless it has undertaken reasonable efforts to surmount such obstacles.<sup>127</sup>

While the doctrine of impracticability can relieve a party from its contractual duties when faced with price increases caused by severe material shortages or an embargo, a specific force majeure clause that covers such events may provide greater protection. However, as discussed above, such a force majeure provision may not be effective if a court deems the material shortage or the embargo foreseeable and has determined that force majeure events must be unforeseeable.<sup>128</sup> If this occurs, the party will have no luck obtaining relief via the defense of impracticability, because this defense does not protect against foreseeable events. Perhaps the best way a party can ensure that it is protected against price increases caused by material shortages is to negotiate a material price escalation clause into its contract.<sup>129</sup> If this option is

unavailable, then a force majeure clause that specifically allows for time and money associated with price escalations caused by material shortages is the next best option.<sup>130</sup>

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<sup>1</sup> RESTATEMENT (SECOND) OF CONTRACTS, Ch. 11 Introductory Note (1981).

<sup>2</sup> *Id.*

<sup>3</sup> See *Dermott v. Jones*, 69 U.S. 1, 17 L. Ed. 762 (1864) (“It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse them... . [This rule] rests upon the solid foundation of reason and justice. It regards the sanctity of contracts.”); *Werner v. Ashcraft Bloomquist, Inc.*, 10 S.W.3d 575 (Mo. Ct. App. E.D. 2000) (“The doctrine of impossibility of performance excuses a party to a contract from performance when an act of God, the law or other party renders performance impossible. If a party desires to be excused from performance in the event of contingencies arising after the formulation of a contract, it is that party's duty to provide therefore in the contract.”). See also 30 Williston on Contracts § 77:31 (4th ed.).

<sup>4</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>5</sup> Jocelyn L. Knoll & Shannon L. Bjorklund, *Force Majeure and Climate Change: What is the New Normal?*, 8 J. AM. C. CONSTRUCTION LAW., no. 1, Feb. 2014, at 29, 35.

<sup>6</sup> See Knoll, *supra* note 5, at 35-36.

<sup>7</sup> UNIDROIT Principles of International Commercial Contracts 2010 Art. 7.1.7, available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

<sup>8</sup> See 5 BRUNER & O'CONNOR CONSTRUCTION LAW § 15:22.

<sup>9</sup> See *Id.* at n.6. These “implied conditions” eventually found their way into Uniform Commercial Code’s Section 2-615, “Excuse by Failure of Presupposed Conditions” (excusing delays when performance has been “made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made”).

<sup>10</sup> See *Id.* at n.7.

<sup>11</sup> See *Id.* at n.8.

<sup>12</sup> 5 BRUNER & O'CONNOR CONSTRUCTION LAW § 15:42.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (citing to AIA and EJCDC standard documents).

<sup>15</sup> William Cary Wright, *Force Majeure Delays*, 26 FALL CONSTRUCTION LAW 33, at 33 (Fall 2006) (emphasis added).

<sup>16</sup> *Id.*

<sup>17</sup> See Knoll, *supra* note 5, at 39.

<sup>18</sup> 5 BRUNER & O'CONNOR CONSTRUCTION LAW § 15:22.

<sup>19</sup> See, e.g., EJCDC C-700 Art. 4.05.C. (describing a force majeure event as “unanticipated causes not the fault of and beyond the control of” the parties); F.A.R. § 52.249-10(b)(1) (“unforeseeable causes beyond the control and without the fault or negligence of” the contractor).

<sup>20</sup> For example, the Army Corps of Engineers uses contractual provisions that provide relief from the contract if weather delays exceed a given amount of time in a defined period.

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<sup>21</sup> Knoll, *supra* note 5, at 40 (citing Sniffen, *In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster*, 31 NOVA L. REV. at 559-60 (2006-2007)). *See also* discussion of “unforeseeability” in I.c.i., *infra*.

<sup>22</sup> In New York, for example, a party is ordinarily excused “only if the force majeure clause specifically includes the event that prevents a party’s performance.” URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1276 (D.R.I. 1996) (quoting Kel Kim Corp. v. Central Markets, Inc., 519 N.E.2d 295, 296 (N.Y. 1987) and holding that zoning approval was not force majeure event because it was not mentioned in the contract’s non-exclusive list and it was foreseeable).

<sup>23</sup> *See* URI Cogeneration Partners, 915 F. Supp. at 1276.

<sup>24</sup> Knoll, *supra* note 5, at 39.

<sup>25</sup> *Id.* at 43.

<sup>26</sup> *Id.*

<sup>27</sup> Wright, *supra* note 15, at 33-34; 5 BRUNER & O’CONNOR CONSTRUCTION LAW § 15:41 (“Foreseeable impediments to timely performance are the responsibility of the contractor to consider in estimating its price for the work, accepting the contract and performing the work.”).

<sup>28</sup> *See* Wright, *supra* note 15, at 33-34; *See also, e.g.*, Perlman v. Pioneer Ltd. P’ship, 918 F.2d 1244, 1248 (5th Cir. 1990) (“Because the clause labeled ‘force majeure’ in the Lease [which listed specific force majeure events] does not mandate that the force majeure event be unforeseeable or beyond the control of [the nonperforming party] before performance is excused, the district court erred when it supplied those terms as a rule of law.”).

<sup>29</sup> Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 992 (5th Cir. 1976) (“Therefore, when the promisor has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable.”).

<sup>30</sup> *See* 2 BRUNER & O’CONNOR CONSTRUCTION LAW § 7:230.55 at n.3 (citing Gulf Oil Corp. v. F.E.R.C., 706 F.2d 444, 452-54 (3d Cir. 1983) (“Even presuming that Gulf’s routine mechanical repairs were within the ambit of the force majeure clause, their frequent, almost predictable, occurrence takes them outside of a force majeure excuse to nonperformance. The element of uncertainty that defines unforeseeability is negated by the regularity with which the events occurred. It is not enough for Gulf to allege that because the mechanical repairs were listed in the contract, they were force majeure events.”).

<sup>31</sup> 318 U.S. 120, 63 S. Ct. 474 (1943).

<sup>32</sup> *Id.* at n.1.

<sup>33</sup> *Id.* at 123, 63 S. Ct. at 474.

<sup>34</sup> *See, e.g.*, Team Mktg. USA Corp. v. Power Pact, LLC, 41 A.D.3d 939, 942-43, 839 N.Y.S.2d 242, 246 (2007) (“When the event that prevents performance is not enumerated, but the clause contains an expansive catchall phrase in addition to specific events, ‘the precept of *ejusdem generis* as a construction guide is appropriate’—that is, ‘words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned.”); *See also, e.g.*, URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996) (“What distinguishes the Biblical plagues described in [the contractual force majeure clause] from a failure to procure zoning permission is the question of foreseeability. As the Board points out, force majeure clauses have traditionally applied to unforeseen circumstances—typhoons,

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citizens run amok, Hannibal and his elephants at the gates—with the result that the Court will extend [force majeure] only to those situations that were demonstrably unforeseeable at the time of the contracting.”).

<sup>35</sup> Knoll, *supra* note 5, at 72.

<sup>36</sup> See 5 BRUNER & O’CONNOR CONSTRUCTION LAW § 15:23 at n.16.

<sup>37</sup> AIA A201-2007 § 8.3.1 (justifiable delay must arise out of “causes beyond the Contractor’s control”); EJCDC C-700 Art. 4.05C. (“unanticipated causes not the fault of and beyond the control of Owner, Contractor . . .”); ConsensusDocs 200 6.3.1 (“If the Contractor is delayed at any time . . . by any cause beyond the control of the Contractor . . .”); F.A.R. (excusable delay must arise from “causes beyond the control and without the fault or negligence of the Contractor.”).

<sup>38</sup> Wright, *supra* note 15, at 34.

<sup>39</sup> See, e.g., *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906, 915 (E.D. Va. 1989), *order aff’d in part, rev’d in part on other grounds*, 911 F.2d 723 (4th Cir. 1990), where a federal district court denied a contractor’s claim for an extension of time because the contractor failed to take actions that could have prevented the weather damage: “[W]hile [the contractor] does not control the weather, [the owner] has pointed to specific precautionary measures [the contractor] could have taken to minimize the adverse effects of precipitation. In some instances, these preventive or mitigating measures were contractually required. Yet [the contractor] chose not to take these actions. This failure to prevent or mitigate the effects undercuts its claim for excusable delay.”

<sup>40</sup> Knoll, *supra* note 5, at n.54.

<sup>41</sup> *Id.* at 46.

<sup>42</sup> Knoll, *supra* note 5, at 41. See also *Hartec Corp. v. GSE Associates Inc.*, 91 So. 3d 375, 386 (La. Ct. App. 2012).

<sup>43</sup> See, e.g., *URI Cogeneration Partners*, 915 F. Supp. at 1276.

<sup>44</sup> Knoll, *supra* note 5, at 50 (citing Anthony Whitley, *Understanding and Controlling the Risk of Volatile Material Prices*, TEXAS CONSTR., Oct. 1, 2008 Vol. 16, issue 10, (p. 63) (2008 WLNR 19791321)).

<sup>45</sup> Article 4.05.C.

<sup>46</sup> Knoll, *supra* note 5, at 50 (citing Sniffen, *In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster*, 31 NOVA L. REV. at 558 (2006-2007)). Bruner & O’Connor suggest that “[i]t is at the point that delayed or suspended performance shades off into commercial impracticability that the remedy shifts from mere time extension to termination of the contract.” 5 BRUNER & O’CONNOR § 15:28.50.

<sup>47</sup> See *Broward County v. Brooks Builders, Inc.*, 908 So. 2d 536, 539 (Fla. Dist. Ct. App. 2005) (“The construction contract at bar did not anticipate any extraordinary delays resulting from the aftermath of 9/11, as 9/11 itself was unforeseen, apparently even by our country’s intelligence agencies.”).

<sup>48</sup> See *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974). This was an insurance coverage case – An airplane was hijacked over London by members of a Palestinian terrorist group and was destroyed in Egypt. The airline had purchased insurance, which did not cover loss caused by the following listed exceptions: damage or destruction by military or usurped power, war, warlike operations, insurrection, riots, or civil commotion. The second circuit held that the loss was not proximately caused by any peril excluded from

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coverage, and granted judgment for Pan American against the insurers. The result could be limited to the insurance coverage context – in reaching its decision, the court noted that an ambiguity in an insurance policy should be decided in favor of the insured.

<sup>49</sup> See, e.g., Wright, *supra* note 15, at 38.

<sup>50</sup> *Id.* at 36.

<sup>51</sup> *Id.*

<sup>52</sup> 789 N.Y.S.2d 652 (2004).

<sup>53</sup> *Id.* at 654.

<sup>54</sup> *Id.*

<sup>55</sup> As Bruner and O'Connor observed: "There is little doubt the contract to wash the windows of the World Trade Center is effectively terminated by force majeure as the buildings no longer exist." 2 BRUNER & O'CONNOR CONSTRUCTION LAW § 7:230.52. If that is the case, it is unlikely that a written opinion would address the issue.

<sup>56</sup> With this approach, the battle may just be kicked down the road: from owner-contractor lawsuits to insurance coverage lawsuits. See Sandy M. Kaplan, *It's a Catastrophe, but We Have a Force Majeure Clause, So No Worries, Right?*, ABA FORUM ON CONSTRUCTION LAW, Jan. 2016.

<sup>57</sup> Pub. L. No. 107-297, Nov. 26, 2002, 116 Stat. 2322, (amended 2007), codified at 15 U.S.C. § 6701.

<sup>58</sup> See INS. INFO. INST., *Top 10 Most Costly World Insurance Losses, 1970-2014*, <http://www.iii.org/table-archive/20579> (last visited Aug. 19, 2015). The Top 5 is rounded out by Hurricane Katrina, Hurricane Sandy, Hurricane Andrew, and the earthquake and tsunami that hit Japan in 2011. *Id.*

<sup>59</sup> Terrorism Risk Insurance Act of 2002, *supra* note 57, at § 101(a)(5).

<sup>60</sup> *Id.* at § 102 (emphasis added).

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> Pub.L. 110-160, Dec. 26, 2007, 121 Stat. 1839.

<sup>63</sup> *Id.* at § 2.

<sup>64</sup> Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub.L. 114-1, § 105, Jan. 12, 2015, 129 Stat. 3.

<sup>65</sup> *Id.* at § 107. The study is supposed to have concluded by September 2015.

<sup>66</sup> Knoll, *supra* note 5, at 71-72.

<sup>67</sup> 5 BRUNER & O'CONNOR CONSTRUCTION LAW § 15:43.

<sup>68</sup> Knoll, *supra* note 5, at 33 (citing United States Environmental Protection Agency, Climate Change Indicators in the United States 1, available at <http://www.epa.gov/climatechange/pdfs/climateindicators-full.pdf>).

<sup>69</sup> *Id.* at 34.

<sup>70</sup> *Id.* at 63 (citing various cases).

<sup>71</sup> *Id.*; 5 BRUNER & O'CONNOR CONSTRUCTION LAW § 15:36.

<sup>72</sup> See *Handex of the Carolinas, Inc. v. County. of Haywood*, 168 N.C. App. 1, 16, 607 S.E.2d 25, 34-35 (2005) ("The contract provided that 'abnormal weather conditions' were to be determined based upon the National Weather Service's thirty-year average. The evidence before the jury provided two different interpretations of what constituted the time frame for measuring these conditions, thus affecting calculations of whether it was above or below the National Weather Service's thirty-year average. It was also unclear, as testified to by [one of the

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witnesses], whether the ‘average’ was to consider days of rain, or inches of rain, and where the statistical data for the weather conditions was to be collected.”). See detailed discussion of Handex in III.d., *infra*.

<sup>73</sup> Knoll, *supra* note 5, at 68 (emphasis in original).

<sup>74</sup> See *Id.* at 72-74 for an interesting discussion on how people tend to overestimate the likelihood of a statistically small risk materializing when they learn that such an event has occurred recently.

<sup>75</sup> No. 138059, 2009 WL 8634986 (La. Dist. Ct. Feb. 11, 2009), *aff’d in part, rev’d in part*, 91 So. 3d 375 (La. Ct. App. 2012).

<sup>76</sup> *Id.* at 385-86 (emphasis added).

<sup>77</sup> On appeal, Hartec apparently argued that it was entitled to extensions for “adverse weather conditions.” The court of appeals noted that the contract specifically referred to “abnormal weather conditions.” *Id.*

<sup>78</sup> *Id.* at 386. The standard of review was whether the finding was “clearly erroneous.” Judge McClendon concurred with the result, but wrote separately to specifically opine that “given the contract's failure to define ‘abnormal weather conditions’ and based on the evidence presented, had I been sitting as trier of fact, I would have found that Hartec was entitled to additional extensions of time. However, I cannot conclude that the trial court's finding in this regard was manifestly erroneous.” *Id.* at 392 (McClendon, J., concurring and assigning reasons).

<sup>79</sup> *Id.* at 386.

<sup>80</sup> Hartec Corp. v. GSE Associates, Inc., 2009 WL 8634986 at 11 (La. Dist. Ct.) (Trial Order) (Feb. 11, 2009).

<sup>81</sup> *Id.*

<sup>82</sup> CBCA 1143, 11-2 BCA ¶ 34,809, 2011 WL 2714000 (U.S. Civilian BCA Jun. 30, 2011), *available at*:

[http://www.cbca.gsa.gov/files/decisions/2011/STEEL\\_06-30-11\\_1143\\_RYLL\\_INTERNATIONAL\\_508.pdf](http://www.cbca.gsa.gov/files/decisions/2011/STEEL_06-30-11_1143_RYLL_INTERNATIONAL_508.pdf).

<sup>83</sup> *Id.* at p. 3 (emphasis added)

<sup>84</sup> *Id.* at p. 17.

<sup>85</sup> *Id.* at p. 10.

<sup>86</sup> *Id.* at p. 19.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at p. 17.

<sup>90</sup> 73 Fed. Cl. 547 (2006), *judgment aff’d*, 557 F.3d 1332 (Fed. Cir. 2009).

<sup>91</sup> *Id.* at 561 n.22.

<sup>92</sup> *Id.* at 561.

<sup>93</sup> *Id.* (emphasis added).

<sup>94</sup> *Id.* at 563 (internal citations omitted).

<sup>95</sup> *Id.* at 561.

<sup>96</sup> 168 N.C. App. 1, 607 S.E.2d 25 (2005) (While it is not clear, this case appears to interpret EJCDC or EJCDC-like language).

<sup>97</sup> *Id.* at 6, 607 S.E.2d at 28-29.

<sup>98</sup> *Id.* at 6, 607 S.E.2d at 29.

<sup>99</sup> *Id.*

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<sup>100</sup> *Id.* at 8, 607 S.E.2d at 29. (Handex also alleged professional negligence by MES).  
<sup>101</sup> *Id.*  
<sup>102</sup> *Id.*  
<sup>103</sup> *Id.*  
<sup>104</sup> *Id.* at 16, 607 S.E.2d at 34.  
<sup>105</sup> *Id.* at 16, 607 S.E.2d at 34.  
<sup>106</sup> Plaintiff – Appellee’s Brief at 7, *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 607 S.E.2d 25 (2005) (No. COA03-1658), 2004 WL 1195942.  
<sup>107</sup> *Id.* at 9; *Handex*, at 16, 607 S.E.2d at 34-35.  
<sup>108</sup> *Handex* at 16, 607 S.E.2d at 34-35.  
<sup>109</sup> *Id.*  
<sup>110</sup> Knoll, *supra* note 5, at 64.  
<sup>111</sup> *Handex* at 16, 607 S.E.2d at 34-35.  
<sup>112</sup> *Id.*  
<sup>113</sup> *Id.* at 17, 607 S.E.2d at 35.  
<sup>114</sup> *See supra* notes 43-46 and accompanying text.  
<sup>115</sup> *See supra* note 30 and accompanying text.  
<sup>116</sup> Oliver J. Armas and Thomas J. Hall, *Contracts Are Binding—In Good Times, and Bad? Contractual Impossibility, Material Adverse Change Clauses and Adequate Assurances During Economic Crisis*, 42 No. 3 UCC L. J. ART 3 (June 2010) (citing 17A Am. Jur. 2d Contracts § 655 (2010) (“[S]upervening impossibility exists when the subject matter of the contract for which the parties bargained is no longer in existence or is no longer capable of being performed due to an unforeseen, supervening act for which the promisor is not responsible.”) (citations omitted)).  
<sup>117</sup> John Gallagher and Frank Rigg, Construction Briefings No. 2006-12, “*Material Price Escalation: Allocating The Risks*” (December 2006); P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 214-15 (1995).  
<sup>118</sup> Gallagher and Rigg, “*Material Price Escalation: Allocating The Risks*”.  
<sup>119</sup> “Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”  
<sup>120</sup> Gallagher and Rigg, *supra* note 120.  
<sup>121</sup> *Id.* (quoting *L.W. Matteson, Inc. v. U.S.*, 61 Fed. Cl. 296, 320 (2004) (citations omitted)).  
<sup>122</sup> P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 219 (1995).  
<sup>123</sup> *Id.*  
<sup>124</sup> U.C.C § 2-615, Excuse by Failure of Presupposed Conditions, Comment 4.  
<sup>125</sup> *Id.*  
<sup>126</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 261, Comment d., “Impracticability.” (1981).  
<sup>127</sup> *See Id.*; *See also*, U.C.C § 2-615, Excuse by Failure of Presupposed Conditions, Comment 5.  
<sup>128</sup> *See supra* note 30 (citing *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444).  
<sup>129</sup> Gallagher and Rigg, *supra* note 120.  
<sup>130</sup> *Id.*