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Uncontrollable Event Risks

HAZARDS

Events and acts beyond the control of parties can adversely affect their transaction. Such acts and events may be the work of natural forces or human agents. Such agents may be government agencies or private third parties, individuals, and entities. The actions of individuals and entities may be those of specific persons that directly affect parties to a transaction or those of many individuals and entities acting in the markets. Market changes are discussed in chapter 12.

Uncontrollable Events: Nature and Third Parties

Each incident, the occurrence or nonoccurrence of which is beyond the parties' control and affects their transaction, can be described using three variables:

- whether such incident was (1) the occurrence of an event that was not expected to or it was hoped would not occur, or (2) the nonoccurrence of an event that was expected to occur or it was hoped would occur,
- whether the incident affected (a) benefit realization or (b) task completion, and
- whether benefit realization or task completion was as a result of such incident partly or wholly (i) reduced, (ii) delayed, or (iii) made more expensive.

These variables can be combined to describe each uncontrollable incident. For example, a storm that delays a contractor's completion of a construction project beyond the scheduled date would be a (1)(b)(ii) scenario: an uncontrollable event that delays completion of a task. If additional cost is also the result, the scenario would be (1)(b)(ii) and (1)(b)(iii). Payment of a successor liability claim—a liability of the seller of a business that is automatically assumed by the buyer of that business—would be a (1)(a)(iii) scenario: realization of the value of the acquisition is made more expensive by the claim.

When task completion is impaired, partly or wholly, or delayed by an uncontrollable event, such incident can be further described using two additional variables:

- whether the task was intended to be completed for (A) the benefit of the party completing it or (B) the other party, and
- whether, in the case of (B), the effect of the event was to (I) constrain or otherwise impair performance or (II) to induce an obligor to choose between two adverse outcomes: performance and suffering or risking suffering a harm, on one hand, and not performing and avoiding that harm or risk, on the other.

These variables can be combined with the first three groups to describe each uncontrollable incident, with the result that 32 scenarios are possible. The storm example would be a (1)(b)(ii)(B)(I) scenario: the storm is an uncontrollable event that delays the contractor's performance (completion of a task for the other party's benefit is impaired). Understanding of all 32 scenarios will help to identify the different risk allocation devices needed to manage the different uncontrollable event hazards, though they are not all described in detail here.

Two other variables often stand out in the occurrence of uncontrollable events. These are

- whether the incident was the product of (1) natural forces or (2) human agency, and
- whether, if it was the product of human agency, the agency was (a) a private individual or (b) a governmental agency.

Where the different combinations of the first four variables may affect the choice of contractual device to manage the resulting risk, the last two variables do not. They help to understand the considerable range of uncontrollable events that can affect a transaction.

Events and Nonevents

An uncontrollable event is easily imagined. The words "act of God" conjure the image of a violent, natural event beyond the parties' control, such as an earthquake or an outbreak of thunder and lightning. What is less obvious is how nonoccurrence of an event can adversely affect a transaction. A transaction can be structured such that benefit realization or task completion can be achieved only if an uncontrollable event occurs. The passage of time without its occurrence results in such benefits not being realized or tasks not being completed as anticipated. An example is winning the lottery. Winning depends upon the occurrence of a highly improbable, uncontrolled event: drawing by the lottery of a sequence of numbers that match a participant's ticket. The risk to the lottery ticket buyer is that such event will not occur.

The following cases illustrate uncontrollable events that did not occur as expected, and as a result the transaction outcomes were also not as expected:

- *Chugach Electric Association v. Northern Corp.*[1]: A contractor agreed with a utility to repair the face of a dam using rock to be quarried from a specific source and stockpiled "for transport across Cooper Lake to the dam site when such lake is frozen to a sufficient depth to permit heavy vehicle traffic thereon."[2] When winter came, the contractor considered the ice too thin to traverse with heavy trucks, while the utility thought it sufficiently thick for work to continue. The contractor eventually attempted a crossing with two half-loaded trucks, but they broke through the ice and sank, resulting in the death of one driver. The utility then agreed the operation could not continue. The contractor terminated the contract.[3] The contractor's anticipated performance depended upon the occurrence of an event: the temperatures reaching their usual lows. The incident might also be recast as the occurrence of abnormally warm temperatures that prevented the formation of ice in its usual thickness.
- *Hensler v. Los Angeles*[4]: Paving work on runways at an airport operated by a city agency could not start until a state highway agency completed a new bypass road, enabling the state to stop using the old bypass road where the new runways would be located. When the new bypass had not been completed when expected, the city issued a change order deleting the work on the taxis, runways, and associated work. Eventually the bypass road was completed and the city let a new contract for the work to another contractor.[5] The contractor's performance depended upon the occurrence of an event: completion of the work on the bypass as anticipated. The incident might also be conceived as late completion by the state of the bypass road that prevented the city's work from starting when anticipated.
- *Wheelbrator Envirotech Operating Services Inc. v. Mass. Laborers Dist. Council Local 1144*[6]: A contractor contracted with a city to operate the city's water treatment plant and, at the same time, separately agreed with the labor union that represented the employees who worked at the plant that if the city agreed to let another contractor become the successor operator of the plant, that successor contractor would agree to the same terms to which the present contractor had agreed with the union. A successor contract was awarded to another operator, which refused to assume the contractor's union contract and negotiated a new contract with the union, with reduced benefits and wages. Performance by the contractor depended entirely upon the occurrence of an event: its successor's agreeing to the same terms with the union. The incident might also be viewed as the occurrence of an event: the union's agreeing to terms with the successor contractor that were less advantageous than those accepted by the contractor.
- *Wisconsin Electric Power Co. v. Union Pacific R.R. Co.*[7]: A railroad agreed to transport coal from a utility's mines in Colorado to its power plants in Wisconsin at two rates, one lower and the other higher. The latter was charged if the railroad could not reload its cars with iron ore in Minnesota for transportation to a steel plant in Utah on the return trip as a result of a force majeure event. The steel plant became bankrupt and stopped operating shortly after the contract was signed.[8] The incident might also be viewed as the occurrence of an event: the steel mill's bankruptcy, which prevented the carriage of the mill's ore from Minnesota to Utah.[9]

In the first two cases, performance could not begin until an event had occurred: the lake had frozen in *Chugach Electric Association*[10] and the bypass road had been completed in *Hensler*.[11] In *Wheelbrator Envirotech Operating Services Inc.*,[12] the contractor's performance could only be started and would then be completed when the successor contractor accepted the union's terms. In *Wisconsin Electric Power Co.*,[13] the steel mill's use of the railroad during the return journey triggered the lower rate. All five transactions were structured so that successful outcomes depended upon the occurrence of uncontrollable events. Those events did not occur, just as the numbers drawn in a lottery do not match those on the ticket purchased by the lottery participant.

The hazards in all five cases were transaction plans or structures that required for their successful outcomes the nonoccurrence of the events, upon the occurrence of which benefit realization or task completion depended. The cases illustrate the following hazards:

- nonoccurrence of an uncontrollable event (frozen lake in *Chugach Electric Association* and successor contractor's acceptance of union terms in *Wheelbrator Envirotech Operating Services Inc.*) prevents task completion (scenario (2)(b)(i)),
- nonoccurrence of an uncontrollable event (completion of the state bypass) delays task completion in *Hensler* (scenario (2)(b)(ii)), and
- nonoccurrence of an uncontrollable event makes the utility's task completion more expensive in *Wisconsin Electric Power Co.* (scenario (2)(b)(iii)).

Such hazards existed at contract formation and continued until they resulted in an unsuccessful outcome. They would have ceased had such events occurred. When the occurrence of an event causes the adverse outcome, the hazard does not exist at contract formation. They are only potential hazards in the transactions at that time.

Benefit Impairment

An uncontrollable event can reduce, delay, or destroy the value or utility a party expects to realize from a transaction or an item it expects to use to realize such value without directly affecting the obligor's performance that yields such value or utility (scenario (1)(a)(i)). It may also delay the realization of benefits (scenario (1)(a)(ii)) or make their realization more costly (scenario (1)(a)(iii)).

The following four cases illustrate scenario (1)(a)(i):

- *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*[14]: A licensee made Listerine for 75 years using a secret formula licensed under agreements made in 1881 and 1885. The licensee paid royalties to the licensor in excess of $1.5 million annually. In 1949, the formula was published in the *United States Pharmacopoia*, the *National Formulary*, and the *Journal of the American Medical Association*.

The disclosure directly impaired the value of the license to the licensee.[15] Because both the licensor and licensee could still perform their obligations—the licensor's continued permission to use the formula and the licensee's continued payment of royalties were unimpaired—the disclosure affected only the licensee's benefit. The case illustrates scenario (1)(a)(i) (uncontrollable event reduced value of formula to the licensee).

- *Felt v. McCarthy*[16]: A buyer purchased parcels of land with a note. He expected to develop the parcels because the area in which they were located had been designated for office and light industrial use. The county changed the zoning designation to wetlands.[17] The change impaired the value of the parcels to the buyer. The change did not affect the discharge of the parties' obligations: the seller had already completed the sale and the buyer could continue to pay the note. This case also illustrates scenario (1)(a)(i) (change in zoning reduced value of land to the buyer).
- *Uminous Neon, Inc. v. Parscale*[18]: A city began construction on the street on which a party's business was located, and as a result, her business declined. Separately, she had leased advertising signs located elsewhere and stopped paying rent because they served little immediate purpose while construction crimped her operations.[19] The street construction impaired the benefits of the billboard advertising contracts. The store operator could still pay rent for the signs and the sign owners could still allow her to use them for advertising. The value of that advertising diminished because the potential customers could not, or had to struggle to, reach her business. This case also illustrates scenario (1)(a)(i) (traffic detour on the street where the shop was located reduced value of billboard advertising elsewhere to the shop owner).
- *Wald v. Lenox Ave. & 140th St. Corp.*[20]: A landlord hired attorneys to apply for a government agency approval that would permit it to raise rents. The landlord agreed to pay the attorneys 50 percent of the increase in the rents for one year. At contract formation, the approval for which application was made was the only one required to increase rents. While the application was pending, a new ordinance was adopted that required the landlord to obtain an additional approval of another agency to increase rents. The change in law did not impair performance by either party: the attorney could continue with its efforts to obtain the first approval and the landlord could pay the agreed fee (when the second approval had been obtained). The nominal value of the benefit, the stated rent increase, remained the same. The case illustrates scenarios (1)(a)(ii) and (1)(a)(iii). The change in law added a task the landlord had to complete to realize those benefits, both delaying and increasing the costs of realizing the anticipated benefits.[21] The case does not illustrate scenario (1)(b)(ii)(A) or (1) (b)(iii)(A) because the second approval was an entirely new task the landlord had to complete, and not one modified by a change in law, to realize such benefits.

Task Impairment

A task that must be completed for a party to realize its benefits may be one the other party must complete, whether or not the other party is committed to completing it. It may also be one that the party itself must complete to realize its benefits, often but not always after the other party has completed its tasks. An uncontrollable event may make the completion of either such task as contemplated impossible, impractical, or infeasible (scenario (1)(b)(i)(B) or (1)(b)(i)(A)) or increase the time required (scenario (1)(b)(ii)(B) or (1)(b)(ii)(A)) or the costs to be incurred to complete it (scenario (1)(b)(iii)(B) or (1)(b)(iii)(A) (occurrence of an uncontrollable event prevents task completion)).

Following are two cases that illustrate scenario (1)(b)(i):

- *Taylor v. Taintor*[22]: An individual was arrested for grand larceny in Connecticut and was granted bail on condition that he appear in the Connecticut court. He returned to New York, where he was taken into custody and transferred to Maine, where he continued to be held in custody. As a result, he failed to appear before the Connecticut court and his bond was forfeited.[23] Neither he nor his sureties who had ensured his appearance before the Connecticut court could perform. This case illustrates scenario (1)(b)(i)(B): the restraint on the suspect physically prevented the sureties from delivering him to the Connecticut court as promised.
- *J.M. Rodriguez & Co. v. Moore-MacCormack Lines, Inc.*[24]: A shipment of cloves, loaded on board in Madagascar, were missing when the vessel was unloaded following its arrival in New York and a two-month delay due to a strike at the port.[25] The theft of the goods prevented the vessel from completing its performance. This case also illustrates scenario (1)(b)(i)(B): the theft physically prevented the vessel from delivering the cloves as promised.

The distinction between frustration and impossibility helps our understanding of the difference between the hazards in scenarios (1)(a), (1)(b)(i)(A), (1)(b)(ii)(A), and (1)(b)(iii)(A), on one hand, and (1)(b) (i)(B), (1)(b)(ii)(B), and (1)(b)(iii)(B), on the other. Frustration may apply where the purpose of the contract has been defeated or destroyed by a supervening event not reasonably anticipated at contract formation. Harm to a benefit may occur from an uncontrollable event even if it or the facts of the case fall short of one where frustration discharges performance. In none of the previous three cases where the anticipated benefits were impaired (*Warner-Lambert Pharmaceutical Co., Inc.*, *Felt,* and *Uminous Neon, Inc.*) was performance discharged by reason of frustration, even though value was impaired, substantially in the first two cases. All three such cases were (1)(a)(i) scenarios: uncontrollable events diminished the anticipated benefits. Impossibility and impracticability may apply where a supervening event makes performance physically impossible or commercially impractical. The hazard (scenario (1)(b)) may occur even if it or the facts of the case fall short of one where impossibility or impracticability discharge performance. In *J.M. Rodriguez & Co.*,[26] the theft impaired performance by the vessel. The relevant distinction between the first (scenarios (1)(a), (1)(b)(i)(A), (1)(b)(ii) (A), and (1)(b)(iii)(A)) and second ((1)(b)(i)(B), (1)(b)(ii)(B), and (1)(b)(iii)(B)) groups of scenarios is between events that impair benefit realization and completion of performance.

Increased Costs

An uncontrollable event may increase the costs of benefit realization or task completion. Such events include traditional *force majeure* events that disrupt benefit realization and task completion and any claim that might be made by a third party against one of the parties in relation to the transaction or events that occur in connection with it.

The following cases illustrate how expansive is the range of uncontrollable events that can increase a party's costs of benefit realization and task completion.

- *Rainbow Navigation, Inc. v. United States*[27]: A vessel carried goods to Iceland where unloading was delayed until a strike at the port ended. The vessel incurred costs while waiting for the strike to end it would not otherwise have incurred. The case illustrates a scenario (1)(b)(iii)(B) (additional costs incurred by party completing task for the benefit of the other party). This case is further summarized later in this chapter.[28]
- *City of Vernon v. City of Los Angeles*[29]: Los Angeles agreed, in a series of contracts beginning in 1909, to dispose of Vernon's sewage, in return for a number of payments, all of which Vernon paid. The contracts did not provide for their termination. Decades later, a state agency obtained a court order prohibiting Los Angeles from continuing to dispose of sewage in Santa Monica Bay. To comply with the order, Los Angeles had to construct a $41 million sewage treatment plant and spend $500,000 in annual operating costs. Los Angeles claimed Vernon should share these costs. If Los Angeles could not terminate the contract and had to bear the entire increase in costs, an uncontrollable event, the court order, would have considerably increased the costs of its performance of its contract with Vernon (scenario (1)(b)(iii)(B)(I)). For Vernon, which had to bear its share of the increased cost, notwithstanding that it paid Los Angeles in advance for the service, the court order increased its cost of performance, which it believed had been completed by previous payments (also scenario (1)(b)(iii)(B)(I)). The contract did not contemplate such additional costs.[30]
- *National Passenger Railway Corp. v. Atchison, Topeka & Santa Fe Railway Co.*[31]: Amtrak entered into contracts with various railroads to allow their employees and their employees' dependents who had received free or reduced-rate transportation on lines operated by Amtrak's predecessors before Amtrak began operation to continue to enjoy such benefits on the lines operated by Amtrak. Congress enacted a law that obligated the railroads to pay Amtrak for its costs in continuing to allow such railroad employees and dependents to enjoy such benefits.[32] For the railroads, the law imposed a new obligation to Amtrak and increased their cost of performance (scenario (1)(b)(iii)(B)(I)).
- *In re Grumman Olson Industries, Inc.*[33]: A truck parts manufacturer that was the subject of a bankruptcy proceeding obtained an order of the bankruptcy court approving the sale to an acquirer of substantially all its assets, free and clear of liens, encumbrances, "claims" and other "interests." The court's order specifically stated that the acquirer would not have any liability for claims against the manufacturer, including any successor liability claims. After the bankruptcy case was closed, an employee at another company, who was injured while driving a truck manufactured using a chassis supplied by the manufacturer before the bankruptcy case was filed, sued the manufacturer in state court. The employee amended the complaint to name the acquirer as an additional defendant. The acquirer was held to have assumed liability to the injured employee under successor liability principles. The combination of uncontrollable events was the employee accident and the court order holding the acquirer liable, and its liability to the employee was an additional cost incurred to realize the benefits of the acquisition (scenario (1)(a)(iii) (an uncontrollable event increases the costs incurred by an obligee to realize the anticipated benefits)).[34]
- *Brown v. Two Exchange Plaza Partners*[35]: An employee of a sub-subcontractor working on the atrium of a building was injured when the scaffold on which he was standing collapsed. The injured employee sued the building owner and general contractor; the general contractor filed a cross-claim against the scaffold subcontractor, the subcontractor hired to erect the walls and ceiling, and the sub-subcontractor of that subcontractor who was the employer of the injured worker. The trial court found that neither the scaffold contractor nor the injured worker's employer had been negligent or was liable to the general contractor but that the general contractor, who had not been negligent, was liable to the injured employee. The general contractor's liability to the injured employee added to the costs of its performance of its contract with the building owner. As such, the case illustrates a scenario (1)(b)(iii)(B)(I) (uncontrollable event causes an obligor's costs of performance to increase).

Impairment and Inducements to Choose

As the previous examples illustrate, an uncontrollable event can impair the value or utility of a benefit or prevent or delay or increase the costs of benefit realization or task completion. An event can also create conditions in which a party must choose between actions with paired adverse outcomes: performing and suffering an adverse result or not performing and avoiding that adverse result. The source of such event may be nature or a third party. The third party might be a private third party or government agency. All such events create (1)(b)(ii)(B)(II) scenarios (uncontrollable event compels choice between completion of task for other party's benefit while suffering adverse consequence and not completing such task while breaching a commitment to that party).

The severity of the pressure or compulsion such events create will vary widely from immediate threats of serious harm to mild approbation and might be plotted on a metaphorical scale or continuum to reflect their immediacy, certainty, and seriousness of the harm that could or will result from choosing to perform an obligation: on one end is a threat of immediate, certain serious injury to person, damage to property, or other loss, and on the other end is strong approbation. The severity of the pressure does not change the nature of the hazard; it is still a (1)(b) (i)(B)(II) scenario. The question the scale helps to frame is not what might be cast as a factual one—when does coercion or pressure from such events overwhelm a party's ability or willingness to perform—but a risk allocation question: to what extent is a party willing to assume responsibility for losses that result from a choice between foregoing a benefit or not performing an obligation and avoiding an adverse outcome, on one hand, and realizing a benefit or performing and risking the occurrence of an adverse outcome, on the other. Understanding the degrees of immediacy, certainty, and gravity of coercion and pressure is essential to identifying and managing certain of the risks, what will be referred to as duress risks, created by potential uncontrollable events.

The following examples illustrate such threats in the order of the pressure to breach a commitment to complete a task for the other party's to avoid an adverse result:

- *Opera Co. of Boston, Inc. v. Wolf Trap Foundation for the Performing Arts*[36]: A foundation hired an opera company to give performances on four days at a center located in a national park. Shortly before the performance was to begin on the second day, a thunderstorm caused an electrical outage in the park that could not be corrected in time and prompted the park service to recommend cancelation of the concert to enable patrons to leave the park safely and to prevent others from coming; the foundation canceled the performance. The foundation faced a choice: to go ahead with the concert, thus performing its obligation to the opera company but risking physical harm to its patrons, or canceling the concert and avoiding that risk.[37]

- *Kronprinzessin Cecile* [38]: The master of a German vessel carrying a shipment of gold to a port in England learned en route that Austria had declared war on Serbia and Germany and Britain had begun preparations for war. The master received orders from the ship's owners to return to New York, as he did. The only exception in the bill of lading was for "arrest and restraint of princes, rulers or people." The declaration of war by Austria on Germany and Serbia, and England's preparing for war, forced a choice between continuing to the port as obligated, with the risk of arrest once there, and returning to New York and not completing performance.[39] The threat was loss of property, whereas in *Opera Co. of Boston, Inc.*, the threat was physical harm.
- *Kolodin v. Valenti*[40]: A family court ordered two singers, who had collaborated professionally and had an intimate relationship that had badly soured, to have no contact with each other, other than through their counsel. Kolodin, the female singer, sued for rescission of her recording and management contracts with the company owned and controlled by the male singer, Valenti. The court order had not automatically voided Kolodin's contract. Rather, it forced her to choose between performing her contractual obligation to the company and breaching the court order or complying with the court order and breaching the contract.[41]
- *MG Marketing & Refining, Inc. v. Knight Enterprises, Inc.*[42]: A government agency challenged the legality of certain contracts to buy petroleum products. In response, the seller entered into a consent decree, agreeing to pay a fine and to advise its customers with whom it contracted that such contracts were illegal. The consent decree did not void such contracts, however. The consent decree forced the seller to choose between continuing such sales as already committed and violating the consent decree or complying with the consent decree and breaching commitments to its buyers. The threat or compulsion was arguably weaker here than in *Kolodin*,[43] where the order was by the court.[44]
- *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*[45]: McDonnell contracted to deliver new aircraft to Eastern. McDonnell also contracted with the government to deliver military aircraft but lacked sufficient resources to meet both the delivery schedule requested by the government and the schedule agreed with Eastern. The government had authority under legislation to order McDonnell to give priority to its orders for military aircraft over production of civilian aircraft. Instead of so designating its orders, the government relied upon an understanding with McDonnell that such orders would be given priority. The aircraft manufactured for Eastern were delivered on average 80 days late. The government's request for priority had McDonnell choose between complying with that request and breaching its commitment to Eastern or not giving priority to the government's orders and performing its obligations to Eastern. Because no formal order was issued, the threat the government request created was seemingly weaker than the orders in *Kolodin*[46] and *MG Marketing & Refining, Inc.*,[47] though the government had the authority to issue orders if McDonnell had not cooperated.
- *Mishara Construction Co. v. Transmixed Concrete Corp.*[48]: A subcontractor who agreed to supply the concrete requirements of a construction project refused for a month to cross union picket lines to deliver the concrete. The union picket line forced the supplier to choose between fulfilling its commitment to the contractor and antagonizing the union and employees and accepting the union and employees' demands and breaching the contract with the contractor.[49] The report of the case does not indicate if the picket line threatened the use of physical force against or simply demanded moral support from those who had reason to cross it.
- *International Minerals and Chemical Corp. v. Llano, Inc.*[50]: A potash mine and processing facility operator agreed to purchase its gas requirements from a gas supplier. The contract also obligated the operator to pay for a minimum quantity of gas if not it did not purchase such minimum, subject to excused failures to perform due to events specified in the force majeure clause and provided the minimum purchase requirements would be adjusted if either the seller was unable to deliver or the buyer unable to receive gas "for any reason beyond the reasonable control of the parties." The state adopted environmental regulations that would, two years after the ten-year contract term expired, require the operator to reduce its operations to a level below the minimum quantity of gas then being purchased under the contract. The operator negotiated a compliance schedule with the government agency that resulted in its reducing its operations and its gas requirements below the minimum for the final one and one-half years of the contract term (more than two years before compliance with the new law was required). The new law inspired, rather than compelled, a choice between compliance with the standards in the new law not yet effective and breaching the contract with the gas supplier or continuing compliance with the then effective standards and fulfilling its commitment to the supplier.[51]
- *Lyondell-CITGO Refining, LP. v. Petroleos de Venezuela, S.A.*[52]: Members of the Organization of Petroleum Exporting Countries agreed to voluntary reductions of their crude oil exports. Venezuela, one such member, directed the state-owned oil company to limit the export of Venezuelan product. As a result, that company did not deliver the agreed quantity of crude to its buyer.[53] A nonbinding decision by members of the OPEC to reduce their oil production, the decision by Venezuela to reduce its exports, and direction to the state-owned oil company compelled that company to choose between performing its commitment to its buyer, ignoring directions from the energy ministry, and dishonoring Venezuela's nonbinding commitment to OPEC, on one hand, and breaching its commitment to its buyer, complying with directions from the oil ministry, and honoring Venezuela's nonbinding commitment to OPEC, on the other.[54] The compulsion here was moral, as the supplier was not subject to a threat of penalty for supplying as it committed to do so.

The first three cases illustrate strong pressure or compulsion on the obligors to deviate from their contractual commitments: the risk of immediate serious injury to patrons, the risk of high probability of immediate arrest of the vessel, and the high risk of violating a court order, in *Opera Co. of Boston, Inc.*,[55] *Kronprinzessin Cecile*[56] and *Kolodin*,[57] respectively. The pressure is less severe in the other cases. In *International Minerals and Chemical Corp.*[58] the pressure, if it can be called that, was the moral approbation that came with early compliance with the standards in a new law.

The hazards in these cases are the events that press or prompt a party to choose between performing and risking the occurrence of adverse results that will likely flow from performing, on one hand, and not performing and avoiding such adverse results, on the other. Unlike other uncontrollable events that impair benefit realization and task completion, uncontrollable events that affect choices leave an element of volitional decision-making, however severe the compulsion and unpalatable the choices. They do not impair a party's ability to enjoy benefits or complete a task, unlike the other hazards previously described.

Natural Forces and Human Agency

The source of an uncontrollable event may be nature or human agency. Two of the cases previously summarized in this chapter illustrate the operation of natural forces: *Chugach Electric Association*,[59] where the temperatures failed to drop to their anticipated lows, and *Opera Co. of Boston, Inc.*,[60] where lightning shut down the use of electricity in the park where the concert was to be held. In all the other cases, human agents were the sources of the uncontrollable events.

Government Agencies and Private Agents

The human agents may be individuals, privately owned or controlled entities, or government departments, bureaus, ministries, organs, and other agencies (referred to as government agencies). The actions of private third parties are illustrated in four of the cases previously summarized: *Wisconsin Electric Power Co.*,[61] where the steel mill's bankruptcy resulted in the utility paying a higher rate; *J.M. Rodriguez & Co., Inc.*,[62] where a thief stole the cargo; and *Mishara Construction Co., Inc.*,[63] where the strikers deterred a supplier from crossing a picket line. The other cases illustrate actions by international, national, state, and local government agencies. *Wheelbrator Envirotech Operating Services Inc.*[64] illustrates combined private entity and government agency actions: the successor contractor and union were private entities, and the city that hired the successor contractor was a government agency.

A government agency that is a party to a transaction is not an uncontrollable third party as it otherwise would be. As a party, it controls all its acts and omissions and is capable of creating all the risks to the other party that any nongovernmental agency party may, as a counterparty, create: lack and loss of will and ability to perform. For example, when a government agency agreed with a foreign investor that it would not impair certain benefits of an investment, its enactment of a law that authorized certain government agencies to take actions inconsistent with that agreement repudiated that agreement, much as any counterparty might repudiate a contract.[65] A change in law or other action by a legislature may be outside the control of a government agency that is party to an agreement; to that extent the agency is like any other private party whose performance of its obligations may be impaired by governmental actions like any private party.[66] When a government agency is not a party to a contract, it is like any private third party who might legally or illegally interfere with a transaction, though by virtue of being cloaked with governmental authority it has a greater variety of superior rights that when invoked can impair a transaction. We are here concerned only with a government agency's role as such a third party to a transaction.

Political Risk

Political risk is sometimes broadly understood to refer to the risk that a government agency's acts or omissions will impair benefit realization or task completion. It thus encompasses all types of acts and omissions a government can take or not take and all conceivable adverse outcomes. It also has a narrower meaning, limited to four specific types of interference by a government with a foreign-owned business or investment: nationalization or expropriation by one country's government of the assets in that country belonging to an investor domiciled in another country, without due process or appropriate compensation; the imposition or increase in the restrictions on the conversion of a currency in a country into the currency of another country or on the transfer of a currency out of a country; disturbances that affect task completion and benefit realization, ranging from war to sabotage, including civil war and terrorism; and repudiation by a government of an investment contract with a foreign investor.

A party engaging in a transaction with a foreign-owned enterprise located in an area where the enterprise should evaluate political risks should consider such risks as relevant to the enterprise's willingness and ability to perform. Expropriation of the enterprise's assets may leave it unable to perform its obligations to the party. Assumption by a government of control of management or operations of the foreign-owned enterprise may increase a party's burdens and cost of performance. The imposition or increase in restrictions on the conversion of one country's currency into another's or on the transfer of a currency out of a country may interfere with payments by such enterprise to the party. Repudiation by a government of its investment contract with a foreign-owned enterprise may impair its financial condition or ability to perform its contract with the party. Political risks are relevant to a transaction to the extent they are risks to one of the parties.

Oversight, etc.

What was said previously about task and benefit oversight, rejection, and uncertainty, and about information and assumption risks (the use of bad information, the bad use of good information, and the making of bad assumptions), can be repeated for the uncontrollable events previously described. Just as it may overlook or reject a benefit or task, a party can overlook or reject as relevant to its transaction potential uncontrollable events; the oversight or rejection leaves open which party is responsible for the losses that result from such events. In the textbook English case *Taylor v. Caldwell*,[67] where a music hall to be used by a renter was destroyed by a fire after contract formation but before such use was to begin, Justice Colin Blackburn observed at the outset of his opinion that "[t]he parties, when framing their agreement, evidently had not present in their minds the possibility of such a disaster. . . ."[68] The case illustrates oversight of a possible contingency. Another example is *Chic Organization, Ltd.*,[69] where the record producer's attorney acknowledged he had not asked the counterparty, the record company, about Diana Ross's contract because "it didn't even occur to me. . . . She started as a child and like Stevie Wonder and all the other Motown people out of the original Motown and everyone assumed it was going on forever."[70] An example of contingency rejection, where at contract formation a party recognized a possible contingency but decided to proceed in the face of the risk of its occurrence, is *In re M&M Transportation Co.*,[71] where rights to operate as motor carriers granted by a government agency that bidders agreed to buy became worthless before the sale closed because legislation made such rights more freely available. The contingency, deregulation, was not a surprise, however, for the bidders. The bankruptcy court judge said of the bidders, "That defendants chose to disbelieve or to dismiss the possibility as a serious threat was a personal assessment. That defendants bid as they did with knowledge of a potential deregulation was a matter of their business judgment."[72] Another example of contingency rejection is *Alternative Thinking Systems, Inc. v. Simon & Schuster*,[73] where a publisher recognized the possibility that events might adversely affect the value of the work, proposed including in the contract a clause that provided the publisher's obligation to publish was discharged if "supervening events or circumstances since the date of this agreement have, in the sole judgment of the Publisher, materially adversely changed the economic expectations of the Publisher in respect to the Literary Work at the time of the making of this agreement,"[74] but accepted the author's rejection of the clause, thus leaving open the allocation of responsibility for the losses that could flow from such events.[75] Uncertainty concerning a contingency will include not only the nature of such an event and the severity of its consequences on benefit realization and task completion but also, because it is always a future event, the probability of its occurrence. Such risks are referred to as contingency oversight, rejection, and uncertainty risks.

ACTS OF GOD AND THIRD PARTIES RISK MANAGEMENT

Diligence

Diligence on potential uncontrollable events has several objectives: to identify such events, to forecast the probability of their occurrence, to assess the likely damage to a transaction upon their occurrence, to list and evaluate the measures that might mitigate their occurrence and the losses that could result from their occurrence, to identify third parties willing to insure the parties against such losses, and to list and evaluate measures to allocate responsibility for the risk of their occurrence as between the parties to the transaction. It is beyond the scope of this book to explain the diligence that should be undertaken on uncontrollable events in any specific transaction or type of transaction.

Uncontrollable Event Risk Allocation

Parties do not have a blank slate when contracting for the allocation of responsibility for uncontrollable event risks. A commitment to complete a task includes an assumption of responsibility for the risk that uncontrollable events may interfere therewith. In certain conditions, the commitment is overridden by the legal principles of unilateral and mutual mistake, supervening impossibility and impracticability, and frustration of purpose; when applicable, performance is discharged. The risk allocation implied by a commitment and such legal principles can be modified by express contractual terms that stipulate when uncontrollable events excuse performance.

The principal contractual terms that are used most often to expressly allocate responsibility for such risks are

- obligor covenants, representations, and warranties,
- limited scope of commitments,
- absolute obligations,
- conditions precedent and subsequent,
- force majeure clauses,
- indemnities,
- third-party covenants and indemnities, and
- "reopeners."

Obligor Covenants and Warranties

Commitments made in certain circumstances implicitly preclude discharge of performance by reason of the impossibility and impracticability defenses. A commitment to cause an uncontrollable event to occur by its terms will usually preclude any claim that failure to perform should be excused because the occurrence of the event was beyond its control. A commitment to cause a third party to act or not act in a certain manner likewise seemingly precludes any claim that causing the third party to so act was impossible. A commitment to complete a task that cannot be completed without the occurrence of an uncontrollable event or act of a third party not controlled by either party similarly should preclude any defense that the event or third party was uncontrollable. These are scenarios where an obligor lacks control over the completion of a task (or perform a covenant) for the benefit of the other party. *Wheelbrator Envirotech Operating Services Inc*.[76] is an example: the contractor covenanted that its successor would agree to the same terms with the union to which it had agreed, even though it had no control over its successor's decisions. It was precluded from claiming impossibility.[77] Because not all cases may be so clear that an obligor has committed to do the impossible, the implied exclusion of impossibility and impracticability may not be a foregone conclusion.

In principle, a representation or warranty could achieve the same result as a covenant: instead of covenanting to perform or cause the occurrence of an uncontrollable event or a third party to act or not act in a certain way, a warrantor could represent or warrant that such event will or will not occur or a third party will or will not act, as represented or warranted, and thereby assume responsibility for the occurrence of the event represented or warranted not to occur or the nonoccurrence of an event warranted to occur and thereby implicitly waive the supervening impossibility and impracticability defenses.

Chugach Electric Association[78] illustrates the strength and weakness of an allocation of responsibility for uncontrollable event risk through implied warranties. At contract formation, when the parties agreed to use the ice haul method, neither party warranted to the other the method was workable. Later, when the contractor insisted the ice haul method was impossible and the utility insisted that it be used, the utility impliedly warranted it was possible as if stated in a specification.[79] The utility thereby assumed responsibility for the risk the ice haul method was impossible. If, however, the contractor knew the ice haul method was impossible, it could not have relied upon the warranty and would have shared the risk with the utility. Whether the contractor had such knowledge was a question of fact, the answer to which was highly contested. While covenants to do the impossible and warranties that the impossible can be done allocate responsibility for the risk of the occurrence or nonoccurrence of an uncontrollable event, the effectiveness of such allocation may be challenged, depending upon the facts of the case. The use of express warranties more clearly states and affirms the implicit allocation of responsibility for a risk to a warrantor.

Commitment Scope

If a task must be completed by one party for benefits to be realized, responsibility for completion of that task must be assumed by one or both parties. Responsibility can be assumed by the party who expects to realize the benefit or by the other party. Avoiding responsibility for completion of a task does not make either the task or responsibility disappear; it shifts responsibility for the resulting losses to the other side of the ledger, so to speak. Adding to the list of tasks an obligor is committed to complete (for the benefit of the other party) thus adds to its responsibility the losses that result from uncontrollable events that prevent the completion of such tasks (scenarios (1)(b)(i), (ii), and (iii) and (2)(b)(i), (ii), and (iii) (occurrence or nonoccurrence of an uncontrollable event impairs, delays, or increases the cost of task completion)), in the absence of agreement otherwise and subject to the doctrines of unilateral and mutual mistake and supervening impossibility and frustration. Conversely, omitting tasks from the obligor's list excludes from its responsibility the losses that result from such tasks not being completed due to such events. Responsibility for losses that result from uncontrollable events that affect task completion can thus be allocated by designating responsibility for completion of such tasks.

The following cases illustrate this use of commitments:

- *Badhwar v. Colorado Fuel and Iron Corp*.[80]: A seller sold a shipment of caustic soda to a buyer on terms that deemed the goods delivered when loaded on board the vessel once the bills of lading and other documents had been delivered to the buyer. The cargo was loaded on board the vessel. The documents were delivered to the buyer's bank five days later. In the meantime, the day after the cargo was loaded, the vessel's crew went on strike, as ordered by the union, with the result the shipment could not be unloaded or the vessel sailed. The vessel arrived at its destination three months late, during which time the price of caustic soda had dropped. If, in addition to loading the goods on board the vessel and delivering the bills of lading and other documents to the buyer, the seller had to choose a vessel whose crew would not join the strike, as the buyer claimed, responsibility for the risk of the strike remained with the seller. As the seller successfully claimed, its tasks were limited to loading the goods on board a vessel whose crew had not declared they would strike and delivering the documents to the buyer; thus, responsibility for the risk of delay caused by the strike had been assumed by the buyer.[81] The case illustrates how defining a party's commitment to complete tasks limits its responsibility for losses caused by uncontrollable events that impair the completion of those and other relevant tasks (scenario (1)(b)(ii)(B)(I)).
- *Swift Canadian Co., Ltd. v. Banet*[82]: A seller located in Toronto agreed to sell lamb pelts to a buyer located in Philadelphia, free on board (FOB) Toronto. The contract included a note that shipment would be "Frankford Via: Buffalo-Penna. R. R. to Broad & Washington Ave. Freight Sta. Penna. R. R. Delivery." The contract also provided that neither party was to be liable for "orders or acts of any government or governmental agency." Another provision stated that "when pelts are sold FOB seller's plant title and risk of loss shall pass to buyer when product is loaded on cars at seller's plant." After the contract formation, the US government banned the importation of such pelts. The seller offered to load the pelts on board rail cars destined for Philadelphia; the buyer refused to accept the offer. The uncontrollable event was a change of law in the buyer's country after contract formation that made illegal its importation of the pelts it has committed to buy from a seller located in a country where the sale was legal. Responsibility for the risk of such a change in law would have been assumed by the seller or both parties if it had to deliver the goods at its facility on a rail car that could legally carry and deliver them to the buyer in Pennsylvania. The seller would have been unable to perform, and either party could have terminated. Such risk would also have been shared if the buyer could have terminated because the pelts lost value because they could not be imported into the United States. The buyer assumed responsibility for that risk because, as the seller successfully claimed, the seller had no obligation to deliver the goods in the United States and the buyer had no obligation to the seller to import them into the United States. If the seller's commitment to deliver the goods at its facility was unaffected by the change of law, then the buyer had no commitment to import the goods. It had to do so to realize the benefits of the purchase, but the realization of that benefit had been blocked by the change of law.[83] The case illustrates how an obligor by limiting the tasks it must complete avoids responsibility for uncontrollable events that impair other tasks, which become tasks the obligee had to complete to realize its benefits (scenario (1)(b)(i)(A) (uncontrollable event impairs the completion of a task an obligee must complete to realize a benefit)).

Absolute Obligations

A party can expressly assume responsibility for all losses that result from impairment of its anticipated benefits and task completion by the occurrence of an uncontrollable event. Its obligation to complete a task is stated to be absolute and unconditional, whatever the uncontrollable events that occur. In such instances, an obligor is liable for its failure to perform even when an act of God or a third party makes performance impossible or impractical. This is the case even when performance is illegal due to a change in law, though the obligor is not expected to violate the law. Similarly, an obligee is liable for its failure to perform its obligations even when an uncontrollable event destroys the value or utility of its anticipated benefits. An obligor assumes responsibility for all risks and insures the obligee against losses incurred by the latter upon the happening of nearly all uncontrollable events that affect the former's performance and the latter's benefits.

Following are two cases that illustrate terms that successfully and unsuccessfully created absolute obligations:

- *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd*.[84]: A Chinese joint venture constructed a toll road in China. It received the funds to pay its construction costs from its parent company, which received its funds from its parent, which issued bonds to raise the capital. The joint venture promised to pay its Hong Kong parent a minimum return on its investment, which promise assured the bond holders of repayment of the bonds. Later, a Chinese regulatory authority strengthened and increased its enforcement of the prohibition against such guarantees and the transfer of foreign currency out of the country to pay the same. The joint venture sought and was refused approval to remit foreign currency from China to pay the guaranteed return to its investor. The bond issuer claimed the regulatory change made payment of the bonds impossible. The indenture under which the bonds were issued stated a default occurred when any of the specified events of default occurred, "whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body."[85] The clause was modeled on a provision in a model indenture intended to exclude the force majeure and impossibility defenses.[86] If the clause did not eliminate the defense of impossibility, as the issuer claimed, the bond holders had assumed responsibility for the risk that payments required to be made under the indenture could become illegal under Chinese law. As the indenture trustee successfully claimed, however, the clause eliminated the defense of impossibility; the issuer had assumed responsibility for the risk that any of the payments required to be made under the indenture would become illegal.[87]

- *New York v. Long Island Airports Limousine Service Corp.*[88]: Long Island Airports Limousine Service (LIALS) entered into a franchise agreement with the city, pursuant to which LIALS was permitted to operate its omnibus route therein, and agreed to pay a franchise fee. The franchise agreement stated LIALS would pay all the amounts it was obligated to pay under a franchise agreement in the event such agreement was terminated. Changes in state law made the city's agreement to the operation of the limousine service in the city unnecessary. The city claimed LIALS was still obligated to pay the fee under the franchise agreement. If the clause was effective, as the city claimed, LIALS assumed responsibility for the risk that a change in law would destroy the value of the benefits of the franchise agreement. The clause was ineffective, however, as LIALS successfully claimed; it thus failed to allocate to LIALS responsibility for the risk that the license issued by the city would cease to have any benefit to LIALS.[89]

Conditions Precedent and Subsequent

A condition precedent or subsequent may be used to allocate to both parties any of the risks previously described in this chapter. A condition precedent can state that an obligor has no obligation to perform until an event that must occur has occurred or an event that must not occur has not occurred. Because the condition must be satisfied for the obligation to become effective, the failure of such a condition should allow the obligor to terminate the contract, in which event each party is responsible for its own losses, unless otherwise specified in the contract. The risk that the lake would not be sufficiently frozen in the winter in *Chugach Electric Association*[90] could have been allocated by expressly conditioning the contractor's obligation to cross the lake upon the lake's being frozen to an agreed thickness or the average daily temperatures remaining at or below an agreed level for a certain period. Responsibility for the risk of delay and additional costs would not have thereby been allocated to the utility or the contractor. Additional terms would have been required, the absence of which would have left the parties sharing the risk: each would have been entitled to suspend or terminate, each bearing the extent of its losses. In *Hensler*,[91] responsibility for the risk the state bypass road would not be completed when anticipated could have been allocated by an express condition that such road be completed by a date certain after which each party would have been entitled to terminate the contract. In each case, the express condition would have had the parties share responsibility for the risk, as each would have had to bear its own losses without recourse against the other. A condition subsequent can state that an obligor may suspend, terminate, or reopen the negotiation of the terms of its obligation to perform upon the occurrence of an event that must not occur or upon the nonoccurrence of an event that must occur by a date certain. A condition subsequent could have allocated responsibility for the risk in the textbook case *Taylor v. Caldwell*,[92] had the risk been identified before contract formation, as both parties would have been relieved of their obligations as a result of destruction of the building; responsibility for the risk of the event would have been shared. The satisfaction of such condition discharges such obligation and leaves each party to be responsible for its own losses, unless specified otherwise in the contract. The contract can require that one party pay the other upon termination, whether the failed condition was precedent or subsequent, as compensation for the latter's cost and lost opportunity.[93]

Force Majeure Clauses

A force majeure clause is a specialized condition subsequent. Its application is triggered by the occurrence after contract formation of one or more events specified in the clause, usually events beyond the reasonable control of the party affected thereby. The clause links such events to adverse outcomes, usually the failure by the affected party to perform its obligations under the contract. The clause permits the affected party to delay, suspend, or terminate further fulfillment of commitments, as stated in the clause. It may also entitle the affected party to compensation for its losses resulting from such event, again as stated in the clause. Such a clause may be as narrow or broad as the parties agree.

Nonoccurrences. A force majeure clause will not ordinarily be triggered by or apply to the nonoccurrence of an event that must occur by the anticipated time (scenarios (2)(b)(i), (ii), and (iii) (nonoccurrence of an event impairs, delays, or increases the cost of task completion)). A typical force majeure clause applies to events that actually occur and adversely affect performance. The nonoccurrence of an event has a different result: performance is not enabled because a circumstance that must exist never comes into existence. The appropriate risk allocation device for the nonoccurrence of an event that must occur is a condition precedent.

Still, the line between a nonoccurrence of an event and an event will not always be an obvious one, and as previously discussed, a nonoccurrence might be perceived of as an event. For example, unusually warm weather kept a lake from freezing instead of the lake failed to freeze. The nonoccurrence is thereby converted into an occurrence, with the result that a nonoccurrence and an occurrence are treated the same.

Hensler[94] illustrates a blurring of the distinction between occurrences and nonoccurrences of events. The contractor could not begin work under its contract with the city until the state's work near the site was completed, and the contract entitled the contractor to reimbursement for its extra costs if it was "ordered by the engineer, in writing, to suspend work for some unforeseen cause not provided for in the . . . contract . . . and over which the contractor has no control."[95] The court held the clause permitted the city to delay the contractor's beginning its work if the state's work was not completed by the agreed date. The city was obligated to reimburse the contractor for its costs and to permit it to begin work when the "when the obstacle to the progress of the work was removed."[96] That "obstacle" was noncompletion by the state of its bypass road project.

Impairment of Benefits. The application of a force majeure clause will not ordinarily be triggered by or apply to the impairment of benefits (scenario (1)(a)) or the completion of tasks that must be completed by a party for its own benefit (scenarios (1)(b)(i)(A), (1)(b)(ii)(A) and (1) (b)(iii)(A) (uncontrolled event impairs, delays, or increases the cost of completion by an obligee of a task that contributes to its realization of anticipated benefits)). First, as previously described, an uncontrollable event may directly impair the value or utility of a benefit. For example, cancelation of a parade destroys the value and utility of the use of a room that has been rented to view it, but the cancelation, the third-party act that directly interferes with benefit realization, does not affect the ability of the obligor or obligee to perform their respective obligations; such third-party interference changes a circumstance, the existence of which would contribute to yielding or yield value when the task (the landlord's letting of the room) was completed. Second, an uncontrollable event may impair an obligee's ability to complete a task that must be completed after the obligor completes all of its tasks, and when the obligee's task is completed, it will yield an anticipated benefit. In this instance the completion by the obligee of such a task may be delayed, prevented, or made more costly by an uncontrollable event, just as completion of a task by an obligor for the obligee's benefit might be. The difference between this benefit impairment and uncontrollable event task impairment is that the task to be completed by the obligee is for its, and not the other party's, benefit; it has no commitment to the obligor to complete the task and no obligation, the failure of which to perform is to be excused. Both parties remain capable of performing their obligations to each other, but the obligee is unable to complete the tasks that will yield value. This link—between the obligee's task completion and value creation—is what is impaired by the third-party act and distinguishes it from the link between third-party disruption and the obligor's task completion. A force majeure clause will usually be inapplicable to uncontrollable events that directly impair benefit realization or the completion by the obligee of a task that will yield an anticipated benefit.

The following are illustrative of the inapplicability of force majeure clauses to uncontrollable event benefit impairment risks:

- *North Indiana Public Service Co. v. Carbon County Coal Co.*[97]: An Indiana electric utility was able to buy electricity from other electricity generating plants at rates lower than its costs of producing its own electricity because it purchased coal at high prices under a long-term contract from a Wyoming coal mine operator. The state regulator prohibited the utility from charging its customers rates higher than those calculated based on purchasing electricity from other plants. The utility terminated the coal purchase contract. It invoked the force majeure clause and claimed it could stop buying coal "for any cause beyond [its] reasonable control . . . including but not limited to . . . orders or acts of civil . . . authority . . . which wholly or partly prevent . . . the utilizing . . . of the coal."[98] Had the order prohibited the purchase of coal, as the utility claimed, its performance would have been prevented and been subject to the force majeure clause. Instead, as the coal supplier successfully claimed, the utility was still able to buy and use the coal.[99] What it could not do, and what was a task it had to complete to realize the full benefits of its coal purchases, was to increase the rates it charged its customers to recoup those costs. The force majeure clause was not triggered by the order and thus did not allocate to the coal seller responsibility for the risk that an order would prohibit the utility from passing through its higher costs of coal to its customers.[100] The case was scenario (1)(b)(i)(A) (I): an uncontrollable event prevented the utility (obligee) from completing a task (raising its rates) that would help to realize its benefit (profits from sales of electricity).

- *National Association of Postmaster of the U.S. v. Grand Hyatt Washington*[101]: An arbitrator resolved a dispute under a collective bargaining agreement between postal workers and the United States Postal Service by ordering the rural mail count—an exercise that measures the volume of mail delivered on rural mail routes and affects compensation of rural mail carriers—to be done on certain dates. These were also the same as or close to or the dates scheduled for the annual leadership conferences of the National Association of Postmasters of the United States (NAPUS), which had already booked blocks of rooms and amenities at the Grand Hyatt for the three years after the first conference dates covered by the order. Because a substantial number of the postmasters would be unable to attend the conference, NAPUS terminated the contract with the Grand Hyatt.[102] The force majeure clause allowed either party to terminate if "acts of God, war, government regulation, terrorism, disaster, strikes, civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control . . . materially affects a party's ability to perform its obligations under this Contract."[103] Had the order prevented NAPUS from continuing with organizing the conference, as NAPUS claimed, it would have "materially affected" NAPUS's "ability to perform its obligations under the [c]ontract." By making it inconvenient for the postmasters to attend the conference, the order drained away the conference attendees but did not affect NAPUS's ability to perform, as Hyatt claimed. NAPUS's benefits were impaired. The force majeure clause was not triggered by the order, and it did not allocate to Hyatt responsibility for the risk in question: that such an order would impair the value of the bookings to NAPUS.[104] The scenario was (1)(a)(i): the order reduced the potential number of postmasters who would likely attend the NAPUS conferences.

Impaired Performance. A force majeure clause can allocate responsibility for the risks that an uncontrollable event will delay and impair an obligor's performance, that is, completion of a task intended to benefit the other party (scenarios (1)(b)(i)(B)(I) and (1)(b)(ii)(B)(I)). When a force majeure clause excuses delayed performance, the clause allocates to the obligee all or part of the responsibility for the risk performance will be delayed due to a force majeure event. Additional costs of performance are ignored for the moment. When a force majeure clause permits termination of the contract as a result of prolonged delayed performance or irreversibly impaired performance, the clause allocates responsibility for the risk of such delayed or impaired performance to both parties. The obligor is not liable to the obligee for its delayed or otherwise impaired performance but must cover its own losses, in the absence of terms to the contrary.

Force majeure clauses often vary the list of uncontrollable events that will excuse late or no performance. First, the more expansive the list of uncontrollable events included in the clause, the greater is the sharing of responsibility for uncontrollable event performance impairment risks; the narrower the list, the greater is the responsibility assumed by the obligor in the absence of other terms allocating such risks.[105] Such events may be described in detail: acts of God, mobs, public enemies, governmental agencies, and the like.[106] They may also be described in broad expansive terms that purport to cover all sources except those excluded: all events and actions "beyond the control" or "reasonable control" of the obligor.[107] The more detailed clause runs the risk of omitting one or more specific sources of disruption,[108] whereas the latter runs the risk of uncertainty about what it covers. The two approaches, however, may be combined.

Force majeure clauses vary little on the wording of the disruptive effects on the obligor's ability to perform that must occur for performance to be excused. The typical wording requires that the obligor be prevented or unable to perform as a result of the occurrence of the qualifying uncontrollable event. Yet such clauses are often expected to apply to two distinct types of disruptive events or hazards: first, interference or impairment of an obligor's ability to perform or performance (scenario (1)(b)(i)(B)(I)) and, second, events that compel an obligor to choose between performing and incurring adverse consequences, on one hand, and not performing and avoiding those consequences, on the other, and the obligor is pressured to make the latter choice (scenario (1)(b)(i) (B)(II)). *J.M. Rodriguez & Co.*,[109] where the cargo was stolen from the vessel, is an example of the former, an act that impairs performance. *Opera Company of Boston, Inc. v. Wolf Trap Foundation for the Performing Arts*,[110] *Eastern Airlines, Inc.*,[111] *International Minerals and Chemical Corp*.[112] and *Lyondell-CITGO Refining, LP*[113] illustrate the latter type: in each case, the obligor had to make a version of the choice previously described. The force majeure clause thus framed the question in each case artificially— whether the pressure on the obligor to choose not to perform overwhelmed its ability to perform. The answer is inevitably mixed with whether the choice was morally and socially the right one.[114] Such an approach creates uncertainty about how the force majeure clause has allocated responsibility for uncontrollable event risk since the application of a clause may vary with specific choices and the circumstances in which they are made.

Additional Performance Costs. An uncontrollable event may increase an obligor's costs of performance (scenario (1)(b)(iii)(B)). Such event may or may not affect an obligor's ability to perform. The increase in a party's costs of benefit realization and task completion is separate and distinct from the impairment and delay of performance. A force majeure clause that excuses an obligor's failure to perform or delay in its performance does not thereby entitle an obligor to compensation from the obligee for its additional costs; such a clause only allocates responsibility for losses caused by such delay or failure to perform.

Contractual terms that allocate responsibility for such increased costs are similar to those that allocate responsibility for task and benefit oversight, rejection, uncertainty, and misconception. Compensation for performance that is based on the obligor's costs allows the obligor to pass through to the obligee the additional costs the obligor incurs as a result of interference by uncontrollable events. An example is a cost-plus construction contract, where the contractor charges the owner for all its costs plus a profit; the incremental costs due to force majeure events are charged to the owner as costs of performance. Fixed compensation for performance allocates to the obligor responsibility for the risk it will incur additional costs due to uncontrollable events in the absence of a clause that entitles it to compensation for such incremental costs. In an extreme case, an increase of costs due to an uncontrollable event may discharge the obligor of further performance as being impossible or impractical.[115] A force majeure or similar clause can be an exception to a fixed price and the risk allocation it implies, entitling the obligor to reimbursement or additional compensation for some or all of the costs it incurs as a result of or when responding to such covered events; such provision allocates the risk of such additional costs to the obligee.[116]

The following cases illustrate how force majeure clauses can allocate the risk of additional performance costs resulting from an uncontrollable event:

- *Rainbow Navigation, Inc. v. United States*[117]: A vessel carried goods to Iceland where unloading was delayed until a strike at the port ended. Under the "liberty clause" in the bill of lading, the vessel was permitted to

  > decline to receive, keep or load the goods or . . . discharge the goods into any depot, craft or place or . . . proceed or return directly or indirectly to such other port or place as the Carrier may select and discharge the goods or any part thereof there, may retain the goods on board until the return trip or such time as the carrier thinks advisable or . . . forward or transship the goods by any means.[118]

  The clause further stated that "[f]or extra services rendered pursuant to this clause, the carrier shall be entitled to reasonable extra compensation." The first part of the clause quoted did not entitle the vessel to its extra costs, as the language nowhere mentioned them. The second clause turned on whether waiting to unload the vessel was an extra service, which the vessel claimed it was and the shipper successfully claimed it was not.[119] While the force majeure clause allocated responsibility for the losses resulting from delay due to a force majeure event to the shipper, neither it nor the liberty clause allocated responsibility for the risk that the vessel might incur additional costs in responding to such an event.

- *Iran v. Boeing Co*.[120]: Iran agreed to reimburse a contractor for the costs of relocating its employees if the contract was not extended, subject to a maximum amount per employee. Conditions in Iran deteriorated while an extension of the contract was being negotiated. The contractor invoked a force majeure clause in the contract and temporarily relocated its employees to locations outside of Iran. Later, when the contract was not extended, the employees were relocated back to the United States. The contractor claimed the portion of the relocation costs up to the maximum under the relocation cost clause and the relocation costs exceeding such maximum under the force majeure clause, which provided, "[t]he price . . . shall be increased to reflect any increases in cost of performance due to Excusable Delays." Excusable Delays included "one or more of a series of normal forces majeures, including wars, strikes, acts of God, failures or acts of the government, etc., provided that these were not due to . . . [the contractor's] fault or negligence." To the extent the additional relocation costs were attributable to the deteriorating conditions in Iran, as the contractor successfully claimed, the clause allocated responsibility therefor to Iran.[121]

"Reopener" Clause

A party may be willing to concede at contract formation that certain uncontrollable events, while not automatically entitling the other party to any specific relief from performance or to compensation or indemnification, may be grounds for a request from the other party to discuss or negotiate an amendment to the contract that grants the other party appropriate relief. Such uncontrollable events can include those that affect benefit realization, affect tasks a party completes for its own benefit, and compel choices that yield undesirable outcomes, as well as events that directly impair, delay, or increase the cost of performing obligations. A clause that allows one party to request reconsideration of the bargain combines a condition subsequent and an agreement to negotiate or agree: the condition identifies the event that allows one party to initiate negotiation and the agreement to negotiate prescribes the extent to which the parties are committed to finding relief for the party adversely affected by the uncontrollable event. While the party unaffected by the event may be under little (an obligation to negotiate in good faith in some circumstances) or no legal obligation to accommodate the affected party's concerns, it may have good financial and other business reasons for doing so. The failure to reach agreement on such relief may leave the affected party in the same position as if the reopener clause had not been included in the contract, however.

In principle, the procedure for amending a contract so as to entitle a party adversely affected by an uncontrollable event to relief or compensation for such an event might be determined by one party, exercising absolute discretion, be proposed by one and accepted by the other, or agreed by both parties. Amendment procedures useful for allocating oversight and rejection risks, discussed in chapter 3, apply here. The amendment procedure included in a reopener clause will usually be the product of the parties' negotiation, rather than custom or practice in an industry. Because such an amendment will usually strike at the fundamental elements of the transaction, parties will ordinarily be reluctant to agree at contract formation to allow other parties to unilaterally dictate such an amendment.

Autry v. Republic Productions, Inc.[122] illustrates a reopener clause that covered an uncontrollable event. Gene Autry, a well-known singer and actor, agreed to act in ten photoplays during the first year of his contract (1938) with Republic Productions (RP), which had options to extend the contract for four successive years, during each of which he would act in eight photoplays. His compensation was $6,000 for the first two photoplays and $10,000 for each of the others during the first year; and his compensation for each photoplay would be increased by $1,000 each year. His compensation during 1939, for example, was $11,000 per photoplay. In 1942, he was ordered to report for a physical examination for conscription into the armed services during the war. He and RP agreed an amendment to their contract. RP received a further one year option for eight photoplays at $15,000 each. The parties also agreed:

> In the event that the Artist shall be required to serve in the armed forces of the United States pursuant to the Selective Service Act, or shall volunteer for such service, the parties hereto will agree upon their mutual rights and obligations hereunder in view of such military service.[123]

Sixteen months later, he voluntarily enlisted and served for three years. When discharged, he claimed the contract had terminated, its purpose having been frustrated or his performance made impossible. The uncontrollable event was the government's mobilization of eligible individuals for service in the armed forces during the war. His decision to enlist, however, was not beyond his control. It was scenario (1)(b) (ii)(B)(II) (uncontrollable event creates a choice between performing as committed while forbearing from volunteering for military service and volunteering for service while delaying completion of a task to be completed for the benefit of the other party). Had he been conscripted, the scenario would have been (1)(b)(ii)(B)(I) (an uncontrollable event delayed his completion of tasks for RP's benefit). The clause, however, allowed Autry to be excused either way without breaching his contract or having to agree, before voluntarily enlisting, when or even if he would perform. The clause left for a later day the full consequences to the parties of Autry's volunteering. To the extent the clause excused his failure to perform his contract with RP because he chose to serve or was conscripted, it allocated the risk of his so choosing or being conscripted to RP. It assumed responsibility for the risk his performance would be delayed during the period he served in the armed forces. To the extent Autry had a commitment to RP to perform if it exercised the option after he finished his service and what remained to be agreed was his compensation, Autry assumed responsibility for the uncertainty about the losses he might incur because he had to perform later for compensation agreed to at an earlier time. Since RP had an option, it could choose not to exercise the option if it decided Autry's value would no longer be worth what had been agreed he would be paid; it did not assume responsibility for the risk it would have to pay Autry more than he could then command for his performances. To the extent, however, Autry's commitment to perform at all under the RP contract was open to negotiation, RP assumed responsibility for the uncertainty risk created by the agreement to agree.[124]

Indemnification

Indemnification is one of the most common devices used to allocate responsibility for losses in a transaction, especially losses incurred in resolving third-party claims. It is defined as "[t]he action of compensating for loss or damage sustained."[125] A party that agrees to indemnify another thereby agrees to compensate the other for the losses covered by the indemnity that are reduced to a monetary amount. Though the courts interpret the insurance and indemnity agreements quite differently because insurers and indemnitors play quite different roles in drafting and negotiating such contracts, insurance contracts are an economic subset of indemnification agreements: an insurer agrees to compensate an insured against specific losses, above a minimum amount or deductible and up to a maximum amount, that result from specific or covered events, subject to exceptions or exclusions.[126]

A party may agree to indemnify any and all losses another incurs as a result of acts and omissions of the indemnifying party, the indemnified party, acts of God, and acts and omissions of third parties, subject to laws that limit indemnification. First, one or each party may agree to indemnify the other for certain losses the latter incurs in the transaction as a result of the former's acts and omissions. To the extent that the covered acts and omissions are breaches of the contract, the indemnity restates as indemnification claims that may be prosecuted as breaches of contract. Unless such an indemnity expands or contracts the indemnified party's entitlement to damages for breach, the indemnity does not augment the indemnified party's rights under a contract. To the extent that the covered acts and omissions are not breaches of the contract, the indemnifying party insures the indemnified party against such acts and omissions and supplements the right to damages for breach. Second, one or each party may agree to indemnify the other for certain losses that result from acts and omissions by the indemnified party, in effect insuring the indemnified party against certain of its own acts and omissions. Third, a party may agree to indemnify another for certain losses that result from certain uncontrollable events, in effect insuring the indemnified party against such losses. Life insurance indemnifies a beneficiary against losses assumed to result from the death of an insured, howsoever caused, subject to exceptions; casualty or property insurance indemnifies an insured against certain losses caused by certain acts of the insured, God, and third parties; business interruption insurance indemnifies an insured against lost revenue caused by covered events; and liability insurance indemnifies an insured against claims by third parties for covered acts, omissions, and events. Such an indemnity can be expanded to include a duty to defend the indemnified party against claims that, if proved, are covered by the indemnity.

Except for an indemnity by a party that covers its existing liabilities to third parties and the indemnified party and liability for breach of contract, an indemnity allocates to the indemnitor responsibility for the covered losses sustained by the indemnified party, which can include the costs of defending the indemnified party against the claims, even if they prove to be unmeritorious. Such losses may include the value of anticipated benefits not realized and unanticipated costs incurred to realize benefits, to perform obligations, and incurred to resolve claims by the other party and third parties resulting from participation in the transaction.

An indemnity may cover costs incurred in response to an act of God or a third party beyond the control of the parties. Such costs may include those incurred while the affected party was prevented from performing its obligations by an uncontrollable event. An example is the costs of the vessel, in *Rainbow Navigation, Inc.*,[127] incurred while waiting for the strike that prevented its delivery of the cargo to end. But an indemnity need not be linked to costs incurred while unable to perform. An indemnity can cover some or all of the additional costs a party incurs as a result of an uncontrollable event to complete a task it must complete for its own benefit (scenario (1)(b)(iii)(A)), a task it must complete for the other party (scenario (1)(b)(iii)(B)), and realization of benefits (scenario 1(a) (iii)). An indemnity that protects benefit realization or the completion by a party of tasks for its own benefit is a version of a yield indemnity. In all such instances, the indemnitor thereby assumes responsibility for the extra costs so incurred by the indemnitee.

The following cases illustrate such indemnification:

- *Kruzits v. Okuma Machine Tool, Inc.*[128]: An equipment lessee agreed to indemnify its lessor for

  > any and all liabilities, losses . . . imposed on, incurred by, or asserted against [the lessor] . . . in any way relating to or arising out of this Lease or the manufacture, purchase, ownership, delivery, lease, possession, use, operation, condition, return or other disposition of the equipment by [the lessor] . . . or . . . [the lessee], . . . any claim arising out of strict liability in tort, and any taxes for which [the lessee] is responsible hereunder.[129]

  An employee of the lessee, who was injured while using the equipment, sued the lessor, who, in turn, claimed indemnification from the lessee. If the lessor had no further obligations to perform, having delivered the equipment and giving no continuing warranties, the liability was an additional cost it incurred to realize the benefits of the lease (scenario (1)(a)(iii)). The employee was a third party over whom the lessor had no control. The indemnity allocated responsibility for the risk of such third-party claims to the lessee, who unsuccessfully argued the clause did not apply because it did not specify claims based on strict product liability, as claimed by the employee.[130]

- *Brown v. Two Exchange Plaza Partners*[131]: This case is previously described in this chapter.[132] An employee of a sub-subcontractor working on the atrium of a building was injured when the scaffold on which he was standing collapsed. He sued the general contractor. The subcontractor agreed to indemnify the general contractor for "any other claim arising out of, in connection with or as a consequence of the performance of the Work and/or any acts or omission of the Subcontractor or any of its . . . subcontractors."[133] As previously noted, the sub-subcontractor's claim against the contractor added to the latter's liability and cost of performing its obligations to the building owner (scenario (1)(b)(iii)(B)). As the indemnity was enforceable, as the general contractor successfully claimed, as between the subcontractor and the contractor, the indemnity allocated responsibility for the risk of such additional liability and costs to the subcontractor.

Third-Party Agreements

The chance that a third party might interfere with performance or benefit realization can be mitigated by having such third party agree to forbear from interfering with the transaction. Such an agreement is practical when the third party can be identified and brought into the transaction by a contract with one or both parties. The contract between the obligor and obligee can stipulate that, as a condition to the obligee's covenants or as a covenant of the obligor, the third party must agree to forbear from disruptive actions. In many transactions this will be infeasible because the third party will not be identifiable at contract formation or even when the transaction closes. For example, the successor liability claimant in *In re Grumman Olson Industries, Inc.*[134] could not have been identified at contract formation or later when the sale of the business closed. He was an unknown potential creditor at the time. Nor could the injured employee in *Kruzits*[135] have been identified at contract formation, as he was not then a creditor (not having been injured). Existing creditors can be identified, however. The third-party agreement with such creditors could be delivered at contract formation or later in satisfaction of a condition, before the obligee must perform any of its obligations.

In re Three Strokes Ltd. Partnership[136] illustrates an agreement between two creditors and the limits of the agreement's effectiveness. A debtor owed $29 million to one creditor and $2 million to another. Both debts were secured by separate liens on a real estate development the value of which was estimated at $25 million. The second creditor agreed with the first creditor that its right to payment was subordinated to the payment of the entirety of the debt to the first creditor. It also agreed that its lien was subordinate to that of the first creditor and any distribution of assets that the debtor might receive in the event of its insolvency or bankruptcy should be remitted to the first creditor until the obligations owing to the first were paid in full. When the first creditor sought to foreclose, the second creditor filed for bankruptcy, successfully claiming that its lien on the collateral could not be extinguished without relief from the bankruptcy court. Had the agreement with the second creditor been enforceable without permission of the bankruptcy court, the first creditor would have avoided the risk of the second creditor's asserting its claims in the debtor's bankruptcy proceeding.

For the first creditor in *In re Three Strokes Ltd. Partnership*, the uncontrollable disruptive event to its transaction with the debtor was the assertion by the second creditor of its claims against the debtor, and the hazard to the first creditor was the second creditor's right to assert its claims. The first creditor mitigated this risk by entering into a second transaction with the second creditor. The intercreditor agreement allocated to the second creditor responsibility for the risk the debtor's assets, when liquidated, would be insufficient to pay both creditors. The intercreditor agreement did not eliminate the risk that the first creditor would not be paid in the priority agreed with the second creditor as the debtor might pay the other creditor out of the agreed order, and that creditor might accept payment. A separate risk was that the second creditor might repudiate the intercreditor agreement, as it effectively did in *In re Three Strokes Ltd. Partnership,* by filing for bankruptcy.

Uncontrollable Event Risk Mitigation

A contract can include terms the purpose of which is to reduce the occurrence of uncontrollable events that could impair or increase the costs of performance or benefit realization. Against each hazard previously described, affirmative and negative covenants that have such purpose could be listed. Such terms would be a version of private regulations that have as their objective the preservation of an obligor's willingness and ability to perform and pay compensation.

The varying terms and arrangements that are effected by a creditor to protect its claims against a debtor from competing claims by other creditors are illustrative. First, the contract between debtor and creditor can include negative covenants that restrict actions by the debtor likely to create liabilities to competing creditors: limits on incurrence of debt, guaranties, and indemnities; purchases of businesses; and investments in joint ventures and other enterprises. Second, the debtor may be required to identify potential competing creditors and cause them to agree on the priority of their claims with, or otherwise to accommodate the realization of benefits by, the creditor. Third, the portion of the debtor's business the creditor most wants to shield from competing creditors' claims can be placed in a single purpose entity so that it transacts business and otherwise deals with only those third parties with whom dealings are essential and can be managed, as previously described in this chapter.

This strategy can be used when a business has specific assets that can be dedicated to the performance of obligations under a contract with the creditor; those assets can be vested in a company whose sole business is the ownership of those assets and the performance of those obligations. The structure is common in accounts receivable financings, where the obligor's business is limited to the purchase from affiliates and the sale to a single buyer of accounts receivable; the special purpose entity insulates such assets, the accounts receivable purchased from affiliates, from the claims of the affiliates' creditors. Such arrangements are also common in real estate and infrastructure projects, where a single building, road, plant, or other facility is vested in a special purpose company. The arrangement is also used in supply chains, where the key assets the vendor uses to fabricate the goods it supplies to an important customer are placed in a single purpose entity so that the operation of a business using those assets can continue and the customer will receive an uninterrupted supply of the products, even if disruptions caused by other third-party claims affect other lines of a vendor's business.

In re Doctors Hospital of Hyde Park, Inc.[137] illustrates the use of a special purpose entity to mitigate the risk of claims by competing creditors. A hospital sold its receivables to a special purpose subsidiary, for which the sole assets were the receivables, and received financing from a lender, whose loans were calculated based on and secured by those receivables. The subsidiary's business appeared in some respects like a division or arm of the hospital's operations. It was conducted from the same office as the hospital; it also used the same stationary, checks, business forms, post office box, telephone number, books of account, financial records, computer and operating systems, and limited liability company records, and its board held no meetings. It did make separate corporate filings, adopt annual resolutions ratifying the actions of its manager, and had a separate bank account, which had activity, and separate certificates delivered to the lender. The hospital filed for bankruptcy, and the bankruptcy trustee claimed the assets of the hospital included those of the special purpose subsidiary.[138] The purpose of the special purpose entity was to shield the lender's collateral from the claims of the hospital's other creditors and thus to mitigate the disruptive effects of such third-party claimants. Had the trustee successfully proved the subsidiary was not separate from the hospital's business, the receivables would have been subject to the hospital's other creditors' claims. As it was, sufficient separateness was maintained, and the arrangements mitigated the lender's risk of competing claims against its collateral.

It is outside the scope of this text to list measures appropriate for all the hazards described in this chapter.

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1 518 P.2d 76 (Alaska 1974), rehearing (rehg) over damages, 523 P.2d 1243 (Alaska 1974), *aff'd*. 562 P.2d 1053 (Alaska 1977).

2 *Id*. at 78.

3 Citing impossibility, the contractor also sued for costs incurred through the date of termination; the utility cross-claimed for damages. The trial court found the contract had been discharged by impossibility and dismissed both parties' claims. On appeal, the Alaska Supreme Court held the quoted language "presupposed the existence of ice frozen to the requisite depth. Since this expectation of the parties was never fulfilled, and since the provisions relating to the means of performance was clearly material, [the contractor's] . . . duty to perform was discharged by reason of impossibility." *Id*. at 80.

4 124 Cal.App.2d 71, 268 P.2d 12 (Cal. App. 1954).

5 The contractor sued for breach of contract, claiming the items so deleted could not be removed under the terms of the contract. The city also claimed the state agency's delay made it impossible to perform. The trial court found for the contractor, the city appealed, and the appeal court affirmed. The contract limited changes to those the purpose of which was to implement the work, which was not the case. Because the city had an obligation to provide a site where the contemplated operations could be carried out, it could not claim impossibility.

6 88 F.3d 40 (1st Cir. 1996).

7 557 F.3d 504 (7th Cir. 2009).

8 The railroad invoked the force majeure clause and charged the higher rate. The application of the clause and higher rate was upheld by the federal district and appeal court.

9 Judge Richard Posner questioned the choice of a force majeure clause to allocate the risk that the steel company might not load the railroad cars with iron ore on the back haul: "Why the parties used the term 'force majeure,' rather than simply providing that the railroad could charge the higher rate if the steel company stopped buying iron ore, has not been explained. More careful drafting might have averted this lawsuit."

10 518 P.2d 76 (Alaska 1974), rehg. over damages, 523 P.2d 1243 (Alaska 1974), *aff'd*. 562 P.2d 1053 (Alaska 1977).

11 124 Cal.App.2d 71, 268 P.2d 12 (Cal. App. 1954).

12 The union claimed the present contractor had to pay as damages the difference between the wages and benefits the present contractor had agreed to pay under its contract and what the successor contractor actually paid the employees. The contractor claimed performance had been impossible all along because the successor alone decided whether to assume the existing contractor's union contract. This was true, Judge Norman Stahl acknowledged, but in upholding the arbitrator's award of damages as claimed, he said, "by agreeing to include the successor clause, [the contractor] accepted and bargained for the risk that, if it lost the contract, it would effectively guarantee that its 'successor' would assume the terms and conditions of the [contract with the union]." 88 F.3d at 45 (1st Cir. 1996).

13 557 F.3d 504 (7th Cir. 2009).

14 178 F. Supp. 655 (S.D.N.Y. 1959).

15 The licensee sued for a declaration that it was no longer liable to pay royalties for the use of the formula. Neither party was responsible for such publication. The court held the licensee remained liable for royalty payments. "The argument that there was failure of consideration in 1931 after the agreement had been in force for some forty-five years because of disclosure then, is wholly devoid of merit. The plaintiff

does not question that the conveyance to it of the 'secret formula' furnished consideration for the contract. Once a contract is supported by consideration its terms are up to the parties. Whether the consideration is adequate or not is no concern of the court." *Id.* at 666.

16 78 Wn. App. 362, 898 P.2d 315 (Wash. App. 1995).

17 The buyer repudiated the note, claiming supervening frustration. The trial court held for the seller, and the appeal court affirmed. "[The buyer] knew that the laws relating to land development were subject to change in the future. He drafted the option and sales contracts. He 'could have controlled the language of the contract to the extent of allocating the risk'. For example, he could have negotiated for a provision making the contract contingent upon obtaining all permits and approvals required for development." *Id.* at 366.

18 17 Kan. App. 2d 241, 836 P.2d 1201 (Kan. App. 1992).

19 The business owner claimed she was excused on the grounds her performance was impractical. The court dismissed the claim, holding, "The present case is one of subjective impracticability. Parscale [the lessee] could no longer afford to operate her business due to road construction or some other reason. It is not sufficient merely that the business suffered." *Id.* at 245.

20 197 Misc. 773, 94 N.Y.S.2d 793 (N.Y. Mun. Ct. 1950).

21 The attorneys obtained the first approval and sued for their fees. The court dismissed analogies to cases that held the doctrine of frustration of purpose applied and the obligations were discharged.

22 16 Wall. 366, 83 U.S. 366, 21 L. Ed. 287 (1873).

23 The sureties sued to recover the bond, contending the accused's appearance had been rendered impossible by his being held in custody in Maine. The trial court ruled against the sureties, and the appeal court affirmed. The U.S. Supreme Court affirmed, holding the sureties, having allowed the accused to go to New York, were responsible for his failure to appear and not entitled to be excused.

24 32 N.Y.2d 425 (N.Y. 1973).

25 The carrier claimed it was not liable for the loss under a statutory limitation on its liability incorporated in the bill of lading, which exempted "the carrier from liability for loss or damage arising or resulting from . . . strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general." The New York Court of Appeal held that the strike had not caused the loss: "The total loss of the goods was due to the fault or allocable to the responsibility of the carrier or its servants, either on loading, in transit, or on unloading, and not to the strike. Consequently, the strike was not the proximate cause of the loss, but only of the delay in effecting delivery." *Id.* at 431.

26 32 N.Y.2d 425 (N.Y. 1973).

27 742 F. Supp. 171 (D.N.J. 1990).

28 See text accompanying notes 117–119.

29 45 Cal.2d 710, 290 P.2d 841 (Cal. 1955).

30 Los Angeles claimed its continued performance under the existing contracts had become economically and legally impracticable and that Vernon should share in these costs. The trial court held the court order had terminated the contracts, and Vernon appealed. The California Supreme Court partly agreed: "[T]he parties contemplated that there would be available for legal use disposal facilities, whether those in existence or to be constructed, the cost of which would not be completely disproportionate to the costs expressly referred to in those contracts." *Id.* at 720. The court held that the contracts had not been terminated as a result of the supervening events. Rather, certain terms and conditions in the contracts "can and should be salvaged, and although the case was not tried in such a way that all obligations between the parties could be precisely adjusted by the judgment herein, such judgment expressly contemplates an adjustment of those obligations." *Id.* at 721.

31 470 U.S. 451, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985).

32 The railroads unsuccessfully challenged the law as a violation of the contracts clause of the US Constitution. In effect Congress had inserted a new term into the contract between Amtrak and the railroads, adding a new task and increasing the costs of performance of the latter.

33 467 B.R. 694 (S.D.N.Y. 2012).

34 The acquirer sued in the bankruptcy court for a declaration and an injunction barring the employee from proceeding in state court against it. The district court held the claims arising in the future had not been extinguished by the bankruptcy court's approval of the sale: "Because parties holding future claims cannot possibly be identified and, thus, cannot be provided notice of the bankruptcy, courts consistently hold that, for due process reasons, their claims cannot be discharged by the bankruptcy courts' orders." *Id.* at 707.

35 76 N.Y.2d 172, 556 NYS 2d 991 (N.Y. 1990).

36 817 F.2d 1094 (4th Cir. 1987).

37 The opera company sued for the balance of the payments under the contract. The district court held the "the existence of electric power was necessary for the satisfactory performance by the Opera Company on the night [of the performance] of June 15. The appeal court affirmed this finding but reversed the verdict, because the court had not decided "whether the possible foreseeability of the power failure in this case was of that degree of reasonable likelihood as to make improper the assertion by [the organizer] Wolf Trap of the defense of impossibility of performance." *Id.* at 1103.

38 244 U.S. 12, 37 S.Ct. 490, 61 L.Ed. 960 (1917).

39 The vessel was sued for breach, for turning back from the voyage, as the vessel might have landed, the cargo unloaded and the vessel set back to sea before war was declared; the district court dismissed the action, as justified to avoid arrest upon entering into a British port. The Supreme Court affirmed, Justice Oliver Wendell Holmes, holding, "In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man." *Id.* at 24.

40 115 A.D.3d 197, 979 N.Y.S.2d 587, 2014 NY Slip Op 745 (N.Y. Ap. Div. 2014).

41 The trial court granted her motion for summary judgment, and the appellate division affirmed, holding "It is of no moment that Jayarvee [the company] could hypothetically perform the contracts absent Valenti's involvement; to do so would require a sort of firewall, the very establishment of which would necessitate (direct or indirect) communication between Valenti and plaintiff [Kolodin]." *Id.* at 201.

42 25 F. Supp. 2d 175 (S.D.N.Y, 1998).

43 115 A.D.3d 197, 979 N.Y.S.2d 587, 2014 NY Slip Op 745 (N.Y. Ap. Div. 2014).

44 The customers alleged breach of contract; the seller contended the contracts were illegal and, as a result, impossible to perform. The district court held that because the seller consented to the decree, the illegality of the contracts had not been established.

45 532 F.2d 957 (5th Cir. 1976).

46 115 A.D.3d 197, 979 N.Y.S.2d 587, 2014 NY Slip Op 745 (N.Y. Ap. Div. 2014).

47 25 F. Supp.2d 175 (S.D.N.Y. 1998).

48 365 Mass. 122, 310 N.E.2d 363 (Mass. 1974).

49 The general contractor purchased its requirements elsewhere and sued the subcontractor for the additional costs. The subcontractor claimed the strike and picket line rendered its performance impossible. The general contractor asked the court to instruct the jury that the subcontractor had to deliver the concrete regardless of the strike; the court refused and the jury returned a verdict for the subcontractor. The Massachusetts Supreme Court affirmed, holding, "Much must depend on the facts known to the parties at the time of contracting with respect to the history of and prospects for labor difficulties during the period of performance of the contract, as well as the likely severity of the effect of such disputes on the ability to perform.

50 770 F.2d 879, 886 (10th Cir. 1985).

51 The operator sued for a declaration that it was excused from the obligation to pay for the minimum quantity. The district court found that because the operator had come into compliance earlier than the new regulations required, it could not claim impossibility. The appeal court held that while the "take-or-pay" obligation would not ordinarily be excused by the occurrence of a force majeure event—the buyer having agreed either to take or to pay for the minimum quantity—the adjustment provision entitled the buyer to a reduction of its minimum quantity obligation if it was "unable" to receive the gas.

52 2003 U.S. Dist. LEXIS 13809 (S.D.N.Y. 2003); 2003 WL 21878798.

53 The contract allowed the seller, and the seller claimed it was in the circumstances entitled, to prorate its deliveries in response to the occurrence of a force majeure event, defined to include "acts, regulations, laws or restraints imposed by the government of any sovereign nation or state or any agency, branch, political subdivision or other similar body thereof."

54 The court held the clause inapplicable: "First, OPEC's directives are nonbinding on its member states. Therefore, Venezuela was not compelled to reduce its oil production by OPEC; it's (sic.) decision to do so was voluntary. Furthermore, Venezuela's oil minister is currently the President of OPEC, and so any OPEC related decisions are not beyond the reasonable control of PDVSA. Second, the instructions from the Ministry do not have the force and effect of an official government act under Venezuelan law. Third, defendants could have maintained their oil shipments to LCR even under the instructions issued by the Ministry, since those instructions did not specify exactly how to reduce oil production, only that it be reduced. They could have cut shipments to other customers and maintained LCR's. Finally, plaintiff asserts that Petroleo's ability to sell XHC [extra heavy crude] on the spot market indicates that the force majeure did not in fact prevent it from producing oil in sufficient quantities."

55 817 F.2d 1094 (4th Cir. 1987).

56 244 U.S. 12, 37 S.Ct. 490, 61 L.Ed. 960 (1917).

57 115 A.D.3d 197, 979 N.Y.S.2d 587, 2014 NY Slip Op 745 (N.Y. Ap. Div. 2014).

58 770 F.2d 879, 886 (10th Cir. 1985).

59 518 P.2d 76 (Alaska 1974), rehg. over damages, 523 P.2d 1243 (Alaska 1974), aff'd. 562 P.2d 1053 (Alaska 1977).

60 817 F.2d 1094 (4th Cir. 1987).

61 557 F.3d 504 (7th Cir. 2009).

62 32 N.Y.2d 425 (N.Y. 1973).

63 365 Mass. 122, 310 N.E.2d 363 (Mass. 1974).

64 *Id*. at 45.

65 *E.g*., Revere Copper and Brass, Inc. v. Overseas Private Investment Corp., 17 Int'l L. R. 1321 (1978), where legislation and other measures enacted by the Jamaican government violated its agreement with a foreign investor in a mining project in Jamaica.

66 *E.g*., U.S. v. Winstar Corp., 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), where the federal agency that insured savings and loan associations agreed, in three separate transactions over a period of six years, with acquirers of insolvent savings and loan institutions to allow the acquirers' favorable accounting treatment for the excess of the targets' liabilities over their assets, referred to as goodwill, and the cash contributed by the agency to the target. Several years later, Congress passed a law that prohibited the favorable accounting treatment of such items, and the acquirers sued for breach of contract. The Court of Claims granted partial summary judgment in favor of the acquirers, and the appeal and supreme courts affirmed. The court held the government agency assumed responsibility for the risk that the law might change and prohibit such accounting treatment, and when the law did change, "the Government was unable to perform its promise and, therefore, became liable for breach." *Id*. at 870. The court acknowledged that had the contract been between private parties, the defense of impossibility would have been available to the party whose promise could not be performed. It went on, however, to deny the government such defense, holding that the requirement that "the nonoccurrence of regulatory amendment was a basic assumption of these contracts" would be difficult to prove in cases where a regulatory agency has contracted with private parties: "Such an agreement reflects the inescapable recognition that regulated industries in the modern world do not live under the law of the Medes and the Persians, and the very fact that such a contract is made at all is at odds with any assumption of regulatory stasis." *Id*. at 905.

67 3 Best & Smith 826, 2 New Rep. 198, 32 L.J. (Q. B.) 164, 8 L.T. 356, 27 J.P. 710, 11 R.R. 726, 12 Digest (Repl.) 419 (Q.B. 1863).

68 32 L.J. (Q.B.) 164, 166. The music hall a landlord agreed to rent to a tenant for four days was destroyed by an accidental fire after contract formation but prior to the first day of performance. The tenants sued for damages, and received a verdict. The Queen's Bench Division held the landlord's obligation was subject to an implied condition that the music hall continued to exist until performance, and the destruction of the music hall discharged both parties' obligations.

69 582 F. Supp. 812 (S.D.N.Y. 1984). For a fuller summary of the case, see the text accompanying ch. 1, notes 25–34.

70 *Id*.

71 13 B.R. 861 (Bankr. S.D.N.Y.1981).

72 *Id*. at 872.

73 853 F. Supp. 791 (S.D.N.Y 1994).

74 *Id*. at 798.

75 See text accompanying ch. 8, notes 37 and 38 for a summary of this case.

76 88 F.3d 40 (1st Cir. 1996).

77 "As long as EOS clearly foresaw and bargained with the knowledge that it could lose the contract—something we must assume if the arbitrator plausibly interpreted the successor clause—the fact that performance might be impossible if EOS indeed lost the contract is of no moment." *Id*. at 45.

78 518 P.2d 76 (Alaska 1974), rehg. over damages, 523 P.2d 1243 (Alaska 1974), *aff'd*. 562 P.2d 1053 (Alaska 1977).

79 523 P.2d 1243, 1246 (Alaska 1974).

80 138 F. Supp. 595 (S.D.N.Y. 1955), *aff'd*. 245 F.2d 903 (2d Cir. 1957).

81 "In a CIF contract the 'property' right passes to the buyer upon delivery to the carrier. Hence the 'property right' to the caustic soda passed to the plaintiffs when the caustic soda was loaded aboard the [vessel] S.S. Hawaiian, which was prior to the walkout, and the risk of loss also passed to the plaintiffs." *Id*. at 606.

82 224 F.2d 36 (3d Cir. 1955).

83 The seller sued for breach of contract and moved for summary judgment. The appeal court held summary judgment should be granted to the seller. The appeal court held the seller had performed its obligation by offering delivery of the pelts to the railroad. The note as to the shipping directions did not alter the FOB terms of sale. Because delivery of the pelts was entirely within Canada, the sale and delivery of the pelts was unaffected by the change in law in the United States.

84 86 F. Supp. 2d 244, 255 (S.D.N.Y 2000), *rev'd* on other grounds, 251 F.3d 334 (2d Cir. 2001), *rev'd* on other grounds, 536 US 88, 122 S. Ct. 2054, 153 L. Ed. 2d 95 (2002).

85 86 F.Supp.2d at 255.

86 "The preamble of section 501 quoted above is identical to section 501 of the Model Debenture Indenture Provision. See Model Debenture Indenture Provision § 501 (1965). According to the American Bar Foundation Commentaries on the Model Debenture Indenture Provisions ('Model Indenture Commentaries'), '[t]he parenthetical clause in the first sentence of Section 501 has the purpose of refuting any argument that events resulting from force majeure were not intended to be treated as defaults.' American Bar Foundation, Corporate Debt Financing Project, Commentaries on Model Debenture Indenture Provisions 205 (1971)." 86 F. Supp. 2d 244, 256. The court held accordingly the defense of impossibility was unavailable.

87 "Under the plain language of section 501, the failure to tender a required payment constitutes an Event of Default, regardless of whether that failure was caused by a change in government policy. As plaintiff persuasively argues, the Indenture anticipates the risk of adverse government action, and it assigns that risk to defendant." *Id*. at 257.

88 62 NY2d 846, 477 NYS2d 613 (N.Y. 1984).

89 The Court of Appeal held the city was not entitled to the compensation stated in the contract. In effect, the court held unenforceable the attempt to have the limousine service waive the defense of failure of consideration of frustration of contract by stating it had an obligation to pay independent of the consideration given by the city.

90 518 P.2d 76 (Alaska 1974), rehg. over damages, 523 P.2d 1243 (Alaska 1974), *aff'd*. 562 P.2d 1053 (Alaska 1977).

91 124 Cal. App.2d 71, 268 P.2d 12 (Cal. App. 1954).

92 3 Best & Smith 826, 2 New Rep. 198, 32 L.J. (Q. B.) 164, 8 L.T. 356, 27 J.P. 710, 11 R.R. 726, 12 Digest (Repl.) 419 (Q.B. 1863).

93 *E.g*., *In re* Chateaugay, 186 B.R. 561 (S.D.N.Y. 1995), where the potential buyer of a target agreed to pay the target $25,000,000 if the required consents were not obtained.

94 124 Cal.App.2d 712, 68 P. 2d 12 (Cal. App. 1954).

95 *Id*. at 84.

96 *Id*.

97 799 F.2d 265 (7th Cir. 1986).

98 *Id*. at 274. The trial court rejected the claim and awarded damages to the coal supplier.

99 Judge Richard Posner, in the appeal court, which affirmed, explained, "Such an order does not 'prevent,' whether wholly or in part, NIPSCO [the utility] from using the coal; it just prevents NIPSCO from shifting the burden of its improvidence or bad luck in having incorrectly forecasted its fuel needs to the backs of the hapless ratepayers." *Id*. at 275.

100 *Id*. at 276.

101 894 A.2d 471 (D.C. Ct. App. 2006).

102 NAPUS terminated the contract with the Grand Hyatt and sought declaratory relief that the contract had been canceled; the hotel countersued for liquidated damages.

103 894 A.2d at 475.

104 The appeal court, affirming the grant of summary judgment in favor of the Grand Hyatt, held, "The rescheduling of the Rural Mail Count may be an inconvenience or even make compliance with the contract inadvisable, but without an urgent need for prompt reaction, it cannot be considered an 'emergency' as that term is properly understood." *Id*. at 476.

105 "Force-majeure clauses are typically narrowly construed, such that the clause 'will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified.'" Kyrocera Corp. v. Hemlock Semiconductor, Inc., 313 Mich. App. 437, 451, 886 N.W.2d 445 (Mich. App. 2015).

106 *E.g*., "Either party shall be excused for delay or failure to perform its agreements and undertakings, in whole or in part, when and to the extent that such failure or delay is occasioned by fire, flood, wind, lightning, or other acts of the elements, explosion, act of God, act of the

public enemy, or interference of civil and/or military authorities, mobs, labor difficulties, vandalism, sabotage, malicious mischief, usurpation of power, depletion of wells, freezing or accidents to wells, pipelines, permanent closing of Buyer's operations at its Eddy County mine and refinery. . . ." Int'l Minerals and Chem. Corp. v. Llano, Inc., 770 F.2d 879, 882 (10th Cir. 1985), summarized in the text accompanying notes 50 and 51.

107 *E.g.,* "Snuffy's will be excused from performance under this contract if it is prevented from doing so by an act of God (e.g., flood, power failure, etc.), or other unforeseen events or circumstances." Facto v. Pantagis, 390 N.J. Super. 227, 915 A.2d 59, 62 (N.J. Sup. Ct. 2007), summarized in the text accompanying ch. 10, notes 64 and 65.

108 *E.g.*, J.M. Rodriguez & Co. v. Moore-MacCormack Lines, Inc., 32 N.Y.2d 425 (N.Y. 1973), summarized in text accompanying notes 24 and 25. *See also* Sassower v. Blumenfeld, 24 Misc.3d 843, 878 N.Y.S.2d 602, 2009 N.Y. Slip Op. 29198 (N.Y. S. Ct. 2009), summarized in text accompanying ch. 8, notes 21–23 and ch. 10, notes 7–9.

109 32 N.Y.2d 425 (N.Y. 1973).

110 817 F.2d 1094 (4th Cir. 1987).

111 532 F.2d 957 (5th Cir. 1976).

112 770 F.2d 879, 886 (10th Cir. 1985).

113 2003 U.S. Dist. Lexis 1380; 2003 WL 218787989 (S.D.N.Y. 2003).

114 *E.g.*, the court, in Int'l Minerals and Chem. Corp. v. Llano, Inc., 770 F.2d 879, 886 (10th Cir. 1985), held that "as a matter of policy, individuals and corporations who cooperate with local regulatory agencies and comply with the letter and spirit of legally proper regulations, environmental or otherwise, are to be encouraged. Stalling tactics are not regarded favorably. Second, as a matter of law, government policy need not be explicitly mandatory to cause impracticability." *Id.* at 886 (10th Cir. 1985). See also Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976), summarized in the text accompanying note 45, where the appeal court held whether McDonnell's late deliveries were predicated upon the force majeure clause or the applicable section of the Uniform Commercial Code, "the military priorities policy . . . was in substance a governmental act beyond the control of McDonnell Douglas. The excusable delay clause cannot be made to turn on a distinction, which for so long has been held to be entirely artificial and unrealistic." *Id.* at 996.

115 *E.g.*, Vernon v. Los Angeles, 45 Cal.2d 710 (Cal. 1955), summarized in the text accompanying notes 29 and 30.

116 *E.g.*, Iran v. Boeing Co., 771 F.2d 1279 (9th Cir. 1985), summarized in the text accompanying notes 120 and 121.

117 742 F. Supp. 171 (D.N.J. 1990). See text accompanying notes 27 and 28.

118 742 F. Supp. 171, 176 (D.N.J. 1990).

119 The court held that the vessel owner's late delivery of the goods was excused under the first part of the clause, even though the strike had been announced before the vessel departed, because it was industry practice to set sail in the face of threatened strikes, and the wait at the port for more than three weeks was reasonable in light of the alternative destinations. The court further held that the waiting at the port for the strike to end was not an "extra service" within the meaning of the clause. *Id.* at 185.

120 771 F.2d 1279 (9th Cir. 1985).

121 The court held the temporary relocation to locations outside of Iran was reasonable, since Iran and the contractor were negotiating an extension at the time. *Id.* at 128–29.

122 30 Cal.2d 144, 180 P. 2d 888 (Cal. 1947).

123 *Id.* at 147.

124 Autry claimed the clause was an agreement to agree and had no effect. The trial court held for the production company, finding that the clause continued the contract, and his rights under the contract had not been prejudiced by the three years' service. The California Supreme Court reversed. Although agreeing the quoted clause continued their agreement in effect while he was serving and would further continue the agreement if the parties agreed to appropriate modifications, it held that requiring his performance on the agreed terms would be inequitable, as the value of his compensation had been eroded by inflation during the three-year period, with the result it was less than that paid artists of similar stature. The court's ruling meant that the agreement to agree to modified terms did not trump the parties' respective rights under the frustration doctrine, in effect putting the artist in the same position as if the clause had not been included.

125 BLACK'S LAW DICTIONARY 886 (10th ed. 2014).

126 "Though indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly. Ambiguities in a policy of insurance are construed against the insurer, who generally drafted the policy, and who has received premiums to provide the agreed protection. . . . In noninsurance contexts, however, it is the indemnitee who may often have the superior bargaining power, and who may use this power unfairly to shift to another a disproportionate share of the financial consequences of its own legal fault." Crawford v. Weather Shield Mfg., Inc., 44 Cal.4th 541, 552, 79 Cal. Rptr.3d 721, 187 P.3d 424 (Cal. 2008).

127 742 F. Supp. 171 (D.N.J. 1990).

128 40 F.3d 52 (3d Cir. 1994).

129 *Id.* at 56–57.

130 "The indemnity clause . . . contains a direct reference to strict products liability claims and Vistek must therefore indemnify Heller in the underlying action." 40 F.3d 52, 57 (3d Cir. 1994). The lessee also unsuccessfully argued Pennsylvania, and not Illinois, law should apply to the indemnity, and the indemnity was not enforceable under Pennsylvania law.

131 76 N.Y.2d 172 (N.Y. 1990).

132 See text accompanying note 35.

133 The trial court found that neither the scaffold subcontractor nor the subcontractor who employed the injured worker were liable to indemnify the general contractor under the contractual indemnity agreements because neither had been negligent; it also held that the indemnities were unenforceable because the general contractor was liable under New York Labor Law §240(1). The appellate division reversed, holding the indemnity was enforceable and applicable, even though the subcontractor had not been negligent. The New York Court of Appeals affirmed. Because there was no evidence the general contractor had been negligent, the prohibition against indemnifying a party for its negligence in a construction contract did not apply.

134 467 B.R. 694 (S.D.N.Y. 2012); see text accompanying notes 33 and 34.

135 40 F.3d 52 (3d Cir. 1994).

136 397 B.R. 804, 50 Bankr. Ct. Dec. 272 (N.D. Tex. 2008).

137 507 B.R. 558, 2013 WL 5524696 (Bankr. Ill. E.D. 2013).

138 The evidence cited by the trustee was alone insufficient to destroy the separateness of the entity. The court noted the lender had failed to require the special purpose entity to deliver separate financial statements as required by the loan agreement, a fact that the trustee argued demonstrated the separateness had not been maintained. “That choice was its [the lender’s] to make dependent on the information it needed in extending credit. Daiwa’s [the lender’s] failure to enforce that requirement should not, by itself, destroy the separateness of a validly composed corporate entity.” 507 B.R. 558, 717.